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### Rodrigo's Seventh Chronicle: Race, Democracy, and the State

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# RODRIGO'S SEVENTH CHRONICLE: RACE, DEMOCRACY, AND THE STATE

Richard Delgado\*

## INTRODUCTION

The familiar voice in my receiver gave me quite a start: "Professor, it's me, Rodrigo Crenshaw.<sup>1</sup> I'm at the corner grocery store just down the block from your building."

I had been getting a number of calls from former students wanting to know if I would serve as a reference for the bar examiners or an employer.

"Sorry it took me a minute to recognize your voice," I said. "Come on up if you have time. It's been a while."

In a few minutes, the tall, lanky Rodrigo was standing in my doorway. An African-American LL.M. student at the famous university across town, the brilliant young firebrand had entered my life about a year ago when he sought me out for career advice.<sup>2</sup> The son of a U.S. serviceman and an Italian mother, Rodrigo had been educated in Italy, where his father was then

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\* Charles Inglis Thomson Professor of Law, University of Colorado. J.D., U.C. Berkeley, 1974. I gratefully acknowledge the support of the Rockefeller Foundation Scholar-in-Residence Program in Bellagio, Italy, where much of this Chronicle was written.

1. Rodrigo Crenshaw, my fictional alter ego and interlocutor, was first introduced in Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) (book review) [hereinafter *Rodrigo's Chronicle*]. The younger half-brother of civil rights activist Geneva Crenshaw, Rodrigo was born in the United States but has been living and studying in Italy. *Id.* at 1357-59; see DERRICK A. BELL, JR., AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) [hereinafter NOT SAVED]; Derrick A. Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 13-17 (1985) (on Geneva). Additional information about Rodrigo is introduced at different points in this narrative. See also Richard Delgado, *Rodrigo's Sixth Chronicle: Essentialism, Anti-Essentialism, and the Dilemma of Law Reform*, 68 N.Y.U. L. REV. (forthcoming 1993) [hereinafter *Sixth Chronicle*]; Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993) [hereinafter *Fifth Chronicle*]; Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Anti-Discrimination Law*, 45 STAN. L. REV. 1133 (1993) [hereinafter *Fourth Chronicle*]; Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 389 (1993) [hereinafter *Third Chronicle*]; Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993) (book review) [hereinafter *Second Chronicle*].

Like Rodrigo, the narrator of this piece is a fictional construct, a composite of several persons I have known, and is not to be identified with any particular individual. He is a man of color in the late stages of his career, teaching at a law school located in a major American city.

2. *Rodrigo's Chronicle*, *supra* note 1, at 1359-60.

serving. He graduated from the base high school, then attended university and law school on government scholarships, graduating close to the top of his law school class.<sup>3</sup> He and I had met a number of times to discuss Critical thought, cultural history, law and economics, and the U.S. racial scene.<sup>4</sup>

"How has your summer been going, Professor?" Rodrigo cast his eyes over my desk. "Looks like you've got your blue books done."

"I had to grade fast this year, because—did I tell you?—I received a grant to spend a month at a study center in northern Italy. I just got back, in fact."

"I didn't know. The last time we talked, I was so wrapped up in my own problems I neglected to find out about your plans. So, what did you think of my old country?"

"I loved it. The countryside and food were great. I'm sure I've put on a couple of pounds. And I used the time at the center to finish that book we talked about before."

"Were the working conditions good?"

"Ideal. It's right by a lake. I thought of writing you, but they said the mail takes weeks. I would have called you up in a day or two, if you hadn't called me first."

"The government's been in turmoil. Did that affect your trip?"

"No—all was calm so far as I could tell. You have relatives there, though, right?"

Rodrigo nodded yes. "In Bologna, mainly."

"Are they okay?"

"Fine. I talked to them last week. They say it's no worse than usual. You probably know that in Italy, as in many parliamentary democracies, the government changes easily and often."

"And not just the national government," I offered. "Regional and even city governments vary. You can travel three miles and be in a completely different regime. In one town, the government can be centrist or socialist. The next town over can be communist, and so on."

"I know. It makes life there interesting. When I came to the States, I went through the reverse adjustment. Here, there are only two basic approaches to politics, each linked with a competing conception of the state.

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3. *Id.* at 1359–64.

4. In *Second Chronicle*, *supra* note 1, Rodrigo and I discuss law and economics, and the relation of the market to racial prejudice. In *Third Chronicle*, *supra* note 1, we discuss capitalism, socialism, and their relation to our racial ills. In *Fourth Chronicle* and *Fifth Chronicle*, *supra* note 1, we analyze law's ability to curb racism. In *Sixth Chronicle*, *supra* note 1, we discuss essentialism, anti-essentialism, and the role of small groups in bringing about social change.

Things seemed to me static, almost boring. Of course, there's nothing a good European intellectual loves better than to sit in a café and discuss politics. I did some of that myself."

"Do you miss the ferment there?"

"A little. I couldn't help being struck by the contrast. Here, there are twenty different theories or approaches to law, ranging from right-wing law and economics to left-wing Critical Race theories, like those you and your friends are developing.<sup>5</sup> Yet, thinking about the *state* seems frozen at a fairly simple level."

"Compared to other countries, you mean?"

"Yes, it's remarkably dichotomous. For example, I've noticed that exactly one-half of my professors think government should be large and powerful, an agent for change."<sup>6</sup>

"We both know what political party they are apt to belong to."

"Of course. And the others believe in the minimalist state. For them the larger the government, the more harm it is likely to do.<sup>7</sup> Of course, there are the communitarians and civic republicans, who want a greater identification between the citizen and the state.<sup>8</sup> But aside from those, the possibilities seem quite limited. My friend and fellow LL.M. student Ali says he almost never runs into a Marxist."

"A growing number of the students are libertarians," I commented.

"I've noticed that," Rodrigo agreed. "They strike me as a variant of Republicans, even if they don't identify with that party. Their fascination with deregulation, personal privacy, and laissez-faire economics reminds me

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5. For the variety found within just one of the approaches Rodrigo mentions, see Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993) [hereinafter *Annotated Bibliography*].

6. For examples of work advocating an expansive role for government see, e.g., MARIAN WRIGHT EDELMAN, *FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE* (1987); JOHN K. GALBRAITH, *THE AFFLUENT SOCIETY* (3d ed. 1976); JOEL F. HANDLER & ELLEN J. HOLLINGSWORTH, *THE "DESERVING POOR": A STUDY OF WELFARE ADMINISTRATION* (1971).

7. For works in this other vein see, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992); THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* (1984).

8. E.g., Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

of the strain of political thinking that prevailed during your period of rapid expansion a century ago."<sup>9</sup>

"But you were saying that all those categories were played out."

"I think so, Professor. For example, consider the age-old problem of race—something both of us care deeply about.<sup>10</sup> Proponents of both the activist and quietist state say they have our interests at heart. Yet people of color seem to do no better in the one regime than in the other.<sup>11</sup> In some respects, we folks of color have the worst possible situation here."

I made a mental note to ask Rodrigo something about that later if the opportunity arose, but resisted the temptation for now. Instead I said, as non-committally as possible: "Some of us have written about that."<sup>12</sup>

"I know."

"And I suppose you think the solution to our social ills is bound up with the concept of the state in some fashion, so that a different—or at any rate, better—form of government is a necessary step toward resolving those problems?"

"We talked about some of those things before.<sup>13</sup> As always, it's easier to see what's wrong with the current system than to figure out what to put in its place. But if you have the time, Professor, I'd love to run some ideas past you. I'm thinking of using them for the last part of my dissertation, a draft of which is due by the end of the summer."<sup>14</sup>

"I'd be happy to listen. As always, I'm sure I'll learn as much as you. Would you like some dinner?"

"Actually, Giannina and I just ate. But I'd be glad to join you for a snack."

9. Viz, during the period of the gold rush, building of the railroads, and the establishment of family business empires. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); OSCAR HANDLIN, *THE AMERICANS 195-326* (1963).

10. Each of the discussions between the professor and Rodrigo has centered, in one way or another, on the problem of race. See *supra* note 4 (summarizing *Second Chronicle* through *Sixth Chronicle*).

11. For an example of this pessimistic view of African-American political fortunes, see NOT SAVED, *supra* note 1. For a discussion of race and party politics, see Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929 (1990) [hereinafter *Zero-Based*].

12. See *supra* note 11. I also had in mind the Critical attack on liberalism that had been gaining momentum lately. See *Annotated Bibliography*, *supra* note 5, at 462-63.

13. See, e.g., *Rodrigo's Chronicle*, *supra* note 1, at 1368-78 (discussing affirmative action and the Western state); *Third Chronicle*, *supra* note 1 at 403-08 (discussing the relation of government to poverty and racial ills); *Sixth Chronicle*, *supra* note 1 (proposing a theory of race's role in social reform).

14. On Rodrigo's LL.M. dissertation and associated spin-off projects, see, e.g., *Third Chronicle*, *supra* note 1, at 388-92, 401-07; *Fourth Chronicle*, *supra* note 1, at 1135-38.

"The two of you made up, I assume?"

"Yes, we're doing fine."

"I'm glad to hear it." As I gathered up my keys and sweater, I asked, "And what are your plans?"

"Well, I've got a teaching job. My friend Ali got one, too. Mine's in the Midwest. I'm not sure what Giannina and I are going to do. We're getting along really well after that rift I told you about. But she's reluctant to leave the city, where she has all her writing contacts."<sup>15</sup>

"Sounds like a difficult decision," I commiserated. "I know couples who have tried commuting. Some find it grueling; for others, it's not so bad. There's a little dessert shop just down the street," I said. "Can I interest you?"

"Great. I can always eat dessert," my young friend said with enthusiasm.

#### I. IN WHICH RODRIGO EXPLAINS THE CONNECTION BETWEEN RACISM AND DEMOCRACY

A few minutes later, we were comfortably seated in the pastry shop down the block from the law school. After selecting our desserts from a tray the waiter brought, I said:

"You were saying something about the relationship between government and racism, Rodrigo. Something about our form being the worst of all for minorities. I'm sure you mean in theory because, in practice, other cultures are just as bad, if not worse."

"Both in theory and in practice, Professor. It may sound troubling."

"It certainly does," I burst in. "What about Cambodia? What about ethnic cleansing? What about the religious tyranny of Iran? And what about the honorable moments of our own history, like *Brown v. Board of Education*?"

"Let me explain, Professor," Rodrigo replied mildly. "There is plenty of blame to go around. Other cultures have been vicious, too. But they have tended to victimize outsiders, generally nonmembers or historic enemies. We—I mean Western democracies—are practically alone in our systematic mistreatment of our own minorities.<sup>16</sup> I mean, of course, African-Ameri-

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15. See *Sixth Chronicle*, *supra* note 1 (in which Rodrigo and Giannina quarrel over essentialism and anti-essentialism and an incident that took place in the law women's caucus at his school). On Giannina, see *Fourth Chronicle*, *supra* note 1, at 1136–37 (on her work and relation to Rodrigo); *Sixth Chronicle*, *supra* note 1 (on her politics and relation to Rodrigo).

16. On the history of U.S. slavery and the "separate but equal" regime, see, e.g., DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 15–46 (3d ed. 1992) [hereinafter *RACE, RACISM*]; A. LEON HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS* (1978); LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860*

cans, Native Americans, Asian Americans, and Latinos. And this is a major problem for any theory of government—understanding and regulating the relation between the majority and the minority, I mean.”<sup>17</sup>

“You have a theory, I assume?” Rodrigo brightened, whether at my question or the arrival of the waiter with our desserts, I couldn’t tell. “What are you having?”

I looked at his plate. “Flan,” he replied.

“Looks good,” I said, taking a spoonful of my own lemon sherbet. “Now tell me about your theory of government and race.”

“I didn’t mean to be too harsh earlier, Professor. Your—I mean our—system has some of the best formal values in the world.<sup>18</sup> We have language declaring that all men and women are equal, about the brotherhood of man, and so on.<sup>19</sup> On the Fourth of July, when all the flags are flying, and on a few other occasions of an official nature Americans can be counted on to be genuinely fair minded, genuinely antiracist.”

“A few of them can be counted on at other times, too,” I interjected.

“To be sure. Yet in moments of informality, those same Americans feel free to tell an ethnic joke, to complain about blacks, or talk to a woman condescendingly.”<sup>20</sup>

“We’ve all seen that. We know that there are certain places, bars and the like, where we are not safe. And we know that even those white folks

(1961). On America’s comparative lateness in repudiating slavery, see JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM*, 344–45 (3d ed. 1967); on our systematic mistreatment of Native Americans, see Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219 [hereinafter *Algebra*]; Robert A. Williams, Jr., *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) [hereinafter *Documents of Barbarism*].

17. On law’s treatment of this problem and the issue of the justification for judicial review, see generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986) (discussing theories of judicial review and law’s role in protecting minorities); JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) [hereinafter *DEMOCRACY AND DISTRUST*]; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16 (2d ed. 1988) (Model VI—Model of Equal Protection) (discussing theories of judicial review and law’s role in protecting minorities); John H. Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978) [hereinafter *Toward Representation*].

18. On some of these formal values, see Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1383–84, 1400–01 [hereinafter *Fairness and Formality*]. On the gap between the official values and the informal ones, see *id.* at 1383–84; GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 23–24 (20th Anniversary ed. 1962) (dichotomy persists 100 years later); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., 1946) (1835).

19. *Fairness and Formality*, *supra* note 18, at 1383–84.

20. *Id.* at 1834–85; 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).

who we can ordinarily trust, who would not think of saying anything hurtful, change. At certain times, in a certain atmosphere, at a certain party, in the company of certain others—you have to watch out.”

“I think the axis has something to do with fairness and formality,” Rodrigo said. “On formal occasions, such as in court, when serving on a jury perhaps, the average American can sometimes get beyond race. You have all those reminders—the flag, the robes, the judge, the solemn words—that cue you that this is an occasion where the formal values, the higher, official ones, are to preponderate. Other, more intimate occasions do not evoke those same values. The same person can be racist one minute, then nonracist the next, depending on the setting.”<sup>21</sup>

“Interesting,” I replied. “I think I agree with you. But what about a country like South Africa?”

“There the situation is exactly reversed. The public values, until recently, were officially racist. But on occasion South African whites could be counted on to show real compassion in their private lives. If you were a black and in trouble of some sort, a private citizen, not the government, would be your best source of hope.”

“Maybe that’s why American blacks like big government and historically have looked to the Democratic Party and the federal government as our salvation.”

“I think it may have something to do with that,” Rodrigo replied. “But more and more, it’s beginning to appear that that is a vain hope. Neither political party does much for us. Our fortunes are little better under the bigger-spending Democrats than under the less-is-more Republicans.”<sup>22</sup>

“I agree. In fact, I’ve written so myself. And so, I gather you think we need some wholly new approach?”

“I do,” Rodrigo replied. “We can’t rely on formality forever. Otherwise, our young people will get jobs in exactly two areas—sports and the Army. Superimposed on the entire system is a layer of anti-black sentiment. To get beyond racism, to make any sort of inroads, we must do more than look for the chinks in the system, the few islands of relative safety. We must first understand, then do something about, the system that demeans and submerges our people at every turn.”

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21. *Fairness and Formality*, *supra* note 18, at 1385–86 (on the situational dependency of much race-based behavior). That formality is a better guarantee of fairness is only contingently, not necessarily, true. In particular, see text immediately following (describing a different situation in South Africa).

22. See *Zero-Based*, *supra* note 11, at 1930.

"A large undertaking, Rodrigo. Would you like to discuss it over coffee?" We had both finished our dessert. Rodrigo looked as though he could handle another one.

"Or, would you like something more to eat? My sherbet was very good."

"No thanks, Professor. Just coffee. Understanding what's wrong is not too hard. I can lay it out for you in a few minutes. Where to go from there is another matter. Waiter!"

Rodrigo had caught the attention of the waiter circulating behind me. Soon we were sipping cappuccino, decaffeinated on my part, the real thing on his. After a moment, he began: "Professor, have you read Catharine MacKinnon's work?"

"Of course. I admire it greatly. Her analyses of the operation of patriarchy are at once illuminating and hard-hitting. She has written several pieces on sexual harassment of women in the workplace,<sup>23</sup> and on pornography.<sup>24</sup> Her book *Feminism Unmodified*<sup>25</sup> is a classic in its time, but she has written much more."

"Then you know how she regards sexuality as the essence of women's subordination."

"I do. It's one of her more controversial theses. She says that the sexualization of woman, the construction of her in that role, is the very instrument of her oppression, and not in any contingent or means-ends sense.<sup>26</sup> It is not possible to be a female sexual being in our society and not be relegated to second-class status. Sexuality is women's subordination, pure and simple. It doesn't just happen that women are both sexualized and oppressed. They are two opposite sides of the same coin."<sup>27</sup>

"And had you thought whether something similar is true for us, Professor—whether there is not some parallel mechanism that accounts for our subordination?"

I was silent for a moment. I reflected on such theories as socio-economic competition, the colonized mind, interest-convergence, and various psycho-

23. E.g., CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

24. E.g., CATHARINE A. MACKINNON & ANDREA DWORKIN, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* (1988) [hereinafter *NEW DAY*]; Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech (Biddle Lectures)*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

25. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter *UNMODIFIED*].

26. E.g., *NEW DAY*, *supra* note 24, at 24; *UNMODIFIED*, *supra* note 25.

27. E.g., *NEW DAY*, *supra* note 24 (not possible to be a sexualized woman, as society today constructs her, and not be subordinate to male role and hierarchy).

logical theories that authorities had put forward to explain the persistence of racism.<sup>28</sup>

"I'm not sure I can think of anything precisely similar, if you mean a simple psychological or political mechanism, like sexuality, that accounts for black subordination and the maintenance of a racist regime. I suppose you have one to propose?"

"I think it's democracy," he replied.

"Democracy?" I was thunderstruck. "The crowning achievement of the West, the legacy of Athens and Rome, the jewel in political theory. You think it's this that explains white-over-black power relations and the oppression of our people?"

"Yes," Rodrigo replied with the remarkable insouciance that was his trademark, "at least one variant of it. Western-style democracies, even with their formal, for-public-consumption rhetoric of equality, brotherhood, and all the rest, basically don't mean it. Whether they ever could change to be fair toward minorities, nonconformists, and other outsiders, I seriously doubt. I think minorities always have done better—relatively speaking—and will continue to do better—in other types of regimes. And this is systemic and intrinsic, not accidental."

"Rodrigo, of all the things we have discussed, this idea of yours strikes me as the most counter-intuitive. I can think of innumerable counter-examples. But let me put them on hold for a moment. I want to learn more about your—how shall I put it?—jaded attitude toward the West. What on earth do you see in democracy that renders it the root of our mistreatment of minorities?"

"It's the idea of enlightenment," Rodrigo answered. "It functions for minorities as sex and sexualization do for women. You recall MacKinnon's thesis.<sup>29</sup> She holds that sexuality, or, rather society's construction of it, is the very medium of women's subordination. I think enlightenment-style Western democracy is its parallel, the source of black people's subordination. Not just in a causal sense. Rather, racism and enlightenment are the same thing. They go together; they are opposite sides of the same coin."

I recalled a powerful scene in the movie *Malcolm X*, in which the young Malcolm was first introduced to the systematic nature of color-imagery in the

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28. For a summary of such theories, see Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter *Interest-Convergence Dilemma*]; *Fairness and Formality*, *supra* note 18, at 1375–83; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

29. *Supra* notes 23–27 and accompanying text.

words of Webster's dictionary by his prison mentor.<sup>30</sup> I asked Rodrigo, "Do you mean the way in which color-imagery and symbols operate to devalue dark skin and place a premium on white?"

"That and much more," Rodrigo replied. "I think the system of imagery, the metaphors, the myths and stories of Snow White, white man's burden, dark villains and continents, and the rest are but surface manifestations of something deeper, something that lies at the heart of Western-style government and politics."<sup>31</sup>

"And this something distributes power, privileges, social roles, disapproval and approval, niceness and its opposite—and has to do with Enlightenment philosophy?"

"Yes. The word itself is no accident. Locke wrote essays justifying slavery.<sup>32</sup> Hobbes, Mill, and even Rousseau either did the same or wrote of a hierarchy of cultures and the natural subservience of the darker-skinned ones to the lighter.<sup>33</sup> The framers of the United States Constitution used color imagery.<sup>34</sup> Many were slaveowners.<sup>35</sup> The few who decried slavery pub-

30. MALCOLM X (*Forty Acres and a Mule Productions* 1992); ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* 175–86 (1965) (on the "whitening" of history); see also Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -isms)*, 1991 *DUKE L.J.* 397, 412 (description of Jewish service in which the Rabbi explained that the covering of the dais was white "to symbolize atonement and cleanliness").

31. See *infra* notes 32–34 and accompanying text (Enlightenment ideas gave great boost to this system of color imagery).

32. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, Ch. 4, §§ 23–24 (Peter Laslett ed., 2d ed. 1970) (providing argument for slavery); see SEYMOUR DRESCHER, *CAPITALISM AND ANTI-SLAVERY* 23–24 & nn.69–70 (1986) (Locke ambivalent, at times supported slavery, other times declared it foul and evil); RUTH W. GRANT, *JOHN LOCKE'S LIBERALISM* 67 (1987); see also FRANKLIN, *supra* note 16, at 78 (Locke wrote that free men of Carolina were entitled to absolute power and authority over Negro slaves, "of what opinion or religion so ever").

33. E.g., THOMAS HOBBS, *LEVIATHAN*, pt. II, ch. 21 (Richard Tuck ed., 1991) (Of the Liberty of Subjects); DEBORAH BAUMGOLD, *HOBBS'S POLITICAL THEORY* 93–97 (1988). On the complex relationship of these and other Enlightenment figures to the institution of slavery, see ALAN RYAN, *PROPERTY* 58, 85, 94–100 (1987); see also DRESCHER, *supra* note 32; sources cited *infra* notes 34–36.

34. The Framers, like others of this period, often equated light (both the skin color and energy source) with civilization, and darkness with savagery and superstition. See, e.g., THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* in *2 WRITINGS OF THOMAS JEFFERSON* 192–98, 201 (Definitive Ed., Thomas Jefferson Mem. Assoc. 1905); RACE, RACISM, *supra* note 16, § 1.9, at 29; see also HENRY F. MAY, *THE ENLIGHTENMENT IN AMERICA* 215–17 (1976) (equation of light with knowledge, science, reason and order); J.H. PARRY, *THE AGE OF RECONNAISSANCE* 281–82 (1963) (Native Americans seen as primitive, savage, endearing, and repulsive, all at same time). These views were not universal or characteristic of every period—at earlier times, Africans were looked on with curiosity and interest, not repulsion. See FRANK M. SNOWDEN, JR., *BEFORE COLOR PREJUDICE: THE ANCIENT VIEW OF BLACKS* (1983). On the early Elizabethan reception, see JAMES WALVIN, *BLACK AND WHITE: THE NEGRO AND ENGLISH SOCIETY, 1555–1945*, at 19 (1973).

licly nevertheless thought people like you and me were inferior and devised schemes to send our 'unfortunate' dark-skinned forefathers, as they called them, back to Africa; others blithely justified the institution as the lesser of two evils."<sup>36</sup>

"Perhaps that was a historical anachronism which Western society has outlived. No one would advocate those things today except the lunatic fringe. Indeed, less than two centuries after the period you are describing, Quakers and others were turning Enlightenment ideas around to challenge slavery."

"I don't think it was simply a stage, something we have outgrown. The Framers put in place a structure of government that is inherently biased against the minority. They thought they were establishing a perfect machine, one predicated on the separation of powers and similar doctrines that would assure that it remained forever in perfect balance, like the heavens, whose celestial laws of dynamics and motion Galileo, Descartes, and Newton described.<sup>37</sup> Such a perfect machine could scarcely need serious systemic cor-

35. E.g., EDMOND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975) (U.S. presidents were slaveholders during 32 of first 36 years of new republic) (summary, back cover); *accord*, MAY, *supra*, note 34, at 300-01; RUSSEL B. NYE & J.E. MORPURGO, *I HISTORY OF THE UNITED STATES 200* (2d ed. 1964).

36. RACE, RACISM, *supra* note 16, § 1.9, at 26, § 1.16, at 56. Jefferson and even Abraham Lincoln shared these sentiments. See THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 201 (William Peden ed., 1955) (Jefferson advanced "as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind. . . . This unfortunate difference of colour, and perhaps of faculty, is a powerful obstacle to the emancipation of these people. . . . When freed, he is to be removed beyond the reach of mixture."); see also PETER N. CAROLL & DAVID W. NOBLE, *THE FREE AND THE UNFREE: A NEW HISTORY OF THE UNITED STATES 138-39* (2d ed. 1988); MAY, *supra* note 34, at 100 (on Madison); JOHN C. MILLER, *THE WOLF BY THE EARS: THOMAS JEFFERSON AND SLAVERY* (1977). On Lincoln's view that freeing the slaves was less important than saving the Republic, see RACE, RACISM, *supra* note 16, at 9-10, 36.

37. E.g., EDWARD M. BURNS, *JAMES MADISON: PHILOSOPHER OF THE CONSTITUTION* 24-25, 63, 125, 175-84 (1938); JAMES G. CROWTHER, *FAMOUS AMERICAN MEN OF SCIENCE* 138, 141, 148-49 (1937) (Madison thought of Constitution in rationalistic and Newtonian terms, as a system of devices and balances to maintain equilibrium); *id.* at 135-37 (same: Adams and Taylor); A. KOCH, *MADISON'S "ADVICE TO MY COUNTRY"* 35 (1966) (Madison and Jefferson collaborated in establishing University of Virginia out of belief that science and liberty would reinforce each other); THOMAS L. PANGLE, *MONTESQUIEU'S PHILOSOPHY OF LIBERALISM* (1973); CALEB P. PATTERSON, *THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON* 188-89 (1953); MARK H. WADDICOR, *MONTESQUIEU AND THE PHILOSOPHY OF NATURAL LAW* 46-65, 182-92 (1970). On the scientific spirit of early colonial leaders and their enthusiasm for the way in which education and science could serve as an antidote for superstition, religious tyranny, and other forms of authoritarianism, see BROOKE HINDLE, *THE PURSUIT OF SCIENCE IN REVOLUTIONARY AMERICA, 1735-1789* (1956); DON K. PRICE, *THE SCIENTIFIC ESTATE* 86-88 (1965). On the view that the Constitution was also designed to serve as a perfect counter-majoritarian machine—*viz.*, protecting the interests of the white male, propertied class, see, e.g., CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1941); NOT SAVED, *supra* note 1, at 26-50.

rection—that would be contrary to its nature. Intrinsic to Enlightenment thought are the ideas of order, balance, symmetry, and control.<sup>38</sup> So, the idea of perfection, of perfect arrangement, made it hard for the minority to get its pleas heard or taken seriously. It remains so today. Have you ever tried to get a white person to take complaints of racism seriously?"

"It's not easy. They either deny them, or say racism lies in the past. If you point out an example they can't deny—the black Nobel Prize winner denied a job in favor of a no-good high-school dropout white—they say, 'well things are better now than they used to be, don't we have to admit that?'"<sup>39</sup>

Rodrigo smiled, then said: "It's part of the idea of perfectionism, which in turn is an integral part of Enlightenment philosophy."<sup>40</sup>

"And that makes us seem like ingrates for complaining. But you mentioned that there was more."

"There is. Another component of Enlightenment thought is the idea of hierarchy—of one culture or mode of thought being always and forever better than another. Light over dark. Enlightened over savage. We over they. Think of all the light-type words with favorable connotations—'enlightened,' 'brilliant,' 'insightful.' Enlightenment implies a progression, with ourselves—which originally meant Western white male aristocrats in lace shirts—at the top. Our class, you see, knows mathematics, physics, the laws of motion and philosophy, while *they* are benighted, ignorant, superstitious, mired in darkness. Naturally, it should fall our lot to develop theories of government, and to run things. We have sanitation and they don't."

"Quite a combination," I replied, ironically. "A balanced, perfect machine. And my own class in charge, pulling the levers. The one confers authority, legitimacy. The other assures stasis, resists challenge. But perhaps we're dealing with benevolent despots, ones who are wise and compassionate. That wouldn't be too bad. Consider the Western missionaries, for example.

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38. BURNS, *supra* note 37, at 24–25; CROWTHER, *supra* note 37, at 141; WADDICOR, *supra* note 37, at 46–65, 192.

39. On this common insistence that "things are getting better," see DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) [hereinafter *FACES*] (essays showing ineradicability of U.S. racism, but arguing that reformers should nevertheless persist); Derrick A. Bell, *Racial Realism*, 24 *CONN. L. REV.* 363 (1992) [hereinafter *Racial Realism*]; Richard Delgado, *Derrick A. Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 *YALE L.J.* 923, 931–32 (1988) [hereinafter *Ever Saved?*].

40. On the Framers' view of the Constitution as a perfect machine, see *supra* notes 36–38 and accompanying text. On the "negative opinions of Africans among thinkers of the Enlightenment," including ideas of a hierarchy of races and distortion of Rousseau's idea of the noble savage, see SNOWDEN, *supra* note 34, at 151 n.249.

Surely they did some good."<sup>41</sup> I was determined to play the Devil's advocate as long as possible.

"You're right," Rodrigo conceded, "except for one thing. Enlightenment thought and politics imply exclusion, imply disdain for those falling outside the charmed circle. It is not a warm, embracing philosophy, like some you might have run into in the villages and small towns of my country, Professor.<sup>42</sup> In its images, metaphors, and foundations it has exclusion and cruelty built in."

"I'm not sure what you mean. Are you referring to something more than the near-universal human tendency to prefer, to be most comfortable with, to trust, one's own kind?"

"I am. Enlightenment thought is exclusionary by its very nature. Consider what a beam of light does.<sup>43</sup> It illuminates a narrow circle or band, leaving the rest unlit. It attracts the eye there, discourages it from going to the rest. That is the guiding metaphor of Enlightenment thought, and it has exclusion built in. And I don't mean in any accidental, contingent sense, but inherently and necessarily. Any political system, such as democracy, built on such a foundation will be bad for the minority. It is not just happenstance that Western democracies pioneered the slave trade, plantation system, coolie labor, Native American relocation, and Bracero programs.<sup>44</sup> The United States was one of the last western countries to abandon slavery.<sup>45</sup> It maintains and tightens strict immigration controls at the very time when other countries are loosening them.<sup>46</sup> The West used color imagery to justify empire—recall the white man's burden—as well as the Discovery

41. See, e.g., LEWIS HANKE, *BARTOLOME DE LAS CASAS HISTORIADOR* (1951) (volumes on the missionary's life and works); PARRY, *supra* note 34, at 307–19 (on role of de las Casas in defending the Native American).

42. I made a mental note to pin Rodrigo down on this point, if he didn't address it later. His own adopted country, Italy, was, of course, a prime originator of and contributor to the development of democracy. See *infra* notes 102–104 and accompanying text (many European countries today are more collectivist than the U.S. and take caregiving funding more seriously).

43. On the Enlightenment's faith in science, progress, and the perfectibility of man, see *supra* notes 37–41; on the role of sight metaphors and cognitive psychology generally, see Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989).

44. See NOT SAVED, *supra* note 1 (interpreting course of U.S. history in matters of race); FACES, *supra* note 39; HIGGINBOTHAM, *supra* note 16; *Algebra*, *supra* note 16. See also Rodrigo's *Chronicle*, *supra* note 1, at 1369–72 (discussing the West's history of colonialism and empire).

45. See *supra* note 16.

46. On the European Community's relaxation of restrictions on workers' movements, see BASIC COMMUNITY LAWS 39–44 (Title III. Free Movement of Persons, Service and Capital), 228–45 (Freedom of Movement for Workers) (Bernard Rudden & Derrick Wyatt eds., 2d ed. 1986).

Doctrine by which we forced the Native Americans off their ancestral lands.<sup>47</sup> Domination and exclusion are implicit in the idea of democracy. All can't govern, literally—that would be impossible. And in the West, the basis of that exclusion is color, followed by sex and property, in that order."

"I thought you said sex was the basis of female subjugation."

"I said sexuality, or rather, MacKinnon did.<sup>48</sup> The way society constructs sexualized woman is the very means of her subordination. You can't have sex, as currently understood, and female equality at the same time. But that's her thesis. Mine is that democracy is the counterpart mechanism for us. If you are black or Mexican, you should flee Enlightenment-based democracies like mad, assuming you have any choice. Enlightenment philosophy is the very means by which you are rendered a nonperson, always one-down. A thousand myths and tales, a thousand scripts, plots, narratives and stories will paint you as hapless, primitive, savage, lascivious, and not-so-smart, suitable only for menial work.<sup>49</sup> It's as rigid a system as the Middle Ages, yet harder to change because it's all informal and implicit. There is nothing to rebel against. Indeed, the formal guarantees are impeccably egalitarian. A black person can be president, even though none ever has, and only three of us have ever been in the Senate."

"Then why are you here?" I asked. "You just said black persons should flee this place, yet you took a teaching job in the Midwest!"

"I have a mission," Rodrigo replied levelly, "As I mentioned before.<sup>50</sup> Besides, I was born here. We have work to do."

"And the thing we have to work on is that which we have all been taught to treasure—democracy, which you see as the means of our oppression?"

"The very instrument," Rodrigo replied cheerfully. "Liberal democracy and racial subordination go hand in hand, like the sun, moon, and stars."

47. See *supra* note 44 and accompanying text; *Algebra*, *supra* note 16; Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1 (1983) [hereinafter *Renaissance Origins*]; *Documents of Barbarism*, *supra* note 16; see also ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990) (tracing notions of European superiority in self-justificatory myths used to permit plunder of Native American lands).

48. See *supra* notes 23–27 and accompanying text.

49. On this system of imagery and its relation to the First Amendment "marketplace of ideas," 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 (1992) [hereinafter *Images of the Outsider*].

50. *Rodrigo's Chronicle*, *supra* note 1, at 1376–80 (Rodrigo explains why he has returned to the U.S.).

Enlightenment is to racism as sexuality is to women's oppression—the very means by which we are kept down.”

“And to think I once studied mathematics and Descartes,” I shuddered in mock disbelief. “Rodrigo, do you have any idea how paradoxical your equation is? Democracy as the very source not just of majoritarian oppression—many have warned of that—but of racism, of steady, enduring, systemic subjugation on the basis of color!”

“All truth is paradoxical,” Rodrigo replied. “It starts out with a question, goes underneath what is accepted.”<sup>51</sup>

“There are paradoxes and then there are paradoxes. As I have done more than once, I must encourage you to keep these ideas to yourself, at least until you are finished with your degree and have tenure. I see nothing but trouble ahead if you air them too freely. Our white friends have a healthy self-image. For them, Enlightenment philosophy is the crown jewel of civilization, the pride of Western culture. To portray it as the source of bigotry and oppression—along that way lies trouble. If I were you, Rodrigo, I would keep these ideas of yours quiet for a while.”

Rodrigo looked at me mildly. “I know you're on my side, Professor. I appreciate your counsel.”

“Besides,” I added, “there's an economic side to all this. It's very complex, having to do with laissez-faire capitalism, a companion system to what you call Enlightenment political thought. Lately, a whole approach to law, called law-and-economics, has sprung up dedicated to exploring this aspect of law and governance.<sup>52</sup> Its practitioners maintain that everything should be efficient. How does your indictment of Western liberalism deal with this? It's not particularly liberal or romantic, but pretends to be hard-headed science.”

“I've actually given it some thought. Will you scold me if I tell you about it?”

“No, please, I'd love to hear.”

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51. On this paradoxical quality of new truth, see UNMODIFIED, *supra* note 25; *Images of the Outsider*, *supra* note 49; Lawrence, *supra* note 28. For the view that a purpose of cultural power is to institutionalize knowledge so that any contrary expression seems outlandish or wrong, see Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813 (1992) [hereinafter *Shadowboxing*]. For an earlier example of this proposition see Plato, *The Apology*, in 1 THE DIALOGUES OF PLATO 401 (B. Jowett trans., 1937); see also THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1962).

52. E.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992); see *Second Chronicle*, *supra* note 1 (discussing this movement).

## II. IN WHICH RODRIGO EXPLAINS THE CONNECTION BETWEEN RACISM AND FREE MARKET ECONOMICS

"The scientific trappings of economics are no guarantee against racism," Rodrigo began. "You recall what anthropologists were saying about us as late as 1925.<sup>53</sup> Note the parallels—both free market economics and Enlightenment political philosophy are erected on mechanistic premises. The one visualizes government as a grand, noble machine, perfectly in balance, as we mentioned.<sup>54</sup> The other regards economic activity in much the same way, as a broad summation of private choices, endlessly and forever perfecting itself as stronger actors and businesses drive out weaker ones.<sup>55</sup> Processes, products, inventions, and services get better over time. People trade things—services and labor—and the whole system improves ineluctably and endlessly. The less regulation, the better, for if people act according to their own self-interest—pursue their own gain—society will be better off.<sup>56</sup> We'll have more jobs, products, services, and wealth."

"And I'm sure you see some flaw in this design?" I asked.

"A kind of flaw. One the seriousness of which depends on your position in society. Some might regard it as minor. For others, it would be more serious."

"And I gather those others are us—people like you and me?"

"Yes. I was discussing this with Ali the other day. Are you familiar with Garrett Hardin's refutation of socialist economics?"

I searched my memory. "Do you mean his work on lifeboat ethics,<sup>57</sup> or the tragedy of the commons?"<sup>58</sup>

"The latter mostly, although the former comes into play as well. In his famous article he points out that socialism—any form of collective organization, really—has a built-in difficulty, namely the free rider problem."<sup>59</sup>

53. See STEPHEN J. GOULD, *THE FLAMINGO'S SMILE: REFLECTIONS IN NATURAL HISTORY* 290-318 (1985); STEPHEN J. GOULD, *THE Mismeasure of Man* 30-72 (1981) (both detailing the exaggerations and misstatements of early eugenicists and race-I.Q. theorists anxious to prove theories of innate superiority and inferiority); Annette B. Weiner, *Anthropology's Lessons for Cultural Diversity*, *CHRON. HIGHER EDUC.*, July 22, 1992, at B1 (on the way early anthropology played into the hands of racism).

54. See *supra* notes 28-47 and accompanying text.

55. See *supra* note 52 and accompanying text; see also EPSTEIN, *supra* note 7 (applying law-and-economics approach to laws against employment discrimination).

56. EPSTEIN, *supra* note 7 (implying that this is true even of racial preferences).

57. Garrett Hardin, *Carrying Capacity as an Ethical Concept*, in *LIFEBOAT ETHICS: THE MORAL DILEMMA OF WORLD HUNGER* 120 (George R. Lucas, Jr. & Thomas W. Ogletree eds., 1976).

58. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243 (1968).

59. *Id.* at 1244.

"You mean the individual who agrees to the collectivist arrangement but with an unspoken reservation. This person is happy to have the village or group set aside land—or any other resource—for common use. He uses it, but when it comes his turn to pay or care for it, mowing it for example, he shirks his duty. One of the other ninety-nine members of the cooperative has to step in. After a while, people start to notice that certain members of the collective are doing the same thing, namely, drawing a share of the crops but not doing the work. So, the whole thing falls apart. Socialism contains the seeds of its own self-destruction, since everyone learns, sooner or later, that they can do better by withdrawing, by investing as little as possible."

"But doesn't this hold true just for lazy people, a small fraction of any group?"

"No. It holds true for the industrious just as well. By inconspicuously withdrawing from the collective enterprise, remaining members in name only, they can devote the extra time to private activity—making shoes, for example. That way, they get both shoes and crops. The others get just crops."

"So socialism is flawed, and tends in time to flip-flop over into capitalism," I said in summary. "But I gather you had something different to point out."

"Oh, yes," Rodrigo replied, taking a quick gulp of his cappuccino and draining his cup. "Without controls, collectivism tends to decay. But the same thing happens with free market capitalism. There is a mirror image flaw on the other side, one with special implications for minorities."

"Do you mean the way in which color preferences exclude us from market transactions, deny us access to trades?<sup>60</sup> People just won't deal with us, at least if a white person is equally available."

"We talked about that before. And I think what we said then holds true: The market does not cure racism, but accentuates it.<sup>61</sup> But on thinking about it a little more, I believe I've found an even more basic mechanism, one that generates a climate in which vulnerable groups, particularly those of color, cannot flourish."

"I'd love to hear what you have to say. But, first, how about a refill? Or would you like more dessert?"

"Fine. All this talking makes me hungry."

I caught the waiter's eye and gestured Rodrigo to continue.

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60. Rodrigo and I had discussed this weakness of the law-and-economics approach in *Second Chronicle*, *supra* note 1; see also EPSTEIN, *supra* note 7, at 26–27 (expressing the view that racial "tastes" or preferences are natural, sometimes rational, and not to be deplored or criminalized).

61. *Second Chronicle*, *supra* note 1, at 1190 (questioning whether the market will drive out racism).

"Individualistic market economics teaches everyone to seek his or her own profit, to rely on his or her own resources and effort to support himself through life. Yet there must be rules and laws, against stealing or setting fire to your competitor's shop, for example, requiring the payment of taxes, and so on."

"Our friends in the law-and-economics movement would set that level as low as possible."<sup>62</sup>

"But even they believe there must be some laws to assure security, public safety, and some degree of social cooperation.<sup>63</sup> Yet even that minimal level tends to erode under market pressures, with the result that Western societies get rougher and rougher over time."

"More or less the opposite of Hardin's thesis, but for capitalism," I commented.

"And, as I mentioned, with sobering consequences for minorities and other outsider groups. In a free market society, every actor is rewarded for coming as close to the line as possible. A merchant who cuts corners, who takes liberties with labor, fair-weights-and-measures, tax and reporting requirements will have an edge on competitors who are more law abiding, more generous toward their staffs, and so on. When everyone learns this and begins to do the same, by a sort of tacit agreement the line moves back. Eventually the legislature formalizes the new line. Driving speeds on the freeway are a good example. Even people who would like to drive slowly and safely can't."<sup>64</sup>

"And you think the same holds true for matters of race?"

"Yes. Even those whites who would otherwise care about us, who left to their own devices would work for a nonracist society, don't. They lose interest, devote themselves to their own concerns, drop out of the civil rights movement."

"I've seen it happen with my own students. Even the ones who begin law school as idealists, wanting to help the poor and downtrodden, change. By the time they graduate, they are ready to go into corporate practice, or

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62. See, e.g., EPSTEIN, *supra* note 7, at 130-43 (urging that proper role of government is limited to providing for safety against crime, policing against flagrant misrepresentation, and a few other functions).

63. *Id.*; see also POSNER, *supra* note 52, § 13.4 ("[t]here is a respectable case for regulation of activities that can cause death."); *id.* § 17.2 (discussing conscription into the military); *id.* § 13.1, at 369 (discussing government's role in punishing drunk drivers).

64. I recalled certain hair-raising moments I recently had driving on Italy's *autostradas*.

become house counsel for the rest of their lives—anything other than the public interest work that attracted them to law in the first place.”<sup>65</sup>

“I’ve noticed that, too. Competitive pressures drive out altruistic, other-regarding impulses. Pretty soon, the formal rules change, and we don’t even notice how this happens. If a free market society does contain an impoverished or minority group, all things being equal, that group’s situation will worsen over time because the majority will come to care less and less about it, will be willing to devote fewer and fewer resources to redressing its needs. Eventually, things get so bad, competition so cut-throat, the agony of the inner city so intense, that society intervenes. We pass a few laws, establish a few programs, and we all feel much better.”

“It is like Hardin’s thesis,” I mused. “And it certainly accords with historical experience. The last twenty years for us have been some of the worst I’ve seen. And certain earlier periods of rapid economic development—or times of economic distress and competition—saw the introduction of harsh measures against Asians, Mexicans, and other immigrant groups.”<sup>66</sup>

“And I think these resurgences of nativism and other unlovely sentiments are not simply aberrations, Professor, but markers in what is generally a steady decline in civility and generosity and tolerance. All of this, of course, has very real consequences for our people.”

“In a way, Rodrigo, your thesis is similar to the counter-majoritarian difficulty which many have pointed out in connection with theories of judicial review,<sup>67</sup> but includes it as a special case. Enlightenment-based, Western-style democracy poses not just the possibility, but the near-certainty of domination and rough treatment of minorities—a treatment that comes in time to seem more and more natural and deserved—and less and less in need of correction. Legal self-seeking comes to be defined as what white people do.”

Just then, the waiter arrived with a tray of tempting looking desserts. “Those look good. Have one. This is on me,” I said.

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65. See ROBERT V. STOVER, *MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL* (Howard S. Erlanger ed., 1989); Terry Carter, *Why Students Lose Their Interest in Entering Public Interest Work*, NAT’L L.J., July 31, 1989, at 4.

66. See *Images of the Outsider*, *supra* note 49, at 1262–76 (tracing this ebb and flow).

67. On this theory of judicial review (namely that judges should intervene, if necessary, to protect the minority from domination by the majority), see BICKEL, *supra* note 17; DEMOCRACY AND DISTRUST, *supra* note 17; TRIBE, *supra* note 17, § 3-6. Rodrigo seemed to be implying that tyranny of the minority by the majority is virtually a normal state, not a rare miscarriage which alert judges might correct.

### III. IN WHICH RODRIGO EXPLAINS THE PERSISTENCE OF WESTERN RACISM

As we started on our desserts, I recapitulated what I had heard. "So, Rodrigo, you believe that the source of our troubles lies with Enlightenment philosophy.<sup>68</sup> You've deployed cognitive psychology to show how that outlook generates a willingness to disdain others, and works together with color imagery to assure that our people are always despised and disdained.<sup>69</sup> You have said that Enlightenment notions are for blacks what sexuality is for women, the very means by which society constructs and justifies our subordination.<sup>70</sup> In democracy not all can have a voice. Enlightenment democracy assures that ours is the one that is excluded.<sup>71</sup> And even if we could be heard, the perfectionist strain that Enlightenment breeds makes criticism seem like fly-specking, making the listener prone to ask questions like, 'But aren't you better off than you were in Africa?'<sup>72</sup>

"Further, you have argued that free market capitalism works together with Enlightenment political thought to keep blacks and other people of color down.<sup>73</sup> In a kind of reversal of Garret Hardin's thesis, you urged that capitalism eventually destroys fellow-feeling and identification with the group. Those who start out caring for us, wanting to join our struggle, fall away, go off to tend their own gardens lest they get too far behind the competition.<sup>74</sup> I agree with you on most of these points. But is there not still hope? Is not democracy an open social arrangement, one in which talented outsiders like yourself may work for change? If not, what's the point of struggle?"

Rodrigo took a mouthful of his raspberry torte and looked up. "It's not particularly open, at least compared with other social systems. And whether there's any point in struggling, I think everyone must decide for himself. The system does resist change, both practically and on a level of theory. Have you noticed how uninterested most Americans are in hearing about their own racial injustices?"

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68. See *supra* notes 23-41 and accompanying text.

69. See *supra* notes 40-44, 48-49 and accompanying text. On the application of cognitive psychology to legal problems, see Winter, *supra* note 43.

70. See *supra* notes 29-30, 48 and accompanying text.

71. See *supra* notes 47-48 and accompanying text.

72. See *supra* notes 38-40 and accompanying text.

73. See *supra* notes 52-66 and accompanying text.

74. See *supra* notes 65-66 and accompanying text.

"I have. And I assume you attribute this to the same factors of perfectionism and the sense of one's own culture's infallibility that make change difficult," I ventured.

"Yes, those plus the other things we talked about earlier. Color imagery and the cognitive psychology of visual imagery and light make it difficult for persons in the society to focus for long on the troubles of outsiders. Plus there is law's contribution to freezing things."

"Locke-ing things in, so to speak," I quipped.

"Interesting double entendre," Rodrigo shot back. "Mind if I steal it?"

"Not at all. You've been doing most of the talking today. I've gotten much more out of this discussion than you."

"You're the one who got me started, encouraged me to pursue this vein of thought in the first place. I can never thank you enough. You're a good mentor and friend."

I marveled, once again, at how even grizzled old veterans like me learn at least as much from our students as they from us. Even their half-formed ideas often trigger responsive ones in our minds, enabling us to go on in what is often an arid and desolate landscape.

But I said, "Tell me more about how the system resists change."

#### A. In Which Rodrigo Explains Further How Racism Gets Locked In: Law's Contribution

"Law—I mean the legal system—is one of the ways," Rodrigo said. "Can I interest you in a gelato? I notice they have it here, and it's one of the things I miss from Italy."

"Of course," I quickly replied. "It's one of the many fine foods from your country that I got hooked on during my visit. It's far better than what we call ice cream, with all that butterfat. My doctor told me to cut down."

I gestured to the waiter and waited while Rodrigo tried to make himself understood concerning what I gather was his favorite flavor. He settled for something second best, after which I ordered *mandarino*, a tart variety of near-orange that I had first bought from a street vendor in Bologna.

When I mentioned this to Rodrigo, he looked up with interest. "No kidding—you were in my old city?"

"Three days. I loved it. I thought the arcaded walkways were gorgeous. I loved the old churches. And I stopped in at the law school completely unannounced, but managed to talk with one professor and three students."

"Did they speak English?"

"They did, for which I was grateful. It struck me as both a sophisticated and highly political place. As you mentioned, the students did know of Criti-

cal Legal Studies. So did the professor, and one of the students had even read Bell and Matsuda, I assume in translation."

"It's possible, professor. But I think it's equally possible they struggled through in English, just as they did in talking with you. Left and progressive movements in Italy read more work from the States than you might think."

"I recall that when we first met, you had already read an impressive amount."

"No more than many of my friends. Ali may have read even more than I, but he was a philosophy major while I studied comparative cultures, as you remember."

"I do. But tell me more about the persistence of racial inequality."

"Well, one additional mechanism—beyond the ones we've already discussed—is simply law's conservatism. There is no particular reason why a legal system needs to be on the wrong side, needs to perpetuate racial or other injustice."

"At a few periods, the American judiciary was actually pro-reform," I interjected.<sup>75</sup>

"In the sixties and early seventies, and sporadically before then. But on the whole judges have turned a deaf ear to minorities seeking change more than they have welcomed them and forwarded their causes."

"And the reasons they have done so are—?"

"The usual ones—judges' class and economic backgrounds.<sup>76</sup> But a further one is simply that the legal system, in the U.S. at any rate, is past-oriented. Your doctrines—I mean, our doctrines—of stare decisis and the rule of law mean that judges are bound to continue the previous regime even if it is unfair."

"That's certainly true. But every now and then, a great jurist like Thurgood Marshall, William Brennan, or William Douglas has seemed able to rise above that culture and stake out a position that is genuinely forward-looking and humane."<sup>77</sup>

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75. I had in mind, of course, the period just after *Brown v. Board of Education*, 347 U.S. 483 (1954), and later the heady 1960s.

76. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (detailing this and other reasons for courts' inability to propel social reform).

77. On Thurgood Marshall's role in promoting social justice for blacks, see, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976); on William Douglas's role, see WILLIAM O. DOUGLAS, *OF MEN AND MOUNTAINS* (1950); WILLIAM O. DOUGLAS, *A WILDERNESS BILL OF RIGHTS* (1965).

"But the new rule or decision has a way of slipping back. You have written about that yourself, along with your friends."<sup>78</sup>

"I know," I said. "Some of us explain that cycle of lurching forward and falling back in terms of interest convergence."<sup>79</sup> Others write that whatever its cause, it's an ever-present reality that argues against putting too much reliance on the courts for social change."

"Girardeau Spann comes to mind."

"I read his brilliant book.<sup>80</sup> And I agree with it to a large extent."

"Me, too, though I have a slightly different explanation for the dismal picture of dashed hopes and betrayals he depicts so remorselessly."

"I'm sure you do, Rodrigo. For one so young, and with such a cheerful disposition, you certainly have some downbeat ideas."

"Not much more than some of yours, Professor. Although one or two of your recent things have had almost a—how shall I put it—spiritual quality?"<sup>81</sup>

"Well, optimistic, anyway. I'll concede that in my younger days no one matched me for skepticism about our people's future. A few people described me as the originator of 'bleak chic.'"

"Now *that* I hadn't heard," Rodrigo exclaimed. "I kind of like it. It fits."

"But what about the occasional judge who champions our cause, what about the breakthrough *Brown v. Board of Education* decision that comes along every decade or two?"

"Decisions like *Brown* produce a lot of hurrah-ing and singing and dancing in the streets, as you have pointed out. Then, they are quietly stolen back by narrow construction, foot-dragging, and administrative delay.<sup>82</sup> We end up no better off than we were before—or even worse. Everyone hears about the great decision and assumes our problems are solved.<sup>83</sup> Our friends

78. On the cyclical nature of racial reform, see PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) [hereinafter *ALCHEMY*] (showing race's imprint in our history and very thoughts); *Racial Realism*, *supra* note 39; *Interest-Convergence Dilemma*, *supra* note 28; *Renaissance Origins*, *supra* note 47.

79. See, e.g., *Interest-Convergence Dilemma*, *supra* note 28; *Ever Saved?*, *supra* note 39; Gary Peller, *Race Consciousness*, 1990 *DUKE L.J.* 758.

80. GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* (1993) (putting forward the views that the Supreme Court is unlikely to advance minorities' interest and that faith in the Court as an instrument of social reform is seriously misplaced).

81. See *Third Chronicle*, *supra* note 1, at 396–401, 408–15, where Rodrigo and I succumb to a rare moment of idealistic reflection.

82. RACE, RACISM, *supra* note 16, § 1.3, at 6–8; *Racial Realism*, *supra* note 39; *Ever Saved?*, *supra* note 39, at 924.

83. *Ever Saved?*, *supra* note 39, at 933, 942–43.

go off to save the whales, or to other causes. And our enemies paint us as whiners and complainers. For, after all these beneficial laws and landmark decisions, if we aren't making it, well—what can be done? Perhaps there is something intrinsically wrong with us. So they get to blame us even more than before."<sup>84</sup>

"But you said there was a new element.<sup>85</sup> These things I think both of us know and have talked about before—right?"

"Right. It's that the legal system can't bring about any sort of significant change because it operates piecemeal. It can only solve the case before it. Doctrines of standing, mootness, ripeness, and political question assure that.<sup>86</sup> And since racism is systemic, rather than episodic, intrinsic to the culture rather than an aberration, the normal rather than the abnormal, law cannot see or redress it.<sup>87</sup> The gravitational tug of the familiar is too great. And the familiar—the ordinary state of things—is racism, rather than the opposite."<sup>88</sup>

"I could use an example."

Rodrigo was silent for a moment, while I scooped up the last drop of gelato in the bottom of my cup, and wished I could have more. I was struggling with my conscience when Rodrigo broke in with an insight that made the wait worthwhile:

"Imagine that the Supreme Court one day decides that a voting regime in which black electoral power is canceled out is, by virtue of that simple result, unconstitutional. It decides in favor of something like the 'proportional representation' that your friend Lani Guinier has been writing about.<sup>89</sup> So that any structure that produces only a handful of black representatives from a heavily black district and allows those few to have their effect canceled out by the need to make trades and compromises is a violation of the Constitution or voting rights laws designed to implement it."

84. *Id.* at 942.

85. *Viz*, law's conservatism and tendency to be on the wrong side of a reform movement, *supra* notes 37-43, 76-77 and accompanying text.

86. On these constitutional and prudential doctrines that confine the judiciary's reach, see *TRIBE*, *supra* note 17, §§ 3-10, 3-11, 3-14.

87. See *Images of the Outsider*, *supra* note 49; Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389 (1991), (book review) [hereinafter *Recasting*]; Lawrence, *supra* note 28.

88. *Recasting*, *supra* note 87.

89. Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991) (advocating measures to improve black representation); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991) (advocating the same).

"I gather you are going to say that such a decision would end up making little difference."

"Very little. Such a decision would be interpreted as the extraordinary thing it is. Local authorities, voting registrars, congressional leaders, and so on, would say, 'Well, of course the Supreme Court didn't mean *that*.'<sup>90</sup> Because of the interlocking web of cultural understandings, meanings, and presuppositions about the sort of country this is supposed to be, local officials will gut the landmark decision. In every close case requiring an interpretation, they will say to themselves, 'Surely the Court meant X,' when it actually meant Y. And of course X will be the status-maintaining interpretation."

"And that's what you meant when you said that everything would have to change at once, and not piece by piece, precedent by precedent."

"Yes—otherwise, the rest of the system will simply drag the new rule down, and we'll be back where we were before."

"And this is just the sort of wide-ranging change that law cannot usher in, by its very nature, for the reasons you mentioned."

#### B. Rodrigo's Second Reason—John Calvin and the Culture of Individualism

"I think there is a grain of truth to what you say, Rodrigo. It captures a growing sense that legal culture is structurally biased against racial reform. It's not so much that judges hate us. Rather, it's something about the milieu in which they work."<sup>91</sup>

"In your country, are most judges Protestants?" Rodrigo asked.

"Interesting question. I really don't know. Probably so, although I can think of many exceptions. And of course, in the legal academy, many are Jewish, and not a few Catholic. Why do you ask?"

"Because I have the sense that Calvinism plays a part in rendering race reform even less likely than it would be in its absence."

"What do you mean?"

"Capitalism arose around the same time as Calvinism did, shortly after the Reformation.<sup>92</sup> Both turned society's attention toward the individual. Calvinism and its variants eliminated intermediaries, such as priests, and

90. On the role of cultural meanings and mindset in limiting law reform, see *Images of the Outsider*, *supra* note 49; *Shadowboxing*, *supra* note 51; *Fourth Chronicle*, *supra* note 1.

91. E.g., ROSENBERG, *supra* note 76; Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705.

92. For history and commentary on this period see, e.g., HENRY S. COMMAGER, *THE EMPIRE OF REASON*, at xi–xiv (1977); MAY, *supra* note 34, at 3–87; JOHN VAIZEY, *CAPITALISM* 27–32 (1971).

focused on the role of the individual believer.<sup>93</sup> Capitalism did much the same in the economic sphere. Both doctrines remain alive and vital today."

"And have something to do with majoritarian oppression of African-Americans and other people of color, such as Native Americans, Puerto Ricans and Mexicans?"

"It's related to the individualism we just talked about.<sup>94</sup> Anyone not succeeding by his or her own efforts must not be trying very hard. Failure is a sign of moral sin or sloth. And any focus on group redress, which African-Americans need to correct the systemic injustices we have suffered over four centuries of domination, is alien to individualistic thought.<sup>95</sup> Before the Reformation, the Church was at least allied with the king and the aristocracy. Over time, it could have come to expand its allegiance to include workers and the poor, as a few liberation theology groups have done.<sup>96</sup> But in the main, religion in the West has been more concerned with individual sinners—and patrons—than groups in need of help."

"Direct democracy, as they have it in the Western states, in which the people get to enact laws and constitutional amendments by referendum and initiative, has been responsible for some notably anti-minority and anti-gay measures.<sup>97</sup> Do you see any connection between this mechanism and the individualism you attribute to our religious tradition?"

"I hadn't thought much about that," Rodrigo conceded. "But it stands to reason that representative government supplies at least a slight momentum in favor of consideration of groups. Representatives are always making trade-offs, weighing the interests of one set of constituents against those of others. Of course, they sometimes blithely trade away *our* interests, as we discussed earlier.<sup>98</sup> But when the people vote in the privacy of the ballot booth, they

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93. See MAY, *supra* note 34, at 10–11; 2 THE NEW CAMBRIDGE MODERN HISTORY: THE REFORMATION 1520–59 (G.R. Elton ed., 2d ed. 1990).

94. See *supra* notes 91–93 and accompanying text.

95. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

96. On the role of liberation theology on behalf of the poor in Latin America and elsewhere, see Claude Pomerleau, *Changing Roles in Latin American Catholicism*, 1985, in 4 LATIN AMERICA AND CARIBBEAN CONTEMPORARY RECORD 95 (Jack W. Hopkins ed., 1985); Claude Pomerleau, *The Christian Left in Latin America*, in 3 LATIN AMERICA AND CARIBBEAN CONTEMPORARY RECORD 246 (Jack W. Hopkins ed., 1985).

97. E.g., COLO. CONST. art. II, § 30b ("Amendment 2," enacted in 1992 by initiative and later struck down as unconstitutional provided that no subdivision of the state may enact a gay-rights law or ordinance, see *Evans v. Romer*, No. Civ. A 92 CV 7223, 1993 WL 518586 (Colo. Dist. Ct. Dec. 14, 1993); see *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating California proposition that prohibited local measures to integrate housing).

98. *Supra* notes 49–50, 67 and accompanying text.

are even freer to vote their preferences—which are sometimes quite unlovely, as you and I know.”<sup>99</sup>

“All too well,” I acknowledged.

“And then there’s the judiciary’s well-known deference to the authority of other branches, or of the people acting through direct democracy. Although the judiciary is supposed to act in a counter-majoritarian fashion, to protect weak and insular minorities from tyranny,<sup>100</sup> they do this less and less these days. And when they are asked to do so, they naturally interpret the request against a background of what seems natural to them.<sup>101</sup> And what seems natural is tyranny. The current system of white over black seems natural. The reigning narratives, myths, and meanings operate to invalidate black claims, so that judicial deference to quite pernicious practices passes, at the time, as the right thing to do.<sup>102</sup> American courts and other branches of government are more apt to write off a poor man’s or group’s pain than are more collectivist governments. I imagine you saw examples of this on your European sojourn, Professor?”

“I was surprised to see how few homeless people there are, or beggars, particularly in your country. And the elderly seem less destitute than many are here. I assume that’s because there is always someone to help them.”<sup>103</sup>

“Yes—either a family member or social service agency. The system isn’t perfect, and there are of course exceptions, as we discussed before.<sup>104</sup> But on the whole the caregiving function is carried out more effectively there.”

“I wouldn’t be surprised if this is related to the way our version of democracy emphasizes Enlightenment ideals. Calvinism lets us blame the poor and the lame. Judges and others come steeped in perfectionism, so that the system changes slowly.<sup>105</sup> And, as you pointed out, incremental reform won’t

99. See *supra* note 97; see also Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978) (calling attention to way in which the referendum process can give effect to racist sentiments).

100. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see DEMOCRACY AND DISTRUST, *supra* note 17; *Toward Representation*, *supra* note 17.

101. On some of the reasons why this happens, see *Fourth Chronicle*, *supra* note 1; Lawrence, *supra* note 28; Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989).

102. On the way in which the careers of even eminent justices are sometimes marred by anomalous opinions, see Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991).

103. Much earlier Rodrigo had alerted me to the possibility that this might be so. *Rodrigo’s Chronicle*, *supra* note 1, at 1373–76; *Third Chronicle*, *supra* note 1, at 391–93.

104. *Second Chronicle*, *supra* note 1. On European approaches to caregiving, see *Third Chronicle*, *supra* note 1, at 389–400.

105. See *supra* notes 38–40 and accompanying text (on perfectionism).

work for racism or other systemic social ills.<sup>106</sup> Everything has to change at once, but can't, because of stare decisis and law's commitment to piecemeal treatment.<sup>107</sup>

"Much more than other disciplines, law is caught up in old-style formalistic, mechanical approaches to reason and analysis, which it is just beginning to abandon. Postmodern and Critical currents have caught on almost everywhere else, providing powerful new insights into our condition and the nature of knowledge itself. With some exceptions—like you and your friends, Professor—law remains committed to outmoded approaches."<sup>108</sup>

"You give me too much credit, Rodrigo," I quickly interjected. "I'm just an ordinary foot soldier, toiling in the trenches. I don't talk this high Crit stuff very well. I'm afraid it's for young people like you, who have the time and flexible minds to master it. I find much of it interesting and provocative, although I often wish the writers who deploy it would learn to write more simply. Sometimes, I almost feel I have to read with a dictionary of 'Critical-ese' in hand."

"I know," Rodrigo conceded. "Some of us do get caught up in impenetrable jargon. I've taken a vow to try to write more clearly, myself. My thesis adviser has been your strongest ally. I'm not sure if you know him, but he's a stickler for the straightforward phrase."

"Don't let my lament sidetrack you," I interposed. "I think postmodern analysis holds enormous promise for a new program of racial reform. It's just that I think you're the one to develop it, not me."

"You've already been doing it," Rodrigo added quietly. "You don't know what an inspiration you and your generation have been. You've shown how formalistic, precedent-based civil rights law built along the liberal model fails over and over again. You've pointed the way, developed the evidence, the prima facie case, so to speak. We're just filling in the gaps, developing theories to explain what you've shown."

"You're too kind," I said. "But all this flattery will get you nowhere if you cannot do two things. Your readers, especially those of majoritarian hue,

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106. See *supra* notes 86–88 and accompanying text (on law's commitment to incremental change).

107. See *supra* notes 89–90 and accompanying text (arguing that everything must "change at once").

108. On the way in which perspectivism, semantics, narrative theory, and other aspects of post-structuralist thought came late to legal academia—and are still resisted by many judges—see Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990). On the critique of legal formalism, see generally THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., rev. ed. 1990); on that of the current school of normative analysis as empty, self-referential and inscribed, see Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991).

will want to know, first, how you deal with certain counterexamples, like Cambodia, Iran, or India under the caste system. Other societies seem to have had no trouble perpetuating and justifying cruelty toward minority or despised populations. How can it be connected with Western thought and government, if it happens everywhere? And, second, they will want to know what you plan to do about it, about our local version, I mean. White people are pragmatic. They will want to know not just your diagnosis of our racial ills, but your solution."

"On the first point, I guess I'd have to concede that there's enough cruelty and racism to go around. My purpose was to explain its persistence in the West. My basic point is that in the West, the disadvantage that blacks and other people of color suffered initially, that is, in connection with the way they were brought here, never ends."

"What about Thomas Sowell? He's shown that blacks from the West Indies rise rapidly.<sup>109</sup> He attributes the failure of older African-American groups to thrive to their lack of industry, to reliance on failed liberal programs, and to a culture of poverty."<sup>110</sup>

"It is true that Sowell found those differences. But you should note that West Indians rise rapidly up the economic ladder when we generally do not, but only for one generation. U.S.-born blacks have lived in a racist society longer than the newcomers and thus have had longer to become demoralized. In time, we may well find that West Indians sink to the same levels. Or, possibly society will construct a new category, like Bill Cosby—nice blacks, the other kind.<sup>111</sup> White folks never see their own racial and class advantages—the family friend who got them a summer job when they were a teenager, the carefully constructed recommendation letter for a college, the receptive teacher who discussed extra credit which led to an A-minus in an Honors English course—things that happen to our kind almost never. But they do see as radically, shockingly, bitterly unfair the advantage a rare black gets when he or she gets into a good college under an affirmative action program. They promptly declare—'That's what I mean by unfair,' overlooking the inheritance, the loan from father, the childhood help they received of various kinds."<sup>112</sup>

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109. SOWELL, *supra* note 7.

110. *Id.* at 77–79.

111. On the relaxed, reassuring cardigan-wearing TV black, see Shelby Steele, *I'm Black, You're White, Who's Innocent?*, HARPER'S MAG., June 1988, at 45.

112. On the left critique of affirmative action as tokenism and deflection, see Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222 (1991).

"Rodrigo, the hour is late, and you set a fast pace. An old man like me needs his rest. As stimulating as I find all this—and I think your thesis advisor will too—I'm going to have to head home soon. Maybe we can share a cab. But I'd love to have you outline your solution to our racial predicament—the one you hinted at earlier."

"This part of my paper is still—how do you say it?—sketchy. I can do it in ten minutes. How about another coffee?"

As luck would have it, the waiter hovering nearby in the now nearly deserted restaurant overheard Rodrigo's remark, and asked, "Can I bring you gentlemen more coffee?" I noticed he was a man of color and remarked, once again, how much better treatment people of color like Rodrigo and me get from service folks of color, even in today's world.<sup>113</sup>

"Decaf for me. Doctor's orders."

Rodrigo shot me a sympathetic look and said, "The same."

"Go ahead and have the high-octane kind if you want," I said. "Any of that would keep me up half the night, but you're different."

"No, decaf's fine. I kind of overdosed during finals, so I'm cutting back. Besides, Giannina's been after me to reduce my intake. She says it makes me hyper."

"Funniest thing," I remarked, smiling to let Rodrigo know I appreciated his high-energy manner. "You were saying you have the outlines of some sort of solution."

#### IV. IN WHICH RODRIGO EXPLAINS HOW TO BEGIN TO ADDRESS OUR RACIAL PREDICAMENT

The waiter quickly returned and poured our coffee. Rodrigo added his trademark four teaspoons of sugar; I added nutrasweet. Then he began:

"The trick lies in dealing with the source of our problem, namely Enlightenment thought. I'm skeptical of any other way out—the structures of domination are deeply engrained, so much so that the current regime seems just and natural to most folks within it, in need of little correction."

"But you said you had some thoughts."

"The beginnings. Some notions of where one might start if one thought the will were there, which I don't. For example, we've both noticed how color imagery, and metaphors of light, of eyesight, play a part in our domi-

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113. I could not help contrasting our reception here with that which we received at the hands of fellow diners in another restaurant. See *Second Chronicle*, *supra* note 1, at 1202 n.87.

nation.<sup>114</sup> We're the great Unseen, the Dark, the Other. We are equated with bad things, with a thousand connotations and narratives that make it difficult for white folks, even ones of good will, to think we might be their equals, might be as nice, as talented, as worth getting to know, as one of them."<sup>115</sup>

"And what would replace that system?"

"Well," Rodrigo replied with that nonchalance I had come to enjoy and appreciate. "We might try to get them to abandon the sight-based metaphors that lie at the heart of Enlightenment philosophy and adopt instead another sense organ, for example, touch."

I put down my cup of coffee. "You mean that you want to get white people to learn to hug the world, including the dark people in it, gays and lesbians, and other outsiders?" I was incredulous. "Rodrigo, I've got to hand it to you. This is a truly novel idea. But it will never go over."

"I'm not sure why not," Rodrigo replied. "Families love and hug each other. The human embrace is the means by which our most basic collectivities form and replicate each other. Handshakes, embraces, pats on the back—these are all primordial human experiences. We could build on this model of human relations, with its much more inclusionary impetus, rather than the more hierarchy-producing and hierarchy-maintaining metaphors of our Enlightenment heritage."

"With environmentalism, you hear the remark, 'Go hug a tree,'" I said, immediately feeling a little lame. The idea of a society whose political structures were built on love and hugging struck me as a little, well, new age, not quite befitting scholars of my station and in Rodrigo's case, station-to-be.

"There's also the bumper sticker, 'Have you hugged your kid today,'" Rodrigo added. "White folks might be persuaded to hug us, too. That's all I'm suggesting."

"That one's promising, if a little, well, *frontal*. Maybe it's worth proposing for its shock value, as a way of getting people to focus on sight metaphors and the pernicious quality of much Enlightenment theory. But you mentioned you might have other avenues in mind."

"A second approach would tap a theory you and your friends have espoused, Professor, namely interest-convergence.<sup>116</sup> Everyone likes and can easily be gotten to act in their own self-interest once it's explained to them."

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114. See *supra* notes 33–35, 39–44 and accompanying text (on color imagery and its role in facilitating majoritarian domination).

115. *Id.*; see also *Images of the Outsider*, *supra* note 49 (on social role of ethnic imagery and depiction).

116. See *supra* notes 77–78; *Ever Saved?*, *supra* note 39.

"So, you want to get the majority group to see that improving their treatment of groups of color benefits them."

"Yes, and to do that we can bring out themes that you and I discussed earlier in connection with the decline of the West, particularly the United States, whose slipping quality of life, economic status, and so on, have now become apparent to practically all.<sup>117</sup> We could gently let them know that the solution to their various predicaments—the environmental crisis, old-age care, and so on—lies with approaches now in the possession and experience of outsider groups. This would, of course, provide a new and compelling basis for affirmative action—namely, the majority group's self-interest.<sup>118</sup> In a sense, some of this is already going on. White folks are turning to Native American thought for approaches to environmental protection,<sup>119</sup> to Southwestern culture for satisfaction and renewal.<sup>120</sup> It reminds me of how your society discovered and exalted all things black during the Harlem Renaissance,<sup>121</sup> but with less condescension. The U.S. is beginning to realize it needs answers. Otherwise, it will soon be overtaken decisively by Asia and the Common Market."

"Do you think that the flirtation of some law professors with deconstruction and other postmodern approaches shares some of that emphasis?"

"You could look at it that way," Rodrigo replied. "There's the sense that the old kind of case-crunching analysis, full of mechanical, formalistic reasoning, has played itself out. Doctrinal analysis holds very few, if any, new insights any more. New scholars are moving beyond it into perspectivism, interdisciplinary 'law-and' scholarship, and cultural studies. There's a general sense that we've reached the end of a road."

"Rodrigo, now that I come to think of it, I much prefer this approach. Though an expert at poststructuralism, Criticalese, semiotics, contextualism, and all the other fancy new approaches I am not, I think Americans are

117. Rodrigo and the professor discuss these matters in *Rodrigo's Chronicle*, *supra* note 1, at 1365–79, 1381–83 app. A (Rodrigo's Printout).

118. *Id.* at 1373–78 (putting forward an earlier version of this argument).

119. E.g., AMERICAN INDIAN ENVIRONMENTS: ECOLOGICAL ISSUES IN NATIVE AMERICAN HISTORY (Christopher Vecsey & Robert W. Venables eds., 1980); David H. Getches, *A Philosophy of Permanence: The Indians' Legacy for the West*, J.W., July 1990, at 54–55, 64, 67; N. Scott Momaday, *An American Land Ethic*, in ECOTACTICS: THE SIERRA CLUB HANDBOOK FOR ENVIRONMENTAL ACTIVISTS 97 (John G. Mitchell & Constance L. Stallings eds., 1970); Rennard Strickland, *The Idea of Environment and the Ideal of the Indian*, 10 J. AM. INDIAN EDUC. 8 (1970).

120. I was reminded of the vitality I had observed in the American Southwest on a recent trip. Many well-known painters and writers have sought refuge and refreshment there over the years, including D.H. Lawrence, Georgia O'Keefe, Carol Griggs, and Natalie Goldberg.

121. On the Harlem Renaissance, see CATHERINE SILK & JOHN SILK, RACISM AND ANTI-RACISM IN AMERICAN POPULAR CULTURE 63 (1990); WILLIAM L. VAN DEBURG, SLAVERY & RACE IN AMERICAN POPULAR CULTURE 120–21, 202–03, 211 (1984).

much more apt to go for them than for the hugging solution. At first I thought you were being facetious, and I'm your friend and advocate."

"I wasn't being facetious. Any change of paradigm strikes one as peculiar when it's first suggested. Other cultures often complain that Anglo culture is cold, find Americans arrogant and superior. These other cultures are more on the hugging model—by which I mean collectivist. They don't have such a perfectionist hang-up, so they are less judgmental. In that respect, they share something with perspectivism, positionality, and some of the new approaches being written about by Pierre Schlag, Steve Winter, and others.<sup>122</sup> It is much easier to be inclusive if one isn't committed to the idea of one right answer, as classical thought inclines one to be."

"I did notice the difference you mentioned while traveling in the Mediterranean. And of course I find much the same warmth and support when I'm with my own people. But I had thought the difference had to do with my own reaction: I'm much more guarded when I'm operating in white circles. But maybe it's not me, but them. And you actually think that the new legal-theoretical approaches, besides having more of an emancipatory potential, could lead the way to a more loving, inclusive society?"

"I do. They certainly are less hierarchical. But what postmodern poverty or labor law would look like is anybody's guess. We do have the beginnings of postliberal analysis of race in CRT.<sup>123</sup> And postmodern approaches underlie much of radical feminism, and some of the newer schools of interpretation and constitutional theory."<sup>124</sup>

"But surely, Rodrigo," I said, "you are not saying that an academic movement, subscribed to by a handful of ivory-tower academics and leftists, can lead the way to a revolution in the material and social conditions under which twenty million people live. Doesn't that ascribe far too much efficacy to what we intellectuals do?"

"Of course it does," Rodrigo replied gloomily. "Although in a hundred years, things may look different. Postmodernism is a powerful critique. If it succeeds in mounting a serious challenge to Enlightenment thought, that may

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122. See, e.g., Stanley Fish, *There's No Such Thing as Free Speech*, BOSTON REV., Feb. 1992, at 3; Schlag, *supra* note 108; Winter, *supra* note 43.

123. On Critical Race Theory, see *Annotated Bibliography*, *supra* note 5; Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

124. E.g., UNMODIFIED, *supra* note 25 (employing perspectivism, textual analysis, and other techniques associated with postmodern thought in developing a critique of law centered on women and women's role).

lead to new ways of relating to one another and ultimately a new form of society. But I doubt change is anywhere over the horizon."

"You're a complete pessimist, then? You think insight and hard work are not enough?"

"There is little the academy can do. Oh, I suppose one could go around turning off all the TV sets in the ghetto. Or, better yet, blow up all the transmitters.<sup>125</sup> Television is one of the greatest and most pervasive purveyors of color imagery there is. That might help a little. But basically I think our troubles are unlikely to yield to a quick or simple fix. The Constitution was color-conscious in its inception, selling out the interests of blacks in no fewer than ten places.<sup>126</sup> Women and the unpropertied were excluded, as well.<sup>127</sup> It was a document shaped by Enlightenment images and structures, one that had white supremacy practically written all over it. The leading Framers had slaves,<sup>128</sup> thought those slaves were intellectually inferior to whites, and equated science and higher thought with European values and civilization. Law, perfectionism, free market economics, and other mechanisms now lock in the system of white-over-black supremacy that the Constitution instituted two hundred years ago. There is no need for chains and laws enforcing separate-but-equal. It's all nice and neat, and I'm afraid the system is likely to go on forever."

"We could contest Eurocentric, honorific notions that equate linear thought, mechanics, etc., with whiteness, with superiority, methodically show the narrow, self-serving nature of all the prevailing myths and narratives."<sup>129</sup>

"If that task is done well, I think it can do some good," Rodrigo replied soberly. "The trouble is that white folks will think it's all sour grapes. Or they may quickly embrace 'folkways,' much as they did the Harlem Renaissance, jazz, and other black arts, deeming them interesting and vital—but not really on a par with the Western greats."

"It's the credibility problem again," I said.

"Which, in turn, is part of our construction."

125. I winced, once again, at Rodrigo's casual mention of the possibility of violence. See *Rodrigo's Chronicle*, *supra* note 1, at 1377-79; *Third Chronicle*, *supra* note 1, at 410.

126. See RACE, RACISM, *supra* note 16, § 1.9 at 27-30 (identifying clauses in the original document that implicitly or explicitly provided for the continuation of slavery).

127. *Id.* at 27-29; BEARD, *supra* note 37.

128. RACE, RACISM, *supra* note 16, at 26.

129. For examples of works that set out to do this, see, e.g., *FACES*, *supra* note 39; *ALCHEMY*, *supra* note 78; on the theory and practice of such "counter-storytelling," see Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

"Which itself is dictated and determined by Enlightenment philosophy. We are not just one-down. We are the kind of people who are created and constructed so as to be unable to change our positions, so as always to be one down."<sup>130</sup>

"The *reductio ad absurdum* of the counter-majoritarian principle, which is supposed to be soluble merely by having the right kind of friend in court."

"Well, Professor, even if you don't have a friend in court, you have one in me. You're looking a little tired, and the hour is late. You mentioned earlier that you wanted to get a good night's rest after your trip, and here I am keeping you up late. They're starting to stack the chairs. What do you say we try to get a cab?"

"I'm going strong," I protested.

"But I'm out of ideas. I mentioned that my solution was still at the formative stage, that it's much easier to see what's wrong with the world than how to set it right."

As I fished out my credit card and motioned to the waiter that we would like to pay our bill, Rodrigo paused. Then, after the waiter walked away to record our charges, he continued:

"I wonder if you saw that conservative's column the other day. The one that spoofed the spate of women's books that have been coming out?"<sup>131</sup>

"You mean the one that complained that there were so many of them?"

"Yes, that one. The writer complained that all the recent books seem to be about women. He was referring, of course, to perhaps ten or twenty books, mostly by women, on women's problems, like child abuse, the 'three-job syndrome,' menopause, and the like."

"I remember the review. It had a plaintive, almost whiny tone. The author was feeling neglected because none of the books were about him."

The waiter returned with our check and wished us good evening. As I signed the credit slip and started to get up, Rodrigo completed his thought:

"That review drove home to me how perspective works. Tens of thousands of books are published every year, many of them on fishing, hunting,

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130. The system of images of blacks and other groups of color that society disseminates not only demeans them, but also damages their credibility, so that they are unable effectively to challenge the images. *Images of the Outsider*, *supra* note 49, at 1287; Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 385 (1991).

131. See Jack Kissing, *No . . . Uh . . . Men Need Apply*, DENVER POST, May 4, 1993, at 7B (lamenting that most advice columnists are women, writing for women); see also Michael Levin, *Book Review*, 5 CONST. COMMENTARY 201, 201 (1988) (attributing women authors' success to a kind of "intellectual affirmative action," in which their work is published and reviewed under more relaxed standards than those applied to men).

sports, mechanics, war, and so on. Yet to the columnist these did not seem like 'men's books,' but just books. And the small number, amounting to no more than a few dozen or hundred a year that in very recent times have been addressing issues of interest to women, seemed to him to skew the distribution all out of proportion toward women, when in reality a huge majority of books deal with things men want to read about."

"And the moral you draw from this is . . . ?"

"Two things," Rodrigo said, opening the door and helping me get in the cab he had inconspicuously flagged outside the restaurant. "One is that night owls like me should never keep our friends up too late. The second is that racial reform will often seem outlandish, one-sided, and unjust to those who are unused to sharing power. They will oppose and hector us at every turn. Which means, among other things, that we had better take care of each other. And so, Professor, I think we had better continue this another time. We had talked about dinner."

I gave my apartment address to the driver, who had been waiting none too patiently.

"How about next Saturday at our place. Giannina has been dying to meet you."

"And I her."

"You're on. I'll call with the address and time."

#### CONCLUSION

As I rode rather sleepily homeward through the dark streets, I reflected on what we had said. Rodrigo's ideas on Enlightenment as the source of racial oppression seemed to me plausible, even powerful. I wondered how his new colleagues would see them, and how they would receive this new *wunderkind* with his audacious ideas. I wondered whether the racial problems of our people were really rooted in some basic flaw of our form of government, so that only a radical reconception of the state could enable us to go beyond cosmetic changes and periodic peaks of progress. Like many, I had grown up thinking that democracy was a good thing, and it pained me somewhat to hear Rodrigo's remorseless indictment, on fairness and formality grounds, perfectionism, color imagery, the association with Calvinism and individualistic mindset, law's contribution to stasis, and free market economics.

I thought how kind and courteous, almost tender, Rodrigo had been of my aging frailties in calling an early halt to the evening and hailing a cab for me. Was that not a root example of democracy, namely, considering the other person's feelings? Or was it socialism?

My reverie didn't last long. "We're here, Professor," the cabby said in a voice just this side of sharpness. I paid, trudged up the steps to my building, and prepared to deal with jet-lag and the new week.

