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REFORMING CAPITALISM THROUGH LAW AND REGULATION

RICHARD DELGADO¹

I. INTRODUCTION: RECENT WRITING ON LAW REFORM.

Reflecting on a number of recent books on social reform through law, it struck me how many of them exhibit a common structure.² The books lay out in the first half how poorly a certain sector, such as corporate finance,³ immigration,⁴ or civil rights,⁵ has been performing under certain criteria, usually justice or efficiency. They then argue for changing ineffective laws or passing new ones that will enable the flawed sector to operate more effectively. Often these proposals take the form of heightened regulatory oversight to reduce self-dealing, conflict of interest, or inconsistent application of the rules.⁶ A few authors go further and propose changes that would redistribute the social benefits of a sector to groups, like consumers, small shareholders, or immigrants, that now receive too few of them.⁷ This common structure also explains why this approach, although appealing, is

¹ John J. Sparkman Chair of Law, University of Alabama. Thanks to Jean Stefancic and Katya Assafe for comments and suggestions.

² This article grew out of talk at a panel critiquing capitalism at the 2013 Lat-Crit annual meeting in Chicago, IL. Other panelists included Katya Assaf, Steve Ramirez, and Emma Coleman Jordan, all addressing different aspects of our corporate capitalist system. The talk and this paper grew out of a longer project. See generally Richard Delgado, *Rodrigo's Equation: Race, Capitalism, and the Search for Reform*, 49 WAKE FOREST L. REV. 87 (discussing the reform of civil rights law in the context of recent books on capitalism, immigration and racial equality).

³ See, e.g., STEVE RAMIREZ, *LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW* 1-16, 47-73 (2013) (discussing the faults in the corporate structure stemming in part from the corruption of powerful corporate elites).

⁴ See, e.g., KEVIN JOHNSON & BERNARD TRUJILLO, *IMMIGRATION LAW AND THE U.S.-MEXICAN BORDER: SI SE PUEDE?* (2010) (asserting that our immigration laws play a large role in racial inequalities).

⁵ See GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 9-71 (2d ed. 2008) (discussing the role the Courts as well as Congress and the executive branch played in key civil rights matters).

⁶ See RAMIREZ, *supra* note 3, at 47-184 (explaining generally how the previous lack of regulatory oversight and corruption contributed greatly to the economic crisis).

⁷ See, e.g., JOHNSON & TRUJILLO, *supra* note 4, at 141-85 (suggesting liberalizing border policy and enforcement).

flawed.

Each of these areas – financial regulation, immigration policy and civil rights – lie close to the heart of our corporate capitalist system of social organization. Prescriptions like those mentioned above—better monitoring, closer regulation, in short, more law – are category mistakes, destined to disappoint for the simple reason that, in our system, *law and capitalism are the same thing*.⁸ Law cannot regulate corporate capitalism or any central feature of it because this would amount to a thing regulating itself. The same holds true for our immigration system: it regulates the very shape and make-up of the American nation, and a nation is extremely unlikely to regulate itself out of existence.

I discuss this thesis in a recently-published article⁹ that commends a number of recent books, but deems them valiant failures. Law reform is not a promising path for restructuring any of the features that are central to the corporate-capitalist system, because the two – law and capitalism – are the same thing. Thus, asking whether something can regulate itself is like asking what color a symphony is or whether the number seven has an enthusiastic personality – they are not the kind of things that can do that.¹⁰

Some of the authors and I have engaged in lively exchanges and are still on speaking terms. I even gave one of their books an enthusiastic blurb, which the author's publicist liked so much she put it on the back cover. Please buy these books – they call attention to problems that require attention, even if not, I contend, through law.

I discuss reform of the financial system a little later. But my thesis holds true for immigration policy, as well, because it, too, deals with the basic make-up of the American state. As a system of law, it is shot through and through with capitalist ideas, policies, images, and principles and, as such, is unsusceptible to basic reform through that means, i.e., more law.¹¹ We have even enacted a formal policy, called the plenary power doctrine,¹² to

⁸ A few books in the area of civil rights assume the appropriate degree of skepticism. See ROSENBERG, *supra* note 5, at 106 (doubting that civil rights reform through law has yielded vast changes); DERRICK BELL JR., AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 57-74 (1987) (noting how the courts were largely ineffective at creating law that fostered actual racial reform).

⁹ Delgado, *supra* note 2 (arguing that regulations alone will not be able to reform the current system).

¹⁰ This is what I meant earlier by a category mistake—attributing a quality or ability to a thing that cannot possibly exhibit it. See *supra* notes 7-8 and accompanying text.

¹¹ For example: labor preferences; prohibitions against paupers and those without the ability to support themselves; provisions allowing wealthy investors to earn green cards with relative ease, etc.

¹² See *Chae Chan Ping v. U.S.*, 130 U.S. 581, 600 (1889) (establishing extreme judicial deference to Congress and the executive branch on

make sure that any reform-minded court inclined to change things minds its own business.

Congress alone can change substantive immigration law and policy, and when it does, it keeps a weather eye on labor and economic needs, wartime exigencies, and which groups are currently in favor or disfavor, culturally speaking.¹³ Reform in this area never comes or lasts long unless it also benefits a key sector of the corporate-capitalist economic system or national security or caters to a currently noisy group of nativists – in which case, the change doesn't amount to reform, any more than seven amounts to yellow. It represents the system defending and replicating itself – acting in its own self-interest, in short.¹⁴

Much the same is true of civil rights, for the very reasons Derrick Bell wrote about in his *Brown v. Board of Education and the Interest-Convergence Dilemma* article.¹⁵ Civil rights law does not change because of evolving notions of decency. Rather, it changes because decision-makers in high places decide it is in the national interest.¹⁶ The changes, when they arrive, do not last for very long.¹⁷

My equation – law equals capitalism and vice versa – is an interpretive principle, the main value of which lies in explaining the past and predicting the future. It tells you what is likely to work and what not. It does not assert a fact, but might enable you to place the facts in perspective and explain them more simply than other ways are likely to.

Thus, the closer one's target is to the central arenas of corporate power, the less likely an instrument the law will be to achieve reform. In short, we should look somewhere else. Reform is possible, just not through law.¹⁸

The books themselves provide an argument for my position. They each begin by contextualizing things – by going back many decades or centuries, reviewing all the previous efforts to make immigration, financial regulation, or civil rights work better.¹⁹

immigration matters).

¹³ At different times, Japanese were decidedly out of favor; another time, Chinese; another time, Mexicans; another time, Muslims and Arabs; and so forth.

¹⁴ See generally Derrick Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (discussing civil rights after the *Brown* decision and what can be done to move racial equality forward now).

¹⁵ *Id.*

¹⁶ *Id.* at 524-28.

¹⁷ *Id.*

¹⁸ Other means include interest convergences, resistance, marching and street demonstrations, and voting.

¹⁹ See generally RAMIREZ, *supra* note 3 (detailing the mistakes, blind alleys, and other defects of our system of corporate capitalism); JOHNSON & TRUJILLO, *supra* note 4 (dealing with the history, the laws and regulations currently in effect, and offering new ideas for reform in the context of

After concluding that earlier efforts did not work, the authors go on to make another such proposal. It is usually a revision of the applicable law, carefully differentiating the new measure from the earlier ones that did not work and sometimes calling them models or paradigms.²⁰

Astute readers might notice that the first half of these articles and books make a case for the opposite of what the authors are proposing. The first half proves, instead, what statisticians call a null hypothesis – that nothing will work, nothing of the legal kind, that is. After all, if ninety-nine efforts at reforming area *X* by a certain means – law reform – have not worked, except perhaps for a very short time and under circumstances that make plain that change was coming anyway, how much faith would a reasonable person, a Martian say, place in that approach the hundredth time?

Still, we plow ahead, telling ourselves that our exact method or model has never been tried. Who knows, maybe it will work this time? Besides, our tenure committee expects a normative article from us from time to time, weighing the values and virtues of this model or that and proposing a new one that will avoid the shoals of *X* or *Y*.

Pierre Schlag wrote about this approach years ago in an article entitled *Normative and Nowhere to Go*.²¹ I am proposing a theory for why the standard approach – propose and pass a new law – goes nowhere.

I also offer a psychological mechanism—perseveration—that explains the attraction of the familiar law-reform approach that tries to reform the un-reformable via yet another law—that is, via itself. Consider the dynamics of a certain type of perseveration called cargo cults.

As you might know, anthropologists write about two types of cargo cult. Chinua Achebe, the postcolonial scholar and author of *Things Fall Apart*, did, too.²² In the best known form, South Sea Islanders notice that one day an invading army that has been camping out on their island, usually without permission, has suddenly departed, leaving behind quantities of goods of great interest to the natives. These goods include containers of GI food, cans of fresh water, tents, jeeps, airplane fuel, and even a few weapons. Seeing no one around to claim them, the natives help themselves and feel much better.

A few months later, they learn that the same thing happened

immigration).

²⁰ E.g., RAMIREZ, *supra* note 3 (positing that corporate reform would really, finally work if only we tried *A* and *B*); JOHNSON & TRUJILLO, *supra* note 4 (discussing how the immigration system would be more rational if only we stopped doing *Z* and changed the rules relating to *C* and *D*).

²¹ Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

²² CHINUA ACHEBE, *THE TROUBLE WITH NIGERIA* 9 (1984).

at another island 500 miles away and start praying and chanting for another visit from the gods – which, of course, never arrives, since the war is moving in another direction. So, they pray harder and dance and chant more fervently since the last time, the gods were so generous to them. Not knowing what brought the great boon, they believe it could happen again, if only they wished for it hard enough or did what they had been doing – praying and conducting rituals – more and more fervently.

In a second version, a down-on-its luck coastal village in a windswept part of Ireland or Wales hears that a cargo ship has foundered on some rocks offshore and is sinking. The villagers rush to the shore to recover the barrels of flour, cargo from the hold, and ship's furniture that they know the tide will bring in soon. They may ignore the cries of the drowning crew, since rescuing them would raise troubling questions about ownership of the loot.

Those of us who write about law reform should be careful not to become ensnared in cargo cult scholarship. Something that did not work yesterday, last month, last year, or the year before last, will probably not work again. Some mechanism may be accounting for it unbeknownst to us.

If, in fact, *Brown III* is not just around the corner, we should, perhaps, stop hoping for that and start a campaign of an entirely different type. Perhaps the islanders should learn to tend a garden or open a furniture factory; maybe we should too. Possibly the coastal village in the godforsaken region should put a lighthouse on those rocks and get on with more remunerative work, perhaps in the tourist industry. (Tourists love scenic things like lighthouses and windswept beaches.)

Our people, after all, are hungry for change. We are the educated class. So, why do we repeat the same form of scholarship that we wrote last year, asking the gods on the Supreme Court or legislature to intervene? Perhaps it's because it is familiar and makes us feel good, not noticing what happened last time – namely, nothing. Please tell me if I'm mistaken.

I will end this essay by suggesting that we devote some attention to the forces that produce the type of dismal paralysis that we see around us and pay some to how the corporate capitalist system replicates itself, year after year, despite our best efforts at reforming it. The common law has a very high opinion of itself. It believes it is becoming fairer, more just, and more efficient over time. This may be true in a few areas such as tort law, but the same is not true in areas that come close to the core of our system of corporate capitalism, where we seem to be actually getting worse – that is, more unfair, more entrenched, and more unequal over time.

That system functions as though it possesses an inner DNA that reproduces itself over and over, or an immune system that

recognizes a foreign body that is trying to invade it so as to repel it unerringly. But this is an immune system in reverse. With a healthy body, the immune system rejects agents that will make it sick. With our system, a sick system rejects the medications, your proposals and mine, that can make it healthy – that is, fairer and with workers who work with a will, who receive a fair share of the benefits of their work, who find their lives creative and fulfilling, and are not constantly insecure – while the one percent of moguls get richer and richer and working conditions worse and worse for the other ninety-nine percent. Wouldn't it be nice to know how this happens?

A book by Steve Ramirez, to its great credit, begins the work of outlining how this immune system works.²³ Regulatory capture is one such mechanism, in which the financial industry, the focus of his book, for example, has become so complex and hard to understand that the only person who could possibly have the knowledge necessary to serve in a regulatory role is one who formerly worked in that industry, like Robert Rubin.²⁴ But then, that person would undoubtedly have a world view, set of attitudes and perspectives, and taken-for-granted ways of seeing the world of complex derivatives and other financial instruments that virtually assure that the world will go on much as it always has. My equation at work.

Ramirez mentions, as well, how those at the top of corporate or financial empires use part of their wealth to purchase political influence, thus assuring that reformers like him and maybe you, too, achieve little purchase besides an occasional invitation to serve on an advisory panel somewhere or give a talk at a conference on reform of the area of X.²⁵ I would add that the very foundations of capitalism – its laws and legal structure – like an immune system, recognize and reject any attempt to change the system in any significant way.

Might it make sense for us to look at how all these homeostatic mechanisms work together to assure and protect corporate capitalism and subsidiary systems essential for its operation? Otherwise, we are little better than leaders of a cargo cult keeping the natives happy with false hopes and mystical language – in short, the equation.

²³ RAMIREZ, *supra* note 3 (attempting to create a theory that would allow people to increase their economic opportunity).

²⁴ *Id.* at xvi-xvii, 5, 15, 37, 35-36, 40-41, 68-69, 95, 98-99, 195 (discussing regulatory capture).

²⁵ *Id.* at xiv, 33, 65, 72-73, 79, 102-03 (discussing the role of lobbyists and PACs).