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II. Law and Equality

***1183** RODRIGO'S SECOND CHRONICLE: THE ECONOMICS AND POLITICS OF RACE

Richard Delgado [FNa]

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FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS. By *Richard Epstein*. Cambridge: Harvard University Press. 1992. Pp. xvi, 505, and appendix. \$39.95.

INTRODUCTION: RODRIGO'S RETURN

"Rodrigo. My God, you're back! [FN1] What are you doing here?" (Normally, I do not use profanity or take the name of the Lord in vain. But the familiar lanky figure standing in my office doorway had given me quite a start.)

My visitor broke into a broad grin. "I needed a while to get my affairs in order, take care of that immigration problem, [FN2] and pack. I was admitted to the LL.M. program of that school uptown. So we'll be neighbors - living in the same city, at any rate."

"I'm delighted," I stammered, putting down the book I had been reading [FN3] and reaching out to shake his hand. "I wrote the INS as soon *1184 as I got your letter. But I didn't expect to see you so soon. This is wonderful news."

"It took a little doing. I received some letters from colleagues of yours who must have read your account of my predicament. They urged me to return. [FN4] But I'd already resolved to do that myself. And here I am - just moved into my new apartment on upper Riverside last week. My sister Geneva gave me a hand. You're the first person I've looked up since getting settled."

"You have no idea how glad I am to see you. I was afraid you'd spend the rest of your life as a cafe intellectual in sunny Italy. At least my letters of recommendation to the LL.M. programs weren't wasted. [FN5] Tell me how you did it. I talked to some colleagues about your immigration problem; they were stumped." I motioned for him to take a seat in my cluttered office, littered with papers and boxes from my recent move. "Would you like a cup of coffee?"

"Thanks," Rodrigo replied, casting a glance at my office coffeemaker and supply of beans. "I'm afraid I became addicted to espresso in Italy, where it's practically the national drink."

As I busied myself grinding the beans and setting the timer, Rodrigo launched into his story. "First, I appealed the INS decision, emphasizing the brevity of my service with the Italian army and my *1185 reasons for performing it. [FN6] But the agency was having none of it - they acted as though they had no discretion, which of course you know they do. They kept telling me to reapply, as though I hadn't been born here and had no good reason for being in Italy while I was growing up."

I poured the coffee and asked, "So are you here on a student visa? And if so, how are you going to get a law teaching job later without lying about your intent?" [FN7]

"That worried me, too, Professor, because as you know I hate lying."

"So, what did you do?" I asked, indicating the cream and sugar. "Whatever it is, I hope it's legal. You're not one of those undocumented aliens, as our Anglo friends call them, are you?"

"Just sugar," he replied. "I used a two-step procedure. As you know, the European Community went into effect recently. [FN8] Under the basic agreement, a citizen of one member state is entitled to travel freely and settle in any other." [FN9]

"Sounds sensible to me," I said. "Although I can't help contrasting it to the situation here. If anything, we've been tightening up our own immigration policies in response to growing xenophobia aimed at limiting the influx of outsiders - particularly ones with coloration like yours and mine. It reminds me of those waves of 'nativism' that seem to rise up when our culture is under threat." [FN10]

"I heard about that. So I planned things carefully. First I became an Irish national. This was much easier than you might think, since both Italy and Ireland are members of the EC and, as a graduate lawyer, I had no problem proving I wouldn't become a public charge. Within a short time I had my own apartment and paralegal job in Dublin, which by the way has a great literary and intellectual life."

***1186** Probably a close call, I thought, for I knew how Rodrigo loved such settings. "And how did you get from Ireland to here?"

"Oh, that part was easy. I enlisted the support of an Irish immigration society located in an eastern U.S. city. [FN11] I told them I was a lawyer with American forebears, and they agreed to sponsor me. Technically, the route used was a private bill."

"A private bill?" I asked.

"I was surprised, too. But, as they explained, it's fairly routine. A U.S. senator of great prestige and standing, himself of Irish descent, sponsors such bills fairly regularly. He thinks the United States needs more Irish men and women, and his colleagues go along even if that year's quota is filled." [FN12]

"And I suppose there was nothing in the record to show that you had previously been excluded or that you are a budding racial reformer and the subject of a recent law journal article laying bare your somewhat unflattering analysis of Western culture." [FN13]

"I think your term for it is 'separation of powers.' The immigration service did learn of my plan and may well have tried to intervene. But they got nowhere, because it's a different arm of government. It's one of the nice features of your - I mean our - political system." [FN14]

I looked up and found my young interlocutor looking slightly guilty. "What is it?" I asked.

"There's one more thing I ought to tell you. I may have overdone it - but you must understand I really wanted to get back. While in Ireland, I bought a title for a few thousand pounds from some down-at-the-heel member of the English nobility. I wanted to assure favorable consideration by your authorities. It turned out probably to have been unnecessary; my law degree and American ancestry were probably enough."

"So, what are you - Rodrigo, the third duke of Crenshaw?"

"Something like that," Rodrigo muttered, looking down at his feet. "The incongruity has not escaped me."

"I'm just glad you made it back. It's quite a story."

***1187** I. GETTING CAUGHT UP: RODRIGO AND I DISCUSS THE ECONOMICS AND POLITICS OF RACE

"Aside from Geneva and the folks at the Boston Irish immigration office, you're the only person who's heard it. What are you working on these days?" Rodrigo craned his neck in an effort to read upside down the titles of the books lying on my desk. [FN15] "The last time we talked you were struggling with black neoconservatism." [FN16]

"Your memory is good. Now, I'm trying to get a handle on their counterparts, the law-and-economics movement."

"I *did* notice that footnote in the reprint you sent me. [FN17] And you guessed right. When we spoke in your office I knew very little about that school of scholarship. It's not well known yet in Italy - there are hardly any books available except the first one by Richard Posner. [FN18] But there were more in Dublin and, as you can imagine, dozens in the library of my new school. I've been reading everything I could lay my hands on. What motivated you to dive into this stuff?"

"Even at my advanced age, Rodrigo, we're expected to keep abreast. And, as luck would have it, I've been invited to a conference on the economics and politics of racial discrimination. [FN19] The organizers plan to pair conservative law-and-economics types with racial reformers

like me. I think they are hoping some sparks will fly, although frankly I'm not sure we'll have much to say to each other."

"Really?" Rodrigo brightened. (Hah - I thought, maybe I'll learn something. Little do students know how much we get from them. Their enthusiasm and even their sometimes half-baked ideas keep us going and provide the spark necessary to sustain us in an otherwise drab and desolate world.)

"Yes, really," I replied, refilling his coffee cup. "The law-and-economics folks write pages full of formulas and little squiggly signs. [FN20] *1188 They talk about things like transaction costs, [FN21] speak of racism as a 'taste,' [FN22] and spend more time showing why governmental efforts to cure it would be 'inefficient' [FN23] than they do deploring the practice itself. We, on the other hand, treat racism as subordination, not a mistake, much less an idiosyncratic 'taste,' and struggle to understand its connection with culture, history, and the search for psychic and economic advantage." [FN24]

"I *have* noticed that gulf between the two groups," Rodrigo agreed. "Some LL.M. students and I were talking about it the other day. Maybe that's one of the things you and the other panelists could talk about at the conference, don't you think?"

Smart kid, I thought. That one idea should be enough to get my speech off and running. [FN25]

"Maybe you could even tie that difference to the notion of 'positionality' that you see emerging in feminism, critical race theory, and other critical literature. [FN26] The law-and-economics scholars have a certain background, training, and set of disciplinary assumptions, so naturally they look upon discrimination the way they do. They treat civil rights statutes as a form of tariff (pp. 37, 265) because that's how they see the government - as a well-meaning, if clumsy, regulator. [FN27] That's their slant, their disciplinary bias, their 'positionality.'"

"That's a start," I said, refilling my own coffee cup despite the lateness of the afternoon hour and my doctor's warning to cut down on caffeine. "But where do you go from there? Position, color, and even life experience don't determine all, as our friend Randall Kennedy has been good enough to point out. [FN28] Tom Sowell, for example, a leading economist of race, is black. And he takes as dim a view of *1189 affirmative action as any blueblood East Coast theorist." [FN29]

Rodrigo looked at me sharply. "Interesting double entendre," he said. "You're right that perspectivism only goes so far." He paused for a moment. "Maybe you could challenge their basic premise that racism is a form of irrationality." [FN30]

"Good idea," I said. "I had planned to take them to task for failing to take into account the intentional, interest-serving dimension of white-over-black prejudice. Maybe I'll call them 'reductionist.' They're sure to hate that because they all fancy themselves scientists." [FN31]

"But of course they'll reply that people like you fail to advance the discussion either, with your loose talk about a culture of racism, interest-convergence, hegemony, false consciousness, and other vague and unquantifiable things." [FN32]

"You're right," I conceded. "I have to show them that their approach is not only reductionist, but wrong."

"That's easy," said Rodrigo with his customary élan. "Why not take their major premise about the market and show that it doesn't explain, much less cure, racism? [FN33] Show them they need critical thought if they are to understand and deal with that scourge."

"It's not clear to me exactly how to do that, although I definitely would if I could," I said.

"Correct me if I'm wrong, Professor, but don't your law-and-economics colleagues believe that, in the absence of monopoly, the market ought to cure most forms of irrationality?"

"At least some of them do say that." [FN34]

"And don't they think of racism as a form of irrationality?"

"Some of them, at least, do." [FN35]

*1190 "But the market obviously doesn't work that way. Consider - the United States has had a free market economy for over two centuries, and racism is as firmly entrenched as ever. The economists reason that an employer or real estate owner who discriminates against African Americans, gays, or women places himself or herself at a competitive disadvantage. Nonracist landlords or employers will be able to employ or rent to better people - at least if they can get

their other workers or tenants to go along. Over time, they should drive out competitors who discriminate, because these others will end up hiring or renting to less qualified whites." [FN36]

"That's the theory, all right, but you and I know the reality is quite different."

Rodrigo drained his cup. "Remind me later, Professor, to explain why things work just the opposite - why racism tends to increase over time rather than dampen, as your friends say it should. The first step, though, is to explain why competitive pressures don't eliminate racism in the market."

"I think I know what you're going to say," I said. "Competitive pressures don't work because discriminators as a group know that irrational-seeming individual decisions, if followed by all or most whites, create a system of social advantage. I've written about that myself, along with others." [FN37]

"I know. But actually I was going to add something else."

"Please go ahead. I didn't mean to interrupt."

"Racism persists, in part, for the reason you mentioned - simple group self-interest. But there's another dimension, as well. Take employment discrimination. Antiracist hiring decisions are so rare that they make news, and the reason is that it never occurs to individual whites to think that hiring a black could benefit them - that is, the whites." [FN38]

"But isn't that just regular irrationality, which the economists say will be cleared up once the lagging firms get the message that nonracist ones do better in competition?"

"With due respect, Professor, I think it's different. Look at it this way. You and your friends have written about the social construction *1191 of reality, including racial reality, have you not?" [FN39]

"Others more than I," I grumbled. "Although I'm familiar with that literature, I haven't found it as useful as some have. It seems to me that racism offers such powerful economic and psychological incentives to any group able to get away with it that resorting to fancy theories is unnecessary."

"Maybe so," Rodrigo conceded. "Although I'll just note that you are considered a leading proponent of legal storytelling, one function of which is to deconstruct and displace comfortable, self-serving majoritarian myths and replace them with less sexist and racist views. [FN40] So in a way you're contributing to the reconstruction of social worlds."

"I know some have said that. But I think of myself as just an ordinary foot soldier. [FN41] If others want to put an elaborate postmodern gloss on it, that's their privilege. I just don't find it necessary."

"Bear with me for a second," said Rodrigo. I noticed he was furrowing his brow, the first time I'd ever seen him depart from his air of youthful exuberance. "Let's suppose there's a world where all the *As* hate and disdain all the *Bs*, whom they consider stupid, lazy, and morally debased. The *Bs* think of themselves as normal, and of the *As* that way as well - except for this unlvely trait."

"Sounds a little bit like a society I know," I said.

"And let's suppose, Professor, that the reason the *As* hold this view of the *Bs* is not that there is anything wrong with the *Bs*. Rather, they were brought to their current land in chains to perform menial work, and the *As* coined an attitude - call it *B*-inferiority - to justify that practice. Later, they freed the *Bs*, but the attitude remained because it was advantageous to maintain it. [FN42] So the *As* circulate and reinforce stories and myths about *B*-inferiority at every turn - in children's tales, TV, movies, advertising slogans, and so on. This all creates a stigma-picture or stereotype so that virtually everyone in the society harbors the attitude to some extent." [FN43]

"This would obviously benefit the *As*, who could use the *Bs* as cheap labor, scapegoats for blue-collar *A* workers unhappy with their *1192 lot, and so on." [FN44]

"But imagine that a few *As* are inclined to be rulebreakers and mavericks. Might they not try hiring a few *Bs*, just to see if it works - just to see if it gave them a competitive advantage?" [FN45]

"Certainly - if only for menial work in times when the surplus labor supply is exhausted."

"No, I mean at other times, and for regular or high-status jobs."

"It's hard to imagine. I suppose they might," I replied, unsure of where Rodrigo was going.

"But the implication of your thought and that of other postmodernists - forgive me, Professor, if I keep calling you that - is that this is unlikely to happen. The shared construct or stereotype of the *Bs* makes it unlikely that anyone at all will do this. [FN46] The person would almost have to stand outside the culture."

"Like yourself." [FN47]

"Perhaps," Rodrigo brushed off the compliment impatiently. "Another way of looking at it is in terms of knowledge. All the economists say the market won't operate perfectly unless everyone has perfect knowledge. [FN48] But the stigma-picture that white people hold of blacks operates as a screen. Because of the thousands of stories, jokes, scripts, and narratives they hear, whites can never have that degree of knowledge - even the proverbial ones who boast that they count some of us among their best friends." [FN49]

"Very funny," I acknowledged. "Although, in one way of looking at it, they do have 'perfect knowledge.' I understand that your favorite authors equate knowledge with power, hold that it is inseparable from social convention and practice. [FN50] White people in that sense ***1193** know us perfectly: the universality of the stereotypes, the way in which they are embedded in the very paradigm we require to communicate with and understand each other, means that the market in a way will operate perfectly - that is, with what passes for perfect knowledge."

"And will thus perfectly reinforce racial reality - whites over blacks - all the while maintaining that it is perfectly neutral," Rodrigo added sardonically. [FN51]

Now *that's* something I can use at the conference, I thought. Worth getting caffeine nerves over.

"We need a good example, or your friends will never get it. What can we use?" Both of us were quiet for a while. I switched the burner on the coffeepot to "Warm."

II. IN WHICH RODRIGO EXPLAINS WHY THE FREE MARKET DOES NOT CURE RACISM

"I have an idea," Rodrigo said at last.

"I'd love to hear it."

"Imagine this thought-experiment. It concerns children, another disempowered group."

"Do you mean white children or black children - or any kind?" I asked.

"Any kind. Imagine a farm state, say Minnesota, decides to license children to drive vehicles. A lot of children are needed to drive cars, tractors, etc., around the farm, something they now can do perfectly legally as long as they stay on private property." [FN52]

"Okay," I said. "And why do they decide to let them drive on the roads, which I assume your licensing scheme allows them to do?"

"Two reasons. Sometimes the young drivers need to take the tractor or car on a public road for a short distance to get from one part of the family farm to another."

"So, to get from the front ten to back twenty acres, they can now drive on County Road 112."

"Right - that's the practical reason. But the other one is empirical. Let's suppose the legislature conducts studies to show that young ***1194** children between the ages of ten and thirteen are likely to prove quite safe drivers. Psychologists testify that children of this age are apt to be careful, conscientious, and law-abiding. Males under the age of twenty-one, by contrast, are high-risk drivers. [FN53] So the state adopts a new licensing scheme in which children can drive between the ages of ten and thirteen, but the males have to give up their licenses when they become young adults."

"A pretty outlandish idea," I said, nevertheless intrigued. "I suppose you think there is some connection between children drivers and race?"

"Yes, as you'll see in a minute. But first we have to suppose that Minnesota's experiment actually works. Things are much more convenient for farm families, plus the ten to thirteen year-olds turn out to be the safe drivers the experts thought they would. With teenagers and young males off the roads, the death rate on the highways plummets. Everybody's insurance rates go down fifty percent." [FN54]

"An intriguing scenario," I allowed. "And what conclusion do you draw from it?"

"This. Would our state's hypothetical program be followed? Would forty-nine other states quickly bring their own licensing schemes in line with Minnesota's?"

"I suppose you are going to say no, but I'm curious why."

"They would all find reasons not to follow the Minnesota experiment, distinguishing their state from that one in some minor respect, when the real reason has to do with the idea of a child."

"I see what you're saying," I said with interest. "The idea of an eleven year-old hunched over a steering wheel, cheerfully and safely driving a car all by himself or herself, is inconsistent with our social construct of a child. It's out of role, like the idea of women in combat today, [\[FN55\]](#) or of blacks in the Navy a few years ago." [\[FN56\]](#)

"Exactly," Rodrigo said. "Society can't accept the notion of children as independent, of having the autonomy and freedom of movement that driving a car on public highways brings. Children are meant to be watched, dependent, small, and helpless. We *want* them to be that way. So, whatever the evidence disclosed, we'd find ways to ignore or discount it."

Hmmm, I thought. Hadn't I heard of evidence law discussions in ***1195** a similar vein? I made a mental note to ask a colleague who teaches in that area. The studies I dimly seemed to remember indicated that child eyewitnesses, although actually better than older ones, are still not allowed to testify. [\[FN57\]](#) The full implication of what Rodrigo had been saying struck me. "So, it's a kind of market failure - no other state would follow the first one's example, just as racist firms would refuse to follow the lead of a nonracist one, even if this meant giving up a competitive edge."

"They won't do it for the same reasons that we won't empower children, let women fight in combat, or accept gays in certain lines of work. [\[FN58\]](#) These things go against the grain. Racism, sexism, and homophobia are in the cultural paradigm - in the very set of values, ideas, and meanings we rely on to construct, order, and understand the world, as well as communicate with each other about it." [\[FN59\]](#)

"And since they are in the paradigm, we don't see them, cannot speak against them without seeming and feeling foolish, much less take action to correct them."

"Exactly, and it's a dimension your economists ignore in their focus on the microcosm, on the individual, atomized aspect of human interaction and choice. Because of who they are, their disciplinary bias or 'positionality,' they systematically misperceive the essence of racism."

"Rodrigo, I need some dinner. You set a fast pace and, as fascinating as all this is, I'm not as young as I used to be. Why don't we walk down to the village for a bite?"

I noticed Rodrigo's quick flash of concern, then added, "Don't worry, I'll pay. This is helping me get ready for my conference. I know what it's like living in the city on a student's budget. You're my guest."

III. IN WHICH MY YOUNG FRIEND STANDS LAW AND ECONOMICS ON ITS HEAD WITH A LITTLE ASSISTANCE FROM THE SOCIOLOGY OF KNOWLEDGE

We were comfortably settled in an Italian restaurant that Rodrigo pronounced "good - at least equal to the ones I used to patronize back there. The pasta seems fresh and homemade. And the wine - not bad, although I see it's from California."

"I come here often with colleagues. It's cheap and they let you stay as long as you want. You had been explaining why law and economics ***1196** does not account for racism's continuing vitality - for the market's failure to make much of a dent in it."

"Posner, Epstein, and others try, but can't. Their approach is too confined. They focus on individual choices, on the microcosm, when the essence of racism and other forms of prejudice is much broader than that. [\[FN60\]](#) Epstein, for example, speaks of the right to exclude from a circle of friends and associates as standing on the same footing as the right to join such a circle (p. 497). He speaks of the antidiscrimination laws as forcing individuals into "undesired interaction" (p. 497), something whose "totalitarian implications become clear only when one realizes the ... steps that must be taken to enforce them " (p. 497). Individuals know their own preferences better than anyone else (p. 149), so any governmental meddling is inefficient and likely to make matters worse (pp. 42, 149-51). Charles Murray, [\[FN61\]](#) Thomas Sowell, [\[FN62\]](#) and even Gary Becker [\[FN63\]](#) echo some of these conclusions. What they don't seem to realize is that, with race, we don't so much operate irrationally in an otherwise sound world as create a world with irrationality built into its very structure. [\[FN64\]](#) Once we create a world where race

matters, we become unaware of our creation's contingency. Racial generalizations come to seem natural, a sort of baseline, 'the way things are.' What now seems irrational is to hire a black or let one in your law school. These decisions require 'affirmative action' and are thus morally troublesome, as you and I discussed earlier. Individual actions work in concert ineluctably to reinforce the racial status quo. It feels like freedom, like individual choice. Yet the effect is tyranny." [\[FN65\]](#)

"This has been quite useful," I said. "I hope you don't mind if I steal your ideas. You asked me earlier to remind you to tell me something. I've forgotten what it was - something about the future perhaps?"

Rodrigo was silent for a moment. "Oh, yes. I was discussing this with one of the other LL.M. students, who is from Ghana. It's my thesis that racism gets worse over time, not better - in other words, exactly the opposite of what the law-and-economics scholars tell us." [\[FN66\]](#)

***1197** "I've been pointing that out myself, although possibly for different reasons. [\[FN67\]](#) And I doubt you'll have any more success than I've had. I'm sure you've noticed, Rodrigo, that it's almost impossible to get most white folks to see that things are getting worse. They love to fasten on the myth of black progress. Tell them twenty dismal statistics about African-American poverty, early death, and despair, and they'll come up with a single cheerful statistic that they heard somewhere that suggests that things are getting better - that today there are more partially sighted Hispanic plumber's apprentices in Ohio than there were twenty-five years ago, more black undergraduates majoring in Naval R.O.T.C. at land grant colleges, or some such thing. But tell me your theory of why the market does not drive out racism but accentuates it."

"It's simple," said Rodrigo, deftly wrapping a long strand of pasta around his fork. "Once you understand that racial differences are social constructs and that racial mythology is intensely interest-promoting yet firmly believed, you see how racism accelerates, feeds on itself. The image becomes reality, which in turn reinforces the image, which seems truer and truer and ultimately beyond refutation."

"Sort of a self-fulfilling prophecy," I offered. To be truthful, I didn't quite get his drift and wanted him to spell it out a little more. Was my blood sugar level low, or was I just not up to following this wunderkind? I took another bite of my fettucini Alfredo.

As though reading my thoughts, Rodrigo added, "Maybe that's a little too elliptical. What I meant was that we have constructed an image of blacks as inferior - as unintelligent, not very ambitious, and so on. Originally, this served transparently majoritarian purposes - justifying slavery first, and later the black codes. [\[FN68\]](#) But over time this transparency drops out. Now, we really begin to see blacks, women, children, the way the construct holds. The occasional high-achieving black or woman - or independent self-sufficient child - is disregarded or lauded as an aberration. For their parts, the objects of the stereotype either internalize it or are coerced into their assigned roles. [\[FN69\]](#) Minorities in fact become poor, women domestic, children passive and 'cute.' The image becomes real, *true* in the sense of 'beyond refutation.' Young children are probably more dependent today ***1198** than they were 100 years ago. Women are just as much objectified sexually, if not more so. And so on."

IV. IN WHICH RODRIGO EXPLAINS HIS NEO-CRYPTO-THEOLOGICO DOUBLE FEEDBACK LOOP

"I'm still not convinced, Rodrigo. Your argument lacks rigor. It may seem plausible to me, but the law-and-economics types on my panel see themselves as hardheaded scientists. Moreover, few of them are familiar as you and I are with the day-to-day reality of life as a person of color. [\[FN70\]](#) They think things are getting better, that all we have to do is let the market operate. You'll need to show them the exact mechanism by which racism tends to worsen, not improve, over time. You can't just offer vague ideas like self-fulfilling prophecies and social constructions that feed on themselves. Your Minnesota example was interesting, but not persuasive in my opinion."

"I don't know how else to show someone who believes all diseases are individual that there is such a thing as social pathology."

Both of us were silent. Rodrigo was furrowing his brow a second time. "Professor, are many of your law-and-economics colleagues religious?" he asked.

The question took me by surprise. "I don't know. Probably. Yes, at least one that I know of is - fairly devoutly so. But what's the relevance of their faith or lack of it?"

"Religion is something beyond empirical proof. Maybe you can build on that to question their faith in microtransactions and analysis as the whole story."

"I don't follow you."

"Well, haven't many religions emphasized miracles, predestination, the notion of a fair and just world, and other manifestations of God's *efficacy*?" [\[FN71\]](#)

"Yes, I suppose so," I said.

"And haven't all conquerors from Hammurabi on down invoked religious explanations to justify their conquests and rule over other nations?"

"Of course. Our young friend Robert Williams wrote a brilliant article entitled 'Documents of Barbarism' showing how the early settlers applied European myths of supremacy and Manifest Destiny to justify genocide and plunder of Indian lands. [\[FN72\]](#) Even the judiciary was complicit in developing a version of this - the Discovery Doctrine, *1199 according to which Indian lands might be appropriated by any European person or nation." [\[FN73\]](#)

"So, can we say that religion, to the extent it speaks to the issue, confirms a culture in what it thinks and does? If society is unjust, if upon looking about them the members see manifest differences between the standards of living, levels of employment, infant mortality rates, and so on, of their group and others - then something must be wrong with those others. They lack character, ambition, the right genes. The social system is fine, because divinely ordained; the fault lies with individual actors like you and me." [\[FN74\]](#)

"Religion, like any powerful narrative, is canonical," I observed. "Anything that deviates from the narrative or tends to cast doubt upon it is itself put in question. The poverty and despair of communities of color puts the fair-world tenet in question. So, the narrative supplies a reason - our fault."

"Are you and I free of that narrative, Professor?"

"I'm not sure," I answered. "They conclude that, because the world is fair yet we are poor and despised, there must be something wrong with us individually, or with our culture or family - we are not among the Elect. We, by contrast, having the same belief in a fair world but knowing that we are normal - like everyone else [\[FN75\]](#) - interpret differences in the distribution of social goods like jobs, longevity, wealth, and happiness as evidence of malevolence or neglect on the part of those in power, or else as basic defects in the social system."

"And so each group interprets the very same reality to reinforce its own beliefs about racial justice," Rodrigo concluded.

"And whites become more and more convinced that blacks and Hispanics are complainers, always conjuring up exaggerated claims of discrimination when all we need to do is go out and work and find the opportunities that are there." [\[FN76\]](#)

*1200 "Your friend and colleague Thomas Sowell says more or less that, and he's black. [\[FN77\]](#) He says if the Irish, Chinese, and West Indians can make it, so can African Americans." [\[FN78\]](#)

"But you said *both* groups seize on the same evidence to confirm their positions, thus drifting farther and farther apart over time."

"Oh, yes," Rodrigo replied. "People of our persuasion see the same events, the same history, and either give up and withdraw - feeling what's the use - or else clamor, riot, or write pungent law review articles and books like you, Professor. [\[FN79\]](#) Each group's conduct just reinforces the other's view that the second group is unjust and impossible. Over time, blacks get more militant and whites more complacent, with a little help - on both sides - from the legacy of John Calvin, Charles Darwin, and Adam Smith." [\[FN80\]](#)

"A double feedback loop with roots in religion and faith in a fair world," I mused.

"Something like that," he said.

"I think I may try this out on my law-and-economics friends. Now that I think about it, many of them are religious - even if they only believe in the Invisible Hand. [\[FN81\]](#) Maybe I can get them to see that societal discrimination is something more than irrationality and that it's likely to get worse before it gets better."

"Good luck."

A few minutes elapsed while we finished dessert and I summoned the waiter. I gave him my credit card, and as we waited I expressed a concern that had been nagging at me. Choosing my words carefully, I asked my young friend:

***1201** "Rodrigo, if this is the picture that the new Critical thought introduces, I'm not sure I or many others will want to see it. Baleful images deepen and rigidify. Racism and sexism increase over time. Compared to that, most of us will take liberalism. Where's the opening for transformation, for hope? Why struggle if things are the way you say? What's the point?"

"Some of those criticisms have been leveled at your own work, Professor, as I'm sure you know," Rodrigo replied levelly. [\[FN82\]](#) "The world is not ordained to be a pleasant place - that's wish fulfillment. One shouldn't pick a philosophy or perspective merely because it makes one feel good."

"Agreed. But where do you go from there? What's the point of struggle? I assume you are back from sunny Italy for a reason. Why did you return to this vale of tears?"

V. IN WHICH RODRIGO EXPLAINS, WHY STRUGGLE

"Because, as I mentioned earlier, the United States' - indeed the entire West's - dominant culture is in disarray. [\[FN83\]](#) Their economy, infrastructure, educational system, cities, and environment are in sharp decline, yet they are stuck - perseverating - digging in and doing harder and with more energy the very things that got them into trouble in the first place. [\[FN84\]](#) They're listening to the neoconservatives and nativists who tell them they can be great again by being *American* - thereby turning their backs on the very voices and points of view that might save them, might enable them to break free from deadlock and stagnation."

"But I thought I just heard you say that the potential for basic change, at least on the racial front, is highly limited. If the United States is to save itself, it must incorporate ideas and people from nonwestern sources - and yet these are the very sources they've constructed, as you put it, to seem unworthy, ridiculous, lazy, and morally debased" I paused to drive home to Rodrigo the blind alley to which his analysis seemed inexorably to lead.

"There's a way out," Rodrigo said quietly. "They're *our* stigma-***1202** pictures, after all. We made them, we can unmake them. There's no objective inferiority of peoples of color to worry about, no reason why white folks must always be on top, no reason why all persons cannot have equal levels of dignity and respect. As soon as one sees this, one places oneself on the path of liberation. The culture, the practices, the thousand images and roles they've assigned to us, all reinforcing the idea of our inferiority [\[FN85\]](#) - all these are revealed as contingent, not necessary. We can accept them or not. They can, too. Our approach in this sense is much more liberating - and more subversive - than liberalism. We need not live in a world we do not like, *that we did not help create*, and then seek minor adjustments and changed positions within that unfairly structured world. We may work for change. If we don't, everything will fail." [\[FN86\]](#)

"And so, law and economics is"

"A useful way of ordering relations and transactions within a given system, say, Western capitalism - but a poor way of understanding and dealing with broad, systemic distortions built into the very structure of that system. Relying on economic theory to solve problems of race and sex makes about as much sense as reading Gramsci for help with one's household budget."

"Speaking of budgets, how are you managing your finances? This is an awfully expensive city for a student."

"I had saved up some from my year of practice in Rome and Dublin. Geneva was nice enough to help me find a rent-controlled apartment. And I got a loan, like two thirds of my fellow students. Which reminds me, Professor - my tuition bill's due tomorrow morning. Thanks for the dinner, but I'd better get to my bank before it closes. Good luck at your conference, if I don't see you before then."

I watched his lanky figure disappear from sight, paid the bill and left, ignoring as best I could the stares of a yuppified couple at the next table. [\[FN87\]](#) As I walked home through the late summer evening, I felt one of those rare surges of happiness over being a teacher. I was

happy to have next month's talk largely mapped out, and grateful to Rodrigo for having helped me think it through. What a rare student! With a start I realized that the afternoon's discussion had focused almost entirely *1203 on my concerns and, except for the first part, little on his. I hoped his adjustment to American legal education and pedagogy went well, and resolved to call him up after a week or two of classes to see how things were going.

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[FN₁]. See Richard Delgado, [Rodrigo's Chronicle, 101 YALE L.J. 1357 \(1992\)](#) (introducing Rodrigo Crenshaw). On Rodrigo's lineage, see DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) [hereinafter BELL, *SAVED*]; Derrick Bell, [Foreword: The Civil Rights Chronicles, 99 HARV. L. REV. 4 \(1985\)](#). In Delgado, *supra*, Rodrigo and a professor discuss recent writings by neoconservatives of color, particularly *Illiberal Education* by Dinesh D'Souza. Rodrigo was born in the United States of an African-American father and Italian mother. When he was 17, Rodrigo moved to Italy when his father, an American serviceman, was assigned to an Italian base. Rodrigo completed high school at the base school, then received a scholarship to study Western Civilization and law at a famous Italian university. As "Chronicle" opens, Rodrigo is seeking out the professor during a visit to the United States to discuss his prospects for a career in law teaching. See Delgado, *supra*, at 1359-60. See *infra* notes 2-7, 13, 16-17, 47 and accompanying text for further information about Rodrigo.

[FN₂]. Rodrigo's first chronicle concludes with his deportation to Italy when U.S. authorities learn that he performed a short period of military service in the Italian Army. See Delgado, *supra* note 1, at 1379.

[FN₃]. The book was Richard Epstein's *Forbidden Grounds*. The author, professor of law at the University of Chicago and editor of the *Journal of Legal Studies*, offers an original and remorseless attack on the antidiscrimination principle in private employment and on Title VII of the 1964 Civil Rights Act in particular. Pp. 3-4. For Epstein, state-enforced inhibitions against whom one may hire are costly, "imperial," inefficient, one-sided, easily sabotaged, and antithetical to the freedom of contract on which our system of liberal politics is based. Pp. 3, 42, 159-64, 495-500. Epstein argues that the only legitimate functions of government are to protect property and personal security and to enforce private contracts - in short, to protect a "zone of freedom." Such a government is principled; but when the state coerces association - as happens through Title VII and enforcement of affirmative action, pp. 3-7, 147, 495-97 - its behavior is unprincipled.

Part I of *Forbidden Grounds* sets out the empirical and theoretical grounds on which Epstein's attack on the antidiscrimination norm is based, including its high cost, negligible gain, and inconsistency with the liberty principle. It also sets out numerous situations in which racial discrimination may be "rational," pp. 59-78 - i.e., a positive good - and the relatively few circumstances where Epstein approves the enforcement of antidiscrimination laws. Pp. 79-87. Part II examines the history of race relations and the evolution from *Plessy v. Ferguson* to *Brown v. Board of Education* and modern civil rights legislation. Originally, according to Epstein, the Civil Rights Movement was "principled" - concerned with striking down southern laws that prohibited employers from choosing to hire blacks. But it resulted in a system of law that exalts forced bonding on the basis of certain "forbidden grounds" - race, sex, national origin, age, and handicap. Parts III, IV, and VI examine the separate laws of race, sex, age, and disability discrimination. Part V discusses affirmative action.

Running throughout the analysis is Epstein's powerful absorption - verging on romance - with the idea of contract at will as the bedrock principle of our system of ordered liberty. *E.g.*, pp. 22-27, 32-46, 497-505. In light of Rodrigo's manifest disdain for Western rationalist, linear thought, see Delgado, *supra* note 1, at 1365-76, I wondered what he would think of someone like Epstein. As luck would have it, we later turned to exactly this subject. See *infra* notes 20-36, 48, 60-63, 70 and accompanying text.

[FN4]. Professor Stephen Feldman's letter urges Rodrigo to skip the LL.M. degree and interview directly for a professorship at his school, which will sponsor his immigration application. Professor Lisa Ikemoto urges Rodrigo to put aside his academic pretensions in favor of a career as an activist and "organic intellectual" whose services are desperately needed by the minority community in the wake of the L.A. riots. See Letters from Stephen Feldman, Professor of Law, University of Tulsa, and Lisa Ikemoto, Professor of Law, University of Indiana-Indianapolis, to *Yale Law Journal* (May 1992) (on file with author).

[FN5]. See Delgado, *supra* note 1, at 1379, where the professor agrees to recommend Rodrigo to four LL.M. programs.

[FN6]. *Id.* at 1379 (Shortly after his twentieth birthday, Rodrigo served briefly in the Italian army as a "way of paying back the Italian nation for subsidizing my education at a fine university.").

[FN7]. A foreign national who is admitted to a U.S. program of study may generally obtain a temporary U.S. visa. But this requires that the applicant disavow any intent to remain in the United States following graduation. See T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 220 (2d ed. 1991).

[FN8]. See BASIC COMMUNITY LAWS (Bernard Rudden & Derrick Wyatt eds., 2d ed. 1986).

[FN9]. See *id.* at 39-44 (Title III. Free Movement of Persons, Services and Capital), 228-45 (Freedom of Movement for Workers); see also Council Directive 90/364, 1990 O.J. (L 180) 26 (compliance necessary by June 30, 1992) (extending general right of residence to all Member State nationals provided they do not become burdens on the host country).

[FN10]. On nativism and immigration policies, see Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1270-75 (1992) [hereinafter Delgado & Stefancic, *Images*]; Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEXAS L. REV. 1929, 1943-47 (1991) [hereinafter Delgado & Stefancic, *Norms and Narratives*]. I wondered whether there could be a parallel between racism and international immigration and trade barriers. Both separate groups of people and are said to be economically inefficient. See *infra* notes 21 & 27 and accompanying text.

[FN11]. Such an organization actually exists. Telephone Interview with Noreen O'Reilly, Irish Immigration Society (June 3, 1992).

[FN12]. On the use of private bills to circumvent or supplement stringent immigration laws and quotas, see ALEINIKOFF & MARTIN, *supra* note 7, at 668-73.

[FN13]. See Delgado, *supra* note 1, at 1368-78 (in which Rodrigo explains his theory of the West's decline and need for infusion of new thought).

[FN14]. On the separation-of-powers doctrine in American politics and constitutional law, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 2-1 to 5-24 (2d ed. 1988) ("Model I - The Model of Separated and Divided Powers").

[FN15]. Aside from *Forbidden Grounds*, the titles were the following: GARY BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971); CHARLES MURRAY, LOSING GROUND (1984); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 615 (3d ed. 1986) (I had been pondering ch. 27, "Racial Discrimination"); and THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? (1984).

[FN16]. Delgado, *supra* note 1, at 1372-75 (focusing on Dinesh D'Souza, Glenn Loury, Shelby Steele, and others writing in this general vein).

[FN17]. *Id.* at 1365 n.25 (wondering whether my interlocutor, who seemed conversant with many of the new trends, also knew about law and economics).

[FN18]. POSNER, *supra* note 15.

[FN19]. Like others, I had long been fascinated by the way in which radical and conservative thought sometimes coincide on issues of racial reform. See, e.g., BELL, *SAVED supra* note 1, at 26-88; Richard Delgado, [Enormous Anomaly? Left/Right Parallels in Recent Writing About Race](#), 91 *COLUM. L. REV.* 1547 (1991) [hereinafter Delgado, *Enormous Anomaly?*]; Richard Delgado, [Zero-Based Racial Politics](#), 78 *GEO. L.J.* 1929 (1990). Perhaps the upsurge in interest in this coincidence accounted for the conference and my invitation to speak at it, I thought.

[FN20]. E.g., BECKER, *supra* note 15 (rigorous analysis of the economics of discrimination).

[FN21]. E.g., pp. 67-73, 497, 500 (arguing that discrimination is sometimes rational and beneficial because associating with persons of diverse races or cultures can impose psychic costs and render communication difficult).

[FN22]. Pp. 42-44; BECKER, *supra* note 15, at 6, 16, 153; POSNER, *supra* note 15, at 615-17.

[FN23]. Pp. 76-78, 497-500; MURRAY, *supra* note 15, at 13-14, 146, 224-28; SOWELL, *supra* note 15, at 32, 49-52, 84.

[FN24]. See BELL, *SAVED supra* note 1; Delgado & Stefancic, *Images, supra* note 10, at 1259-61, 1276-79 (both stating that racism is concerned with preserving racial advantage); see also Kathryn Abrams, [Hearing the Call of Stories](#), 79 *CAL. L. REV.* 971, 975-76 (1991) (arguing that law's narrative substructure promotes advantage of the powerful but disguises its own operation).

[FN25]. I could visualize a nice, slightly wry introduction gently pointing out these initial differences and urging the participants to discuss them in a collegial atmosphere. All this would take five or ten minutes, make me seem the voice of sweet reason, and perhaps head off the usual criticism of me as an intemperate, one-dimensional race reformer.

[FN26]. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); Delgado & Stefancic, *Images, supra* note 10; Martha Minow & Elizabeth V. Spelman, *In Context*, 63 *S. CAL. L. REV.* 1597 (1990).

[FN27]. Pp. 28, 37, 73-74, 159, 163; see also *supra* sources cited in note 23.

[FN28]. Randall Kennedy, [Racial Critiques of Legal Academia](#), 102 *HARV. L. REV.* 1745, 1770-77, 1779-87, 1794-1807 (1989).

[FN29]. E.g., SOWELL, *supra* note 15.

[FN30]. E.g., pp. 42-47, 60; BECKER, *supra* note 15, at 6, 16, 18, 153; POSNER, *supra* note 15, at 615-18; SOWELL, *supra* note 15, at 96, 112-14, 116.

[FN31]. E.g., pp. 7-8 (describing his study as *systematic, foundational*, and as an extension of recent *sophisticated* studies of laws and market forces); see also Part I, at 13-87 ("Analytical Foundations," including discussion of whether private discrimination may sometimes be rational or efficient).

[FN32]. See, e.g., PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (discussing interest-convergence and culture of racism); Derrick Bell, [Brown v. Board of Education and the Interest-Convergence Dilemma](#), 93 HARV. L. REV. 518 (1980) (discussing interest-convergence); Richard Delgado, [Storytelling for Oppositionists and Others: A Plea for Narrative](#), 87 MICH. L. REV. 2411 (1989) (discussing culture of racism).

[FN33]. I gathered that Rodrigo was referring to their premise that racism and other forms of prejudice are irrational conduct that the market ought to drive out over time.

[FN34]. E.g., pp. 41-42, 265, 496; BECKER, *supra* note 15, at 159; POSNER, *supra* note 15, at 615 & n.1; SOWELL, *supra* note 15, at 96, 112-14, 116.

[FN35]. E.g., pp. 41-42; see BECKER, *supra* note 15, at 6, 18; POSNER, *supra* note 15, at 615-18. *But see* pp. 59-78 ("Rational Discrimination," arguing that discrimination sometimes makes sense - and confers legitimate benefits such as greater ease, familiarity, and better communication among coworkers).

[FN36]. E.g., pp. 43, 76, 265; BECKER, *supra* note 15, at 84-88, 159; POSNER, *supra* note 15, at 615 & n.1, 616-18; SOWELL, *supra* note 15, at 96, 112-14, 116. *But see* Cass Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHILOS. & POLY. 22, 25-31 (1991) (citing problems of third parties who prefer to deal with discriminators, of "statistical" discrimination based on a stereotype thought to have a grain of truth to it, and demoralization).

[FN37]. On the view that the essence of racism is group advantage, see, for example, BELL, *SAVED supra* note 1; Bell, *supra* note 32; Richard Delgado, [Recasting the American Race Problem](#), 79 CAL. L. REV. 1389 (1991) (reviewing ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* (1990)).

[FN38]. On the contribution of ethnic imagery and depiction to this process, see Delgado & Stefancic, *Images, supra* note 10.

[FN39]. See, e.g., Milner S. Ball, [Stories of Origin and Constitutional Possibilities](#), 87 MICH. L. REV. 2280 (1989); Delgado, *supra* note 32; Mari J. Matsuda, [Public Response to Racist Speech: Considering the Victim's Story](#), 87 MICH. L. REV. 2320 (1989); see also MACKINNON, *supra* note 26 (discussing construction of women and women's role).

[FN40]. On legal storytelling as a means of jarring or displacing comfortable majoritarian beliefs, see BELL, *SAVED supra* note 1; Delgado, *supra* note 32; Matsuda, *supra* note 39.

[FN41]. As Derrick Bell put it recently (out of the mouth of an old black woman): "I lives to harass white folks." Derrick Bell, [Racial Realism](#), 24 CONN. L. REV. 363, 378 (1992).

[FN42]. For this general view of the origins of racist stereotypes and attitudes, see DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 1-51 (2d ed. 1980).

[FN43]. See Delgado & Stefancic, *Images, supra* note 10.

[FN44]. See pp. 41-42 (arguing that much discrimination is economically harmful to whites because it deprives them of opportunities to make beneficial trades); BELL, *SAVED supra* note 1 (portraying racism as system of group advantage). *But see* BECKER, *supra* note 15, at 6, 18; POSNER, *supra* note 15, at 615-17.

[FN45]. See pp. 31-35 (arguing that, if even small percentages of private actors are nonracist, market pressures will cause others to follow suit and deal with blacks).

[FN46]. See Delgado & Stefancic, *Images, supra* note 10, at 1261, 1280-82 (terming faith that

we can readily escape the force of our own embedded stereotypes and cultural assumptions the "empathic fallacy").

[FN47]. I mean to remind Rodrigo of the way in which his years abroad enabled him to see U.S. culture with new eyes; see Delgado, *supra* note 1, at 1359 n.6.

[FN48]. On the role of knowledge, see POSNER, *supra* note 15, at 96-100, 348-50. On the view that Title VII can decrease information flow to employers and thus increase discrimination, see pp. 28-30.

[FN49]. On the ubiquity of these images and their internalization by virtually all in the culture, see Richard Delgado, [Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling](#), 17 HARV. C.R.-C.L. L. REV. 133 (1982); Delgado & Stefancic, *Images*, *supra* note 10; Charles R. Lawrence III, [The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism](#), 39 STAN. L. REV. 317 (1987).

[FN50]. See PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1967); JOSEPH CAMPBELL, THE POWER OF MYTH (1988); MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977 (Colin Gordon ed. & Colin Gordon et al. trans., 1980); 1 & 2 PAUL RICOUER, TIME AND NARRATIVE (Kathleen McLaughlin & David Pellauer trans., 1984-1985); see also JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri C. Spivak trans., 1976) (contending that words alter - do "violence" to - experience).

[FN51]. On the way narrative structures shape what we see and believe, see MACKINNON, *supra* note 26; Abrams, *supra* note 24; Delgado, *supra* note 32; Delgado & Stefancic, *Images*, *supra* note 10; Lawrence, *supra* note 49.

[FN52]. Telephone Interview with Gerald Torres, Associate Dean and Professor of Law, University of Minnesota (May 10, 1992) (on underage drivers of farm vehicles and machinery - but not the hypothetical licensing scheme, which is Rodrigo's imaginary creation).

[FN53]. See Ron Shaffer, *Insurance Gender Gap*, WASH. POST, Aug. 29, 1991, at D.C.-1; see also Marcus Montoya, *Boulder Cracks Down on Drunk Drivers*, BOULDER DAILY CAMERA, June 7, 1992, at C1.

[FN54]. Rates for teenage males are very high, of course, but the accidents they cause also force other drivers' rates up.

[FN55]. On women and the military, see [Rostker v. Goldberg](#), 453 U.S. 57 (1981).

[FN56]. On desegregation of the Armed Forces, see Bell, *supra* note 32, at 524-25; Mary L. Dudziak, [Desegregation as a Cold War Imperative](#), 41 STAN. L. REV. 61, 71-73 (1988).

[FN57]. On the reliability of eyewitnesses of various backgrounds and ages, see RONALD L. CARLSON ET AL., EVIDENCE IN THE NINETIES 162 n.1 (3d ed. 1991).

[FN58]. On gays in the military, see [Dronenberg v. Zech](#), 741 F.2d 1388 (D.C. Cir. 1984).

[FN59]. "Truths" that are accepted into the broader culture, that became part of received wisdom, are highly resistant to change. See Delgado & Stefancic, *Images*, *supra* note 10; Delgado & Stefancic, *Norms and Narratives*, *supra* note 10; Lawrence, *supra* note 49.

[FN60]. For examples of law-and-economics writers' focus on the individual transaction side of prejudice and racism, see pp. 35-37, 57-74, 265, 419; POSNER, *supra* note 15, at 615-18. When they discuss the possibility that prejudice may implicate broader currents and forces,

these scholars tend to afford such concerns little efficacy or to dismiss them because racism concerns supposedly intractable historical evils. See, e.g., pp. 495-99 (conceding that debate about racism swirls around "symbols").

[FN61]. MURRAY, *supra* note 15, at 146, 224, 227-28.

[FN62]. SOWELL, *supra* note 15, at 51-53, 77-78.

[FN63]. BECKER, *supra* note 15, at 6, 16, 153 (describing discrimination as a "taste").

[FN64]. BELL, *SAVED supra* note 1; Delgado & Stefancic, *Images, supra* note 10 (both characterizing racism as structural, not accidental or a matter of individual pathology).

[FN65]. See Delgado, *supra* note 1, at 1361-63, 1374-75.

[FN66]. See *supra* notes 33-37, sources cited therein, and accompanying text.

[FN67]. For earlier views of this "optimism gap" (in which whites hold that things are getting better for blacks, while blacks think the opposite), see Robin D. Barnes, *An Extra-Terrestrial Trade Proposition Brings an End to the World as We Know It*, 34 ST. LOUIS U. L.J. 413 (1990); Bell, *supra* note 41; Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923 (1988).

[FN68]. On the way American society coined this attitude to justify treatment of blacks, see BELL, *supra* note 42; Delgado & Stefancic, *Images, supra* note 10, at 1259-61 (focusing on prevailing cultural images).

[FN69]. Delgado, *supra* note 49, at 146-47; Delgado & Stefancic, *Images, supra* note 10, at 1287.

[FN70]. *But cf.* SOWELL, *supra* note 15 (arguing against affirmative action and antidiscrimination law as inimical to blacks' interests).

[FN71]. *E.g.*, JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* (Henry Beveridge, trans., Wm. B. Eerdmans Publishing 1953); see DAVID HUME, *DIALOGUES CONCERNING NATURAL RELIGION* 51-56 (Norman K. Smith ed., 1947) (addressing "argument from design").

[FN72]. See Robert A. Williams, *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989). See also Ball, *supra* note 39.

[FN73]. Delgado & Stefancic, *Norms and Narratives, supra* note 10, at 1939-40.

[FN74]. See JOHN KENNETH GALBRAITH, *THE CULTURE OF CONTENTMENT* 1-12 (1992). On the way antidiscrimination law enables American society to believe racism is ended and that any remaining inequities are blacks' fault, see Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1369-87 (1988); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

[FN75]. On "double consciousness," in which excluded people see themselves in two perspectives at once - that of the majority race, according to which they are demonized and despised, and their own, in which they are normal - see W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 3-4 (Kraus-Thomson 1973) (1903); RALPH ELLISON, *THE INVISIBLE MAN* (1952). For contemporary explications of double or multiple consciousness, see BELL HOOKS, *FEMINIST*

THEORY: FROM MARGIN TO CENTER (1984); Mari J. Matsuda, [When the First Quail Calls: Multiple Consciousness as Jurisprudential Method](#), 11 WOMEN'S RTS. L. REP. 7 (1989).

[FN76]. Then I quickly thought: not just whites. See Delgado, *supra* note 1, at 1373-74; Delgado, *Enormous Anomaly?*, *supra* note 19, at 1548-51 (discussing neoconservatives of color such as Glenn Loury, Thomas Sowell, Shelby Steele, and Steve Carter); see also Sunstein, *supra* note 36, at 31-32 (explaining the phenomenon in terms of cognitive dissonance).

[FN77]. See SOWELL, *supra* note 15; THOMAS SOWELL, THE ECONOMICS AND POLITICS OF RACE (1983); THOMAS SOWELL, ETHNIC AMERICA: A HISTORY (1981); THOMAS SOWELL, MARKETS AND MINORITIES (1981).

[FN78]. See, e.g., SOWELL, *supra* note 15, at 20-22, 77-78.

[FN79]. On the proliferation of critical writing about race and radical feminism, and its half-hearted absorption by the rest of the legal academy, see Richard Delgado, *The Imperial Scholar Revisited: How To Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992). See also Richard Delgado, [Brewer's Plea: Critical Thoughts on Common Cause](#), 44 VAND. L. REV. 1 (1991) (expressing doubt that the impasse between Critical Race Scholars and mainstream civil rights scholars will soon be bridged); Richard Delgado & Jean Stefancic, [Critical Race Theory: An Annotated Bibliography](#), 79 VA. L. REV. 461 (1993) (tracing development of critical race theory and reviewing its major themes and writings). For criticism of the CRT movement, see Kennedy, *supra* note 28.

[FN80]. On the contribution of Enlightenment faith in science to belief in black inferiority, see STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1981); Richard Delgado et al., *Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research*, 31 UCLA L. REV. 128, 132-33 (1983). See also Sunstein, *supra* note 36, at 33-34 (explaining that the empowered group adopts merit criteria to define others' conduct as devoid of merit and their own as meritorious and nondiscriminatory).

[FN81]. Attributed to Adam Smith, the term refers to the unseen operation of the all-wise market. See ADAM SMITH, THE WEALTH OF NATIONS (Mod. Libr. ed. 1937).

[FN82]. On criticism of critical writing as too despairing, see Alan D. Freeman, [Race and Class: The Dilemma of Liberal Reform](#), 90 YALE L.J. 1880 (1981); *Commentary*, 24 CONN. L. REV. 497 (1992) (including various authors' comments on Bell's realist premise); Robert M. O'Neil, A Reaction to "The Imperial Scholar" and Professor Delgado's Proposed Solution, 3 LAW & INEQ. J. 255 (1982).

[FN83]. See Delgado, *supra* note 1, at 1375-76.

[FN84]. *Id.* at 1373-76 (setting out Rodrigo's view that the West is suffering economic decline, cultural stasis, and environmental deterioration); see also *id.* at 1381-83 (Appendix: Rodrigo's Printout; listing books and articles on the theory of cyclicity among nations and on the United States' decline in particular). I was also reminded of the United States' recent refusal to sign proposed bioprotection treaties at the Earth Summit in Rio de Janeiro. E.g., Paul Raeburn, *U.S. at Loggerheads over Forests*, BOULDER (CO) DAILY CAMERA, June 11, 1992, at A1.

[FN85]. See Delgado & Stefancic, *Images*, *supra* note 10.

[FN86]. On counterstorytelling as jurisprudential method and means for challenging, enriching, or changing the dominant culture, see BELL, *SAVED* *supra* note 1; WILLIAMS, *supra* note 32; Abrams, *supra* note 24; Delgado, *supra* note 32; Matsuda, *supra* note 75.

[FN87]. What about two well-dressed men of color put them off, I wondered briefly. Rodrigo and

I had been engaged in exactly the sort of economic trading that, according to the law and economists, should reduce prejudice. Was it that we were eating in their favorite restaurant? Were of the same sex? Were engaged in intense intellectual discussion? Yet another nagging reminder of the separateness of race and economic class as disadvantaging factors, I mused. On the "hate stare," see Harlon L. Dalton, [*The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 \(1987\)](#).

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