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Rodrigo's Book of Manners: How to Conduct a Conversation on Race - Standing, Imperial Scholarship, and Beyond Chronicle

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CHRONICLE

Rodrigo's Book of Manners: How to Conduct a Conversation on Race—Standing, Imperial Scholarship, and Beyond

BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW. By Daniel A. Farber and Suzanna Sherry. (New York: Oxford University Press, 1997.) Pp. 3, 195. $25.00.

REVIEWED BY RICHARD DELGADO*

Responding to a number of Critical Race Theory's critics, "the professor" and his alter ego Rodrigo Crenshaw discuss a number of themes in the writings of Daniel Farber and Suzanna Sherry, Judge Richard Posner, Stephen Gey, and others. The two discuss whether the espousal of multiculturalism really constitutes an assault on the truth, and criticism of conventional standards of merit an implicit attack on Jews and Asians. They also ponder whether legal storytelling and narrative jurisprudence fall outside the realm of serious scholarship, as their detractors maintain, or whether certain truths can best be brought to light by these methods. After observing that many of CRT's detractors overstate, misquote, employ ad hominem attacks, or set up and then destroy straw men, the two protagonists propose a series of rules, like standards of etiquette, for conducting scholarly conversations about race. Expanding on the insights of an early article, The Imperial Scholar, Rodrigo and his mentor draw analogies from rules of civil procedure and constitutional adjudication that have worked to facilitate the orderly presentation of ideas in these other areas. The chronicle concludes by urging that both sides of scholarly disagreements in heated areas such as race draw inspiration from the rules of engagement that keep in-court conversations on course, minimize rancor, and discourage the presentation of mock or bogus claims.

INTRODUCTION: IN WHICH RODRIGO AND I MEET IN AN AIRPORT LOUNGE AND DECIDE TO DISCUSS THE FARBER-SHERRY BOOK

"Rodrigo?" I said, looking up at the tall, smiling young man who had materialized, as though by magic, as I sat in a self-absorbed stupor in the airport boarding area, a half-read newspaper in my lap.[1]

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1. *See* Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) [hereinafter *Rodrigo's First Chronicle*], introducing my interlocutor and alter ego, Rodrigo. The son of an African-American serviceman and Italian mother, Rodrigo was born in the States but raised in Italy when his father was assigned to a U.S. outpost there. Rodrigo graduated from the base high school, then attended an Italian university and law school on government scholarships, graduating second in his class. When the reader

"Professor!" my young friend and protégé beamed, shaking my hand warmly.[2] "I hoped you'd be on this flight. And here you are! You're going to the crit conference, I gather?"[3]

"I am, indeed," I replied. "You, too?"

My friend gestured toward a conference program under one arm, then said: "My connecting flight got in a half hour ago. I've been wandering the concourse looking for a bookstore to pick up something for the flight. But I'd much rather talk with you. Want to sit together? The plane was nearly empty coming in."

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meets him, he has returned to the U.S. to investigate graduate law (L.L.M.) programs. At the suggestion of his sister, veteran U.S. civil rights lawyer Geneva Crenshaw (*see* DERRICK BELL, AND WE ARE NOT SAVED (1992) (creating the character of Geneva as foil for Bell's own dialogs)), he seeks out "the Professor" for advice. Despite their age difference, the two become good friends, discussing affirmative action and the decline of the West (*Rodrigo's First Chronicle, supra*); law and economics (*Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993)) [hereinafter *Rodrigo's Second Chronicle*]; love (*Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993)) [hereinafter *Rodrigo's Third Chronicle*]; legal rules (*Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993)) [hereinafter *Rodrigo's Fourth Chronicle*]; the critique of normativity (*Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993)) [hereinafter *Rodrigo's Fifth Chronicle*]; relations between men and women of color (*Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993)) [hereinafter *Rodrigo's Sixth Chronicle*]; enlightenment political theory (*Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994)) [hereinafter *Rodrigo's Seventh Chronicle*]; black crime (*Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994)) [hereinafter *Rodrigo's Eighth Chronicle*]; narrative jurisprudence (*Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995) (final chronicle in first cycle and final chapter of THE RODRIGO CHRONICLES (1995)) [hereinafter *Rodrigo's Final Chronicle*]; the rule of law (*Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994)) [hereinafter *Rodrigo's Ninth Chronicle*]; affirmative action (*Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995)) [hereinafter *Rodrigo's Tenth Chronicle*]; clinical theory (*Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996)) [hereinafter *Rodrigo's Eleventh Chronicle*]; the problem of desperately poor border settlements, (*Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997)) [hereinafter *Rodrigo's Twelfth Chronicle*]; formalism (*Rodrigo's Thirteenth Chronicle: Legal Formalism*, 95 MICH. L. REV. 1105 (1997)) [hereinafter *Rodrigo's Thirteenth Chronicle*]; the recent right-wing surge (*Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 HARV. C.R.-C.L. L. REV. 275 (1997)) [hereinafter *Rodrigo's Fourteenth Chronicle*]; racial mixture and assimilation (*Rodrigo's Fifteenth Chronicle: Latino Critical Scholarship and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997)) [hereinafter *Rodrigo's Fifteenth Chronicle*]; alternative dispute resolution (*Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391 (1997) (unnumbered tribute to the late Professor Grillo)); and recent conservative thought (*Rodrigo's Bookbag*, STAN. L. REV. (forthcoming 1998)) [hereinafter *Rodrigo's Bookbag*] over the next five years. During this period, the brash, talented Rodrigo earns his L.L.M. degree and embarks on his first teaching position. The Professor meets Rodrigo and Rodrigo's soulmate "Giannina," and learns that Rodrigo's family immigrated to America via the Caribbean. His father Lorenzo looks black and identifies as such, but speaks perfect Spanish.

2. Like Giannina and Rodrigo, the Professor is an imaginary character and should not be confused with any person, living or dead. As I have created him, the Professor is a civil rights scholar of color in the late stages of his career.

3. As it turns out, the two friends and colleagues, who teach at different schools and are separated by 40 years of age, are on their way to the same Critical Race Theory conference. For the origins and structure of this genre of scholarship, see generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995).

"I'd love to," I said. "Uncharacteristically, my speech is already prepared, so I was going to do nothing but finish this newspaper and maybe catch a nap. But I'd much rather catch up on what's been happening with you. Is Giannina along?" I cast an eye around the waiting lounge but the familiar face of Rodrigo's companion was not in view.[4]

"She's home, studying for exams. She wanted to come, but decided to pass up the conference provided that I take good notes and share everything with her later. If she had known we'd run into you, nothing would have kept her away. I think you're her honorary uncle and role model."

"If so, she's in some trouble, I'm afraid. In this last month alone, I've been attacked in print more times than I can remember." Then, craning my neck and pointing at a slim gray and red volume under Rodrigo's other arm, I asked: "What's that you're reading?"

"Oh," Rodrigo replied. "It's Farber and Sherry's latest book, *Beyond All Reason*.[5] Subtitled (Rodrigo looked down) *The Radical Assault on Truth in American Law*, the book criticizes Critical Race Theory and radical feminism, which the two eminent authors refer to as 'radical multiculturalism.'[6] They attack Derrick Bell,[7] Mari Matsuda,[8] Catharine MacKinnon,[9] and Richard Delgado.[10] Even you and I come in for some criticism."[11]

"I know," I said, a little wryly. "It's one of those attacks on me to which I was referring before."

Just then, our conversation was interrupted by the loudspeaker announcing that our flight was boarding. "Let's see if we can switch seats," Rodrigo said. "What's your seat assignment?"

I handed him my boarding pass. Seconds later, my young friend was back from the counter, new passes in hand. "We've got a window and an aisle," he said. "The flight's only half full. That way, we'll have an empty seat in the middle to put our stuff. Can I help you with those bags?"

I. IN WHICH RODRIGO AND I DISCUSS *BEYOND ALL REASON*

After a short delay, during which two courteous airport security agents in plain clothes pulled us aside, went through our scanty luggage, and asked us about our destination and purpose for travelling, we boarded our plane.

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4. *See Rodrigo's Sixth Chronicle*, *supra* note 1, at 640, introducing "Giannina," Rodrigo's life companion and soulmate. A published poet and playwright, see *Rodrigo's Third Chronicle*, *supra* note 1, at 402; *Rodrigo's Fourth Chronicle*, *supra* note 1, at 1137, Giannina recently enrolled in law school. *See Rodrigo's Thirteenth Chronicle*, *supra* note 1, at 1108.

5. DANIEL A. FARBER AND SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997).

6. *See, e.g.*, *id.* at 5-7, 10, 57-59, 95-117.

7. *Id.* at 4, 5, 13, 24-26, 37, 58-59.

8. *Id.* at 101, 135.

9. *Id.* at 5, 26, 32, 40-43, 122-23.

10. *See, e.g.*, *id.* at 4-5, 13, 21-28, 32, 40, 44, 47, 55-59, 76-77, 86, 90, 99, 102, 109, 121-23.

11. *See id.* at 155 n.30, 157 nn.40 & 43, 163 n.1, 165 n.9, 192 n.3.

"That's never happened to me before," Rodrigo said. "We must have triggered a profile of some sort. Oh, here are our seats."

We placed our bags in the overhead compartments and sat down, trying to ignore the anxious looks of nearby passengers. "I'm sure we did," I replied. "Two men of color, meeting at a transfer point, and carrying relatively little luggage. I read that this sort of thing happens all the time."[12]

"At least they were polite and didn't cause us to miss our flight," Rodrigo said. "They probably let us off easy because of all the law review articles they found in the bags—that and your speech. Scarcely a drug dealer's or a terrorist's paraphernalia."

"A good story for Giannina," I remarked.

"I'm going to call her as soon as I get to the hotel," Rodrigo replied.

"Give her my best," I said.

A. RADICAL MULTICULTURALISM AND THE ASSAULT ON TRUTH

We buckled up. After the flight attendant finished the safety demonstration, I asked Rodrigo what he thought of the Farber and Sherry book.

"I found it thought-provoking," Rodrigo began, "even if it didn't treat our side very gently. Building on previous articles in the California and Stanford law reviews, the book takes issue with race-crit scholarship, particularly narrative analysis or legal storytelling.[13] The authors also part company with radical feminism.[14] But Critical Race Theory seems to be their main target."

"That was my impression also," I said. "They accuse us, and MacKinnon, of cultural relativism[15] and writing as though truth does not matter.[16] According to them, we play fast and loose with such cherished concepts as merit, the rule of law,[17] and Western rationalism.[18] Lacking in common sense and respect for knowledge, we are part of what they call 'the sleep of Reason.'[19] All this they illustrate through a string of provocative-sounding quotations, divorced from context and calculated to make major critical writers sound like extremists."[20]

"I noticed that, too," Rodrigo replied. "Although, unlike some of our detractors, they at least get the quotes right. And also, unlike some of the others, they do try to substantiate most of the charges they level. They point out, for example, that we emphasize the role of history and context in evaluating whether legal rules are fair,[21] which we do, although I don't see how it follows

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12. *See, e.g.*, Larry BIeiberg, *Profiling Latest Weapon in Airline Security Arsenal*, PITTSBURGH POST-GAZETTE, Mar. 2, 1977, at F5.

13. *See* FARBER & SHERRY, *supra* note 5, at 11-17, 38-40, 88-94, 122-23, 146. For a somewhat more balanced treatment of race scholarship, see Charles Abernathy, *Advocacy Scholarship and Affirmative Action*, 86 GEO. L.J. 177 (1997) (book review).

14. *See* FARBER & SHERRY, *supra* note 5, at 23-26, 39-43, 82-83, 128, 142.

15. *See, e.g., id.* at 7, 23-29, 36, 39, 142.

16. *See, e.g., id.* at 23-33.

17. *See id.* at 18-21, 27-37.

18. *See id.* at 3, 6, 25-29, 34, 37-39, 48.

19. *Id.* at 3-4.

20. *See, e.g., id.* at 32.

21. *See id.* at 23-27, 32-34, 36-40, 47-51.

that we are cultural relativists who reject all truth whatsoever. They also note how we weave stories and narratives into our scholarship—"[22]

"Which, of course, mainstream figures like Lon Fuller and Norval Morris have been doing for years,"[23] I interjected.

"Indeed," Rodrigo acknowledged. "They even accuse two crits of attempting to overturn the foundations of American legal thought merely because they point out how conventional bibliographic categories and indexing systems are slow to change and incorporate new terms like indeterminacy, postmodernism, interest convergences, and even consumer protection."[24]

"I should have thought anyone would acknowledge that," I quipped. "You should see how the Index to Legal Periodicals classified my latest article."

"That article, at least, developed a rational argument, with examples and reasons. But Farber and Sherry—others, too[25]—say that much of our attack on the legal order is therapeutic. We supposedly focus too much on feelings and motivations, personal or unconscious things lying beneath the surface of social discourse, like standpoint, perspective, and the invisible sort of self-interest that can tip an argument.[26] All this supposedly goes against the Enlightenment tradition of rational argument, in which the speaker or writer lays all his or her cards out on the table and doesn't spend much time analyzing why the other side plays its hand the way it does."[27]

"Good gamblers have always done just that," I mused. "Slaves, too. Hegel pointed out that dominated people tend to be better observers of their masters than the latter are of them.[28] They have to, since the master's moods, habits, and ways of operation could spell the difference between survival and death. But the slave-owner does not need to know much about what is going on in the slave's mind, much less his unconscious, since the owner can rely on force to make the slave do his bidding."[29]

"Exactly," Rodrigo replied. "No conservative seems to waste much time analyzing minority culture or ways of knowing. Except, of course, when a few law professors start to write in a different voice, and to win readers."

"Or advocate controls on hate speech and pornography," I interjected. "Then they are ready to attribute base motives to us."[30]

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22. *See id.* at 25-26, 31, 37-40, 55-56, 75-77.

23. *See* Lon Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949); Norval Morris, *The Tropical Bedroom*, 57 U. CHI. L. REV. 773 (1990).

24. *See* FARBER & SHERRY, *supra* note 5, at 26-29 (criticizing Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories? Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989)).

25. *See, e.g.*, Henry L. Gates, *Let Them Talk*, NEW REPUBLIC, Sept. 20-27, 1993, at 37.

26. *See* FARBER & SHERRY, *supra* note 5, at 6, 12, 14, 29, 34-48.

27. *See id.* at 12, 34-48, 95-116.

28. *See* GEORGE W.F. HEGEL, THE PHENOMENOLOGY OF MIND 229-40 (J.B. Baillie trans., 1967) (1807); *see also* JAMES BALDWIN, THE PRICE OF THE TICKET 554 (1985); STANLEY ROSEN, G.W.F. HEGEL 162-64 (1974).

29. *See* HEGEL, *supra* note 28, at 229, 235-40; BALDWIN, *supra* note 28, at 554.

30. *See, e.g.*, Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 218 (1996) (charging proponents of hate-speech regulation with censorship, paranoia, and reluctance to engage in robust give-and-take).

"Or ignorance," Rodrigo agreed. "Farber and Sherry, for example, write that our willingness to entertain limitations on face-to-face racial slurs and name-calling on campus shows disdain for Enlightenment values and rational discourse.[31] We supposedly ignore that free speech has been a huge benefit for minorities. If we know our own self-interest, we would not be attempting to bridle speech."[32]

"I found that accusation to be more than slightly odd," I said. "Oh, here we go." We were silent for a moment as the plane began gathering speed for the take-off. We watched the ground rush past as the plane lifted, banked slightly, and ascended smoothly into the sky, clouds rushing past. The pilot's voice came on to announce our destination and estimated time of arrival. We loosened our safety belts slightly. I continued:

"But if I recall, Farber and Sherry also find fault with us for a second reason, namely the way we incorporate stories and narratives into our scholarship.[33] Do you think this is part of their critique of us as cultural relativists?"

"I think it is," Rodrigo replied. "They don't reject narrative scholarship entirely, just the kind that they think plays on emotions and that deforms an ambiguous reality so that it has only one interpretation.[34] These and other defects they lay at the doorstep of some of the most noted narrativists, such as Derrick Bell and Patricia Williams, especially the latter for her famous Benetton buzzer story.[35] These first-person narratives, they say, are troublesome as legal scholarship because the reader cannot apply the ordinary criteria of legal scholarship to them. One cannot be sure a story such as Williams's is authentic, typical, and true.[36] Indeed, they offer evidence that minority tales, such as the ubiquity of racism, are not typical or true. In particular, they say minorities have better chances than Euro-American white males of getting jobs as law professors."[37]

"That would surprise me, if it were true," I said.[38]

"But my point is that it's hardly typical," Rodrigo replied. "No reasonable person could think that applicants of color have a better chance of winning a job, or a promotion, than similarly credentialed whites, everywhere and at all times."[39]

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31. *See* FARBER & SHERRY, *supra* note 5, at 40-45, 122, 126, 141.

32. *See id.* at 45, 141-42.

33. *See id.* at 12, 31, 37-40, 78-99, 86-94, 111-17, 122-33.

34. *See id.* at 38-40, 72-90, 96-117.

35. *See id.* at 85-86, 98-99 (discussing incident in which Williams, an African-American female law professor, was denied entry to a New York boutique where she wanted to buy a Christmas present for her mother).

36. *See id.* at 76-84, 88-117.

37. *See id.* at 55-56, 76-78.

38. On career prospects of legal scholars of color, see generally Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989); Deborah J. Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law School Hiring*, 97 COLUM. L. REV. 199 (1997).

39. On studies of "testers," as alike as possible except for race, who set out to rent apartments, buy cars, and apply for jobs, see Katharine O. Seelye, *Undercover "Testers" Target Bias in Hiring*, DENVER POST, Dec. 7, 1997, at A27.

B. ANTISEMITISM IN THE CRIT CAMP?

"I agree," I said. "But the relativism charge is only one of many they level at us. Another is that our critique of merit is potentially antisemitic and anti-Asian."[40]

"Supposedly by calling into question conventional criteria such as IQ tests and the LSAT, we are disparaging Jews and Asians, who have achieved well on those and other measures.[41] If we take away merit, that leaves no explanation, other than unsavory theories such as Asian mimicry or Jewish pushiness, for the success those groups have enjoyed,"[42] Rodrigo said.

"A curious charge, since I don't know anyone in the crit camp who would say those things," I said. "Farber and Sherry put words in our mouths, then take us to task for what they think we must be saying."

"Even Judge Richard Posner, in an otherwise gushing review in *The New Republic*, thinks they went too far.[43] The essence of antisemitism, he writes, is preoccupation with Jews, something the crits are not guilty of.[44] Of course, he pretty much agrees with everything else Farber and Sherry said."

"And goes on to deliver a few zingers of his own,"[45] I added. "Our side has certainly been coming in for criticism these days. After a honeymoon period, in which the press was notably generous toward the fledgling movement,[46] Critical Race Theory has been taking some hard knocks. Some of this criticism seems principled. But some strikes me as mean-spirited or unfair. Some critics rely on selective quotation, as you mentioned. Others choose one example of what they consider bad scholarship, such as the Benetton story—which I don't think is bad scholarship, by the way—and attribute it to the entire movement.[47] Posner, for example, criticizes the author of *The Imperial Scholar* for trying to usher white liberals out of the civil rights movement, and then goes on to declare that the author of that article, a Chicano, is white and has no business writing about the poor community and people of color.[48] Talk about a double bind!"

II. IN WHICH RODRIGO AND I EXPLORE THE ETIQUETTE OF RACIAL CONVERSATION: THE IMPERIAL SCHOLAR AND BEYOND

We paused for the flight attendant to take our beverage orders. "Orange juice

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40. *See* FARBER & SHERRY, *supra* note 5, at 52-71.

41. *See id.* at 53-54, 57-58.

42. *See id.* at 59-67.

43. Richard A. Posner, *Beyond All Reason*, NEW REPUBLIC, Oct. 13, 1997, at 40 (book review).

44. *Id.* at 42.

45. For example, Posner states that the movement is marked by a rational fringe and a lunatic core; grasp of social reality is weak; diagnoses are inaccurate; suggested cures are "tried and true failures." *Id.* at 40-43.

46. *See, e.g.*, Stephanie Goldberg, *The Law, A New Theory Holds, Has a White Voice*, N.Y. TIMES, July 17, 1992, at A3 (praising new movement as adding an intriguing new dimension to legal discourse).

47. *See* FARBER & SHERRY, *supra* note 5, at 85, 98-99.

48. *See* Posner, *supra* note 43, at 42-43.

for me," I said. "Coffee for me, cream and sugar," replied my young companion. He then continued as follows:

"It seems to me, Professor, that just as Farber and Sherry, Ed Rubin,[49] Mary Coombs,[50] and others feel free to lay down rules for our side, we should be able to propose our own versions, especially when some of our critics, like Farber, Sherry, and Posner, take liberties themselves."

Rodrigo paused, took a sip of his coffee, and grimaced slightly.

"Bad?" I asked sympathetically.

Rodrigo nodded. "I'm not used to the mass-produced variety. I'm afraid I got addicted to espresso overseas, where it is practically the national drink."

"I miss good coffee," I said. "But I've had to lay off—doctor's orders. But back to what you were saying. I agree. It should be tit for tat. The rules should be subject to negotiation. If it's fair for one side to call the other to task for being overly rhetorical or playing fast-and-loose with statistics, why shouldn't the other have a say when it believes the first is being unfair? If it's open season on crits, we should at least insist that those taking pot shots at us obtain a license and obey the hunting rules."

When Rodrigo nodded vigorously, I looked at him encouragingly and asked, "And what might those be? I imagine you have given this some thought."

A. RODRIGO PROPOUNDS AN OVERALL THEORY FOR RACIAL DISCOURSE

"I have. Giannina and I were talking about this the other day after her study group broke up.[51] They had been meeting in our apartment, and one of them asked if we had read a certain article by Stephen Gey on hate-speech regulation.[52] It just came out in the *Pennsylvania Law Review*, where Giannina's fellow student had read it for a legal writing assignment. Later, Giannina and I discussed the article, which I found to be long, detailed, and fairly contentious. The author trots out some of the standard objections to hate-speech regulation, but goes on to attribute paranoia, fear, cowardice, and other not-so-nice qualities to writers like Mari Matsuda and Charles Lawrence, who are merely trying to make campuses safer for undergraduates of color."[53]

"And you say this suggested a theory of racial discourse?" I prompted.

"It did," Rodrigo replied. "It occurred to me that the law reviews are sort of adjuncts to the courts, and so are ideally suited to serve as a testing ground for new theories and criticism."

"We've certainly seen evidence of the criticism part," I replied. "But go on."

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49. *See* Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992).

50. *See* Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992).

51. A second-year law student, Giannina has just completed a summer internship at a women's litigation center. *See* Delgado, *Rodrigo's Bookbag*, *supra* note 1.

52. *See generally* Gey, *supra* note 30.

53. *Id.* at 196, 218, 231.

"Well, as with structural analysis of statutes and the Constitution,[54] this view suggests certain features for law review discourse. Giannina and I were talking of this after her group left."

"Yes, yes," I said, impatiently. But before Rodrigo could continue, another flight attendant materialized at our row, pushing a heavy rolling cart. "Would you gentlemen like some lunch?"

"What are we having?" I asked, while Rodrigo eagerly put down his tray. I regretted not having asked for my usual vegetarian meal when making my reservation.

"You have your choice of lasagna primavera or a cheeseburger," the attendant said. I delightedly ordered the lasagna, while my omnivorous friend opted for the cheeseburger. ("And more coffee, please."). The attendant put down our trays, after which we silently ate for a few minutes.

"How's your burger?"

"Great," replied my ebullient companion. "After the coffee, I feared the worst. But this is actually quite good. Would you like a bite?"

"No. I'm trying to cut down on red meat. But you were going to tell me your theory of racial discourse. You started by mentioning that the law reviews are testing grounds for new theories, which would imply relatively wide latitude in what is said and, presumably, how one goes about saying it. What follows from that, in your opinion?"

Taking one last bite of his burger and wiping his lips, Rodrigo said, "Despite the wide latitude—or perhaps because of it—certain maneuvers ought to be avoided. Just as when men and women engage in conversation, men have to be careful not to dominate, similar rules should apply when people talk about race."[55]

"A sort of racial etiquette," I observed. "Now I'm extremely interested. That article you mentioned earlier, *The Imperial Scholar*,[56] addressed one aspect of racial conversation. It proved controversial at the time, although now its advice seems almost commonplace.[57] And, in a way, the author's suggestion, that the white giants who were then dominating racial discourse back off a bit and allow new scholars of color who were springing up to show their stuff, is a kind of rule of conversational etiquette. It says, in effect, that when you are having a conversation, look around you and see who has been speaking. If too many people of one sort are not talking, shut up for a while or try to draw them into the conversation.[58] And do you think other rules of this sort are in order?"

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54. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 317 (2d ed. 1989) (proposing that structures of constitutional decisionmaking be "matched with substantive human ends").

55. On male-female conversation and its pitfalls, see DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION (1990).

56. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

57. *See, e.g.*, Richard Delgado, *How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992).

58. *See* Delgado, *supra* note 56, at 577; *see also* Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (or other-Isms)*, 1991 DUKE L.J. 397, 400.

"I do," Rodrigo replied. "The author of that early article drew an analogy to the doctrine of standing, according to which litigants who are most immediately affected by a controversy—because their interests are at stake—ought to be the ones who bring cases springing out of it.[59] But I think other rules of procedure might be tapped as well. This is where Giannina and I had to stop. Our landlord called saying he had to have an electrician in to check the wiring, and we got distracted. We're getting a new air conditioner."

"A metaphor for all of life," I said, smiling. "Sometimes we have to check up to see that an old system, like the one we use to guide discussion in the law reviews and our professional literature, is working well, not short-circuiting, or causing a risk of overheating."

Rodrigo grinned at my corny analogy, and, draining his coffee cup, continued as follows:

"I think the rules for law review discourse can tap insights and doctrines we have developed in other areas, such as pleading and constitutional adjudication."

"I'm not sure what you mean," I said. "Do you mean that every law review writer should be required to adhere to rules of evidence, discovery, burdens of proof, and things like that?"

"Not in every detail," Rodrigo replied. "But a lawsuit is in some respects a kind of conversation.[60] Two parties put forward their own stories of what happened and what law should be applied.[61] The legal system has devised rules about how that conversation should take place, including not speaking at the same time, answering contentions directly and in numbered paragraphs, not suing unless you have a stake in the litigation, and so on."[62]

"And so one rule would be the one you just mentioned," I said. "That one ought to have standing, in the sense of having a direct stake in the controversy.[63] That would mean that minorities would have a special stake in civil rights discourse.[64] At least their views should be treated respectfully and not dismissed outright."

"Some of our critics seem unaware of this rule," Rodrigo replied. "For

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59. *See* Delgado, *supra* note 56, at 567 (arguing that scholars of color ought to be heeded in civil rights discourse as the ones most immediately concerned with resolution of problems of race).

60. *See* JAMES B. WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 100, 141 (1990) (opinion-writing as conversation); James B. White, IMAGINING THE LAW, *in* THE RHETORIC OF LAW 29, 38 (Austin Sarat & Thomas R. Kearns eds., 1994) (law as a type of conversation among "a set of speakers and actors"); *see also* JAMES T. FARREL, DIALOGUE ON JOHN DEWEY 58 (Corliss Lamont ed., 1959) ("democracy begins in conversation"); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (containing articles on narrative analysis and legal discourses, or storytelling) [hereinafter *Symposium*].

61. *See* Richard Delgado, *Legal Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH L. REV. 2411, 2418-35 (1989) (recounting five stories of one legal event).

62. On the rules governing the pleading of complaints and defenses, see FED. R. CIV. P. 8. On those governing standing to sue, see TRIBE, *supra* note 54, at 108.

63. *See* TRIBE, *supra* note 54, at 108-09.

64. *See* Delgado, *supra* note 56, at 564-71.

example, Richard Posner both invoked and transgressed it in the space of a short review essay.[65] Farber and Sherry come perilously close in practically making a career out of minority-bashing.[66] Maybe that's too harsh—I should say, out of pestering and scolding a group of scholars that is merely trying to work for racial justice. Toward the end of their book, they engage in a little imperial scholarship of their own, when they attempt to draw a hierarchy between responsible and lunatic-fringe race-crits.[67] Some of your and my best friends fall in the loony group, although others receive their grace."

"An odd distinction," I said. "Not to mention presumptuous. But you mentioned rules in addition to standing."

B. RODRIGO DEVELOPS PRUDENTIAL RULES, BASED ON PUBLIC ADJUDICATION

"I did. Just as public adjudication limits standing to those who can show an injury in fact, courts have developed a host of nonconstitutional doctrines that, while not strictly compelled by the Constitution, apply as counsels of prudence."[68]

"And you think that these suggest principles for scholarly discourse on racial justice?" I asked.

"Yes. Consider, for example, the rule that litigants must present a live case and controversy, rather than some abstract question.[69] This would counsel against work like that of a recent scholar who wrote critically of hate-speech controls and their proponents.[70] The author lays out, in highly abbreviated form, his conviction that hate-speech controls violate the First Amendment. He then proceeds to analyze, over the course of dozens of pages, why, as examples of what he calls "substantive equality," hate-speech rules, on a college campus for example, offend our libertarian sensibilities."[71]

"But the debate over hate speech has little to do with the one over the various forms of equality," I offered.

"Of course," Rodrigo replied. "And a system of hate-speech controls might

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65. Posner, *supra* note 43, at 41–42 (rejecting argument by Delgado that white scholars dominating civil rights discourse begin moving on to other fields, but also questioning Delgado's standing to engage in civil rights writing because he is supposedly white).

66. *See supra* notes 5-6 and accompanying text; *see also* Daniel A. Farber & Susanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (criticizing outsider scholarship); Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L. REV. 893 (1994) (taking issue with both sides of affirmative action controversy and charging crits with overstatement); Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453 (1996) (critical scholarship nihilistic and unable to distinguish knowledge from superstition); Dimitri Yurasov, *Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994) (further assaulting critical scholarship).

67. *See* FARBER & SHERRY, *supra* note 5, at 140-42.

68. On these prudential doctrines and their role in constitutional and public adjudication, see TRIBE, *supra* note 54, at 108-55.

69. *See id.* at 67-69, 107-11.

70. *See* Gary Goodpaster, *Equality and Free Speech: The Case Against Substantive Equality*, 82 IOWA L. REV. 645 (1997).

71. *See id.* at 660.

equally be seen as promoting process as outcome, or substantive, equality.[72] That other debate simply is not in the minds of most hate-speech theorists like Matsuda or Lawrence."[73]

"So the critic you mentioned violates the rule dealing with cases and controversies. Maybe the one against ripeness, as well."[74]

"Precisely," Rodrigo replied. "He speculates what our side *might*, or *must*, be saying, rather than asking us—or better yet, waiting until we say something on the subject. It's like the straw man argument in ordinary discourse. The author speculates or assumes that the other speaker must be saying something indefensible, and demolishes it, even though the other speaker may not be saying that at all."

"Do you think Farber and Sherry are guilty of that?" I asked.

"Yes, although some of the other critics are worse. But Farber and Sherry do commit this mistake when they accuse us of latent antisemitism because we critique conventional standards of merit that have served Jews well."[75]

"That's a big leap," I replied. "Jews might do well under any revised system of merit, including one that *is* fair to minorities."[76]

"None of us implied in the least that they would not," Rodrigo agreed. "What's more, Farber and Sherry transgress the rule regarding cases and controversies when they say we have no explanation for Jewish success.[77] That's true, only because we don't need one. Most people of color very much want to be allies with Jews in the struggle for civil rights.[78] But to require that Latinos and blacks have at the ready a complete explanation for the wholly

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72. For the view that hate-speech controls permit minorities to participate more actively in social dialog than they might otherwise feel free to do, and thus promote more speech, see RICHARD DELGADO ET AL., WORDS THAT WOUND (1993) (containing four essays arguing that hate-speech controls are constitutionally valid, and vital to democratic decisionmaking.)

73. Charles Lawrence and Mari Matsuda have written broadly about hate speech. *See id.* at 42; *see also* Charles R. Lawrence, III, *If He Hollers, Let Him Go: Regulating Hate Speech on Campus*, 1990 DUKE L.J. 431 (arguing that the distinction between face-to-face racial insults and other fighting words is false and that civil libertarians fail to take into account other constitutional rights when considering free speech); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH L. REV. 2320 (1989) (considering both the victims' view of racist hate messages and the First Amendment). However, they have written little, if anything, about equality theory in Goodpaster's sense.

74. On ripeness, see TRIBE, *supra* note 54, at 77-82. Ripeness is the rule against adjudicating a case when a prospective examination suggests future events may alter its makeup so fundamentally that a later decision may be more apt. *See id.* at 77.

75. *See* FARBER & SHERRY, *supra* note 5, at 9-11, 52-71.

76. For example, a revised system might decrease reliance on the SAT and other standardized testing, emphasizing instead evidence of leadership ability, originality of mind, and entrepreneurial skills. In all these measures, Jews might prove to be as much above average as they are now, under conventional criteria.

77. *See* FARBER & SHERRY, *supra* note 5, at 10, 59-67.

78. On this historic alliance, see JACK GREENBERG, CRUSADERS IN THE COURT: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994); *see also* Jack Greenberg, *A Crusader in the Court: Comments on the Civil Rights Movement*, 63 UMKC L. REV. 207, 218 (1994) (noting that racially restrictive covenants on property were also imposed on Jews).

commendable success some Jews have enjoyed in education and the professions, as a price for coalition, seems odd. Minorities want Jews' help precisely because we need their brains and energy. To accuse us of harboring unspoken thoughts about Jews' ill-gotten gains is unfair. If a minority leader like Farrakhan expresses such thoughts, the criticism can be leveled at him.[79] But to impute such ideas to all of us simply because we want fairer promotion standards at work is to place words in the mouths of people who show no inclination whatsoever for speaking them."

The co-pilot's voice came on telling us to expect choppy air. After tightening our seat belts, I asked Rodrigo: "But you mentioned other prudential rules. What were they?"

"A third rule that I think applies, again by way of analogy, to racial discourse is the rule against mootness,[80] which counsels against dredging up disputes that have already ended and are unlikely to recur. In scholarly discourse, this would counsel that one who critiques another's work look for the latest, and most complete, expression of it—not an earlier version that that author might have abandoned."

"Or refined," I added. "Most writers I know elaborate a thesis in an early article, then develop it in later ones. That's true of leading work on hate speech,[81] interest convergence,[82] narrative theory,[83] and a host of critical race themes."[84]

"Some of our critics do appear to violate that rule," Rodrigo added. "The author we mentioned earlier, who approached hate speech by means of his

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79. *See, e.g.*, Norimitsu Onishi, *Again Farrakahn Rallies Faithful*, N.Y. TIMES, Aug. 13, 1997, at B3.

80. *See* TRIBE, *supra* note 54, at 82-93. The rule against mootness provides that a case is moot, and hence nonjusticiable, unless the one mounting a challenge confronts harm or a significant prospect of it in the future. *See id.*

81. *See, e.g.*, Richard Delgado, *Words that Wound: A Tort Action for Racial Slurs, Epithets, and Name-Calling*, HARV. C.R.-C.L. L. REV. 133 (1982); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) [hereinafter *Narratives in Collision*]; RICHARD DELGADO ET AL., WORDS THAT WOUND (1993); Richard Delgado & Jean Stefancic, Hateful *Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, 82 CAL. L. REV. 851 (1994); Richard Delgado & David Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871 (1994); Richard Delgado & David Yun, *The Neoconservative Case against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807 (1994); RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT (1997).

82. *See, e.g.*, Derrick Bell, Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

83. For example, many of the authors in the pathbreaking symposium on legal storytelling, *see Symposium*, *supra* note 60 have gone on to compose further articles or books on the narrative or storytelling function. *See, e.g.*, RICHARD DELGADO, THE RODRIGO CHRONICLES (1995); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

84. For a sampling of this corpus, illustrating the above mentioned developmental trend, see CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

favorite philosophical category, picked on one or two ten- or fifteen-year old articles by prominent hate-speech writers, ignoring the more recent and sophisticated versions those same authors have put forth in the law review literature."[85]

"Farber and Sherry do something like that, too, when, toward the end of their otherwise dispassionate book, they set out what they consider to be dominant 'stock stories' of the crits.[86] They either haven't been reading very carefully or else have stopped after reading our very early stuff, for many of these stories have not been heard in critical circles for years, if not decades. Some are more characteristic of liberalism."[87]

"I noticed that, too," Rodrigo said. "For example, they say that critical race theorists essentialize, drawing conclusions from the black experience[88] when the population of color in the United States today is almost equally split between blacks and nonblacks. If we ever did that, we are most emphatically not guilty of it today. Lat-Crits, Asian-American scholars, and gay and lesbian activists within Critical Race Theory have been developing their own theories under the CRT umbrella, while still maintaining friendly relations with blacks.[89] Anti-essentialism was identified as a key theme within Critical Race discourse as early as Angela Harris's article.[90] The first CRT bibliography, published in the *Virginia Law Review* nearly a decade ago,[91] listed it as one of the movement's principal themes. Farber and Sherry stray, as well, when they assert a simplistic, additive model of intersectionality according to which a black woman, for example, must be doubly disadvantaged because of her status as an African-American and a woman.[92] None of us says this today. Even the early articles on intersectionality expressly disavow this model."[93]

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85. *See, e.g.*, Goodpaster, *supra* note 70, at 650 (discussing a handful of early articles by hate-speech scholars, but ignoring more recent works, including books).

86. *See* FARBER & SHERRY, *supra* note 5, at 12, 129-31.

87. For their critique of these scholars as proponents of multiculturalism, see *supra* notes 6, 11-43 and accompanying text, or wrapped up in feelings, see *supra* notes 25-26; 34–35 and accompanying text, when many if not most crits today are nationalists and concerned more with material determinism than feel-good philosophy.

88. *See* FARBER & SHERRY, *supra* note 5, at 129.

89. *See, e.g.*, Robert S. Chang, *Toward an Asian-American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1266-67 (1993) (explaining that although Critical Race scholarship understands the importance of racial differences, it has not fully developed the complex racial paradigm in the United States); Jean Stefancic, *Latino/a Critical Scholarship: An Annotated Bibliography*, CAL. L. REV. (forthcoming 1998) (discussing trends in recent Latino scholarship written from a critical perspectives); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 358 (1995) (discussing the need for racial harmony within the gay culture and in gay legal theory).

90. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

91. *See* Delgado & Stefancic, *supra* note 84.

92. *See* FARBER & SHERRY, *supra* note 5, at 129-30.

93. *See* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 372 (explaining similarities and differences between racial and gender bias);

"So you're saying that some of our critics—and maybe even some people on our side—make the mistake of relying on old sources, of dealing with issues that are, as you put it, moot, superseded by later work. But what about the doctrine of no-collusive suits?[94] Do you think that has any application? It seems to me that it's related to the other prudential rules you've been discussing."

Rodrigo paused as the flight attendant came by to ask if we would like refills of coffee. Rodrigo nodded vigorously, reminding him that he liked extra sugar. I wondered if Rodrigo ever sleeps. I asked for a cup of tea, after which Rodrigo continued as follows:

"I was thinking about that rule just now. The idea behind it is similar to that which underlies the rule against advisory opinions. Courts don't want to hear cases that lack an adversarial character because the parties are basically on the same side—that is, trying to accomplish the same thing.[95] In legal scholarship, this would correspond to an author's writing an article that lavishly praised someone from the same camp."

"For example, to gain tenure or curry favor with a more senior scholar,"[96] I said.

"Or to solidify a friend's reputation."[97]

"Which the average reader might not be aware of," Rodrigo added. "Posner's gushing book review of the Farber and Sherry book comes to mind."[98]

"Although I don't know that there's anything wrong with writing a favorable review, per se, even for someone who is on your side, so long as you disclose that somewhere," I said. "Posner doesn't. But more important, he sneaks in several barbs of his own, even more vituperative and mean-spirited than the ones Farber and Sherry aim our way."[99]

"That does sound a little collusive," Rodrigo agreed. "Although he might reply that he was going to use them anyway, and just took advantage of this occasion to do so. But I agree his essay is collusive in the sense that he professes to be reviewing the Farber-Sherry book, but really is reviewing us."

"And he doesn't disclose that, so that his readers can judge for themselves," Rodrigo concluded. "But, speaking of smuggling in one's point of view, did you notice how another reviewer, Jeffrey Rosen, accused one of us of something similar?"[100]

Harris, *supra* note 90, at 588 (discussing the danger of separating the women's experience from other facets of experience like race, class, and sexual orientation).

94. *See* TRIBE, *supra* note 54, at 93-95.

95. *See id.* at 93.

96. *See* ARTHUR AUSTIN, THE EMPIRE STRIKES BACK (forthcoming NYU Press 1998) (accusing critical race scholars and feminists of cozy, in group citation practices—a form of reverse-imperial scholarship—themselves).

97. *See id.* (accusing crits of lavishly praising each other).

98. *See* Posner, *supra* note 43.

99. *See id.* at 42 (critical race theorists are poor role models); *id.* at 43 (grasp of social reality is weak); *id.* (their lodgment in the law school is a disgrace to legal education).

100. *See* Jeffrey Rosen, *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, NEW REPUBLIC, Dec. 9, 1996, at 27 (book review).

"Do you mean in his *New Republic* review essay?"

"The very same," Rodrigo replied. "One of his charges was that critical race theorists like Bell, Williams, and Delgado, who sometimes write in the narrative vein, elaborated theories of law as storytelling that the O.J. Simpson Dream Team appropriated in their successful defense of Simpson.[101] In his view, Johnny Cochran 'unwittingly embrace[d] the critical race theorists' term,'[102] and was thus a virtual puppet of those academics who pulled the strings in the trial."

"I thought it one of his strangest observations. Cochran was a highly successful defense attorney long before Critical Race Theory arrived on the scene. To say that we colluded with him, or he with us, to do what defense attorneys have long been doing, namely, framing theories of a case that weave facts and law to the benefit of their client,[103] is preposterous. And to say that Cochran did all this unwittingly gives him too little credit. It also overlooks that he had different motives and methods for telling his client's story from those of the Critical Race Theory writers when they tell stories and chronicles. Finding collusion where none exists, Rosen uses the supposed fact of that collusion to discredit an entire school of civil rights scholarship. Look—this is where it can lead, he says."[104]

C. RODRIGO AND THE PROFESSOR DISCUSS PROCEDURAL AND EVIDENTIARY DOCTRINES THAT CAN SERVE, BY ANALOGY, AS GUIDELINES FOR DISCUSSIONS OF CONTROVERSIAL SUBJECTS LIKE RACE

We stopped to help the flight attendant gather our empty plates and cups. Then, I asked Rodrigo:

"I think you said some nonconstitutional doctrines, as well, offer insights for racial discussions?"

"I did," Rodrigo replied. "I'm pretty much fresh out of the macro-prudential ones that have overtones of constitutionalism and Article III power or the prudent ways to exercise or decline it. But Giannina and I were starting to name some nonconstitutional doctrines and rules. Would you like to hear some?"

"I'm all ears."

"These, too, apply by way of analogy. But like the ones we just discussed, I think they can supply guideposts for how we talk to each other in the academy. Courts and legislatures have devised a panoply of rules having to do with how arguments and evidence are presented. Although many promote values other than civility and the orderly consideration of issues—values such as economy and efficiency—they also are designed to serve interests one should be con-

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101. *See id.* at 34.

102. *Id.* at 36.

103. *See* Anthony V. Alfieri, *Stances*, 77 CORNELL L. REV. 1233 (1992) (analyzing modern lawyer-client discourse).

104. *See* Rosen, *supra* note 100, at 34 ("[t]he Simpson case is something of an embarrassment for critical race theorists. . . . Yet it is also . . . a vindication for them.").

cerned about when scholars wrangle. One such group of rules discourages the dismissal of claims, especially novel ones, prematurely and without adequate consideration."

"Hmmm," I said. "I haven't taught civil procedure since my very early days as a law professor. But I do remember the rule against granting summary judgment[105] unless it appears to a legal certainty that the party against whom the motion is made cannot possible prevail. And then, there are the rules disfavoring motions for a more definite statement[106] and against granting a demurrer or motion to dismiss for failure to state a claim,[107] except when it appears that the plaintiff cannot state any ground on which relief can be granted. What's more, the right to amend should be liberally granted when the plaintiff has such a motion granted against him or her."[108]

Rodrigo brightened. "Those were almost exactly the ones Giannina and I were discussing. You must have read our minds."

"You mustn't assume we old-timers don't know anything," I said, a little archly. "Just because we can't talk high Crit-talk or cite the latest Europeans, it doesn't follow that we don't know a little doctrine here and there."

"I wasn't implying that," Rodrigo said, blushing slightly. "You really know your stuff. I just meant that those are the rules anyone would come up with who was looking for analogous authority for not showing the door too quickly to someone, like a crit, who is putting forward a new theory."

"And do you think our detractors do that?" I asked.

"Stephen Gey and others do, in my opinion, when they reject our arguments for bridling hate speech on the basis of traditional First Amendment doctrine, ignoring that the controversy presents a host of issues dealing with equality and equal treatment and thus requires a balancing of interests.[109] Their argument is similar to a demurrer. Look how poorly hate-speech rules fare when judged by the one standard, they say, as though that were the only possible one. Of course, when you add human dignity interests, you get a different equation.[110] As with a demurrer, dismissal should not be granted because a claim can be made based on these other interests and values."

"What about Farber and Sherry?" I asked.

"They generally are more careful not to dismiss us merely because we deviate in some respects from the old paradigm. But they do fall into the trap of applying the old way of judging to the newcomers, whose ideas are aimed at changing, not functioning within, the old paradigms. They do this, in my

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105. See FED. R. CIV. P. 56.

106. *See id.* at 12(e).

107. *See id.* at 12(b)(6).

108. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 303-04 (2d ed. 1993).

109. *See* Delgado, *Narratives in Collision*, *supra* note 81, at 345-48 (pointing out that the hate-speech controversy can be seen, depending on one's perspective, as centering around equality or free speech).

110. *See id.* at 375.

opinion, with their critique of positionality and context."[111]

"Do you mean the way they dismiss these approaches as departures from the rule of law and from reliance on what they call 'Reason'?"[112] I asked.

"That and more," Rodrigo replied. "Crits and radical feminists are asserting that conventional legal discourse contains encoded in its very terms and ways of addressing questions white male supremacy, so that reform cannot occur without altering the basic structures and premises of legal argument, such as the reasonable man standard or the concept of color-blindness.[113] This strikes Farber and Sherry as going to the very heart of the way law does things—as though this way could not, and will not, ever change.[114] They come close to saying, 'This is law; work within this system or you will be saying things that cannot be heard, that don't register.' But, of course, some very basic principles of law *have* changed. Not so long ago, women and unpropertied men were not entitled to vote,[115] and courts were saying that separate can be equal in pupil assignment rules or railroad car seating.[116] At one time blacks were persons whom the law need not respect.[117] Today, they are. The same might happen to seemingly bedrock principles of antidiscrimination law, such as the colorblind maxim, the rule requiring intent as proof of discrimination, and other premises of the liberal state."

"Deployment of demurrer-like arguments with new scholarly movements begs the question," I summarized. "It's like saying, what you are urging is new, so we needn't listen to it just because of that."

"Exactly," said Rodrigo. "The same is true of Rule 11,[118] which provides for sanctions for frivolous claims or ones not based on a good-faith investigation by the attorney into the relevant facts and theories."

"Many have pointed out how the rule can easily discourage law-reform cases and cases that judges may disfavor, such as civil rights.[119] Most now agree that the rule should be used carefully, so as not to discourage innovation."[120]

"That would counsel that writers like Posner be careful about calling an entire school of scholarship loony[121] merely because he has not heard about it before. It would also argue against that style of refutation that merely offers a

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111. *See* FARBER & SHERRY, *supra* note 5, at 23-32, 95-116.

112. *See id.* at 4-5, 95-137.

113. For criticism of these doctrines, see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

114. *See* FARBER & SHERRY, *supra* note 5, at 4-5, 25, 27-32.

115. *See* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 176-287 (3d ed. 1992).

116. *See id.* at 39-44; *see also* Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (holding that segregation of the races into separate railroad cars did not violate Fourteenth Amendment).

117. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1856).

118. FED. R. CIV. P. 11.

119. *See, e.g.*, Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105 (1991); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200-01 (1988).

120. *See, e.g.*, Tobias, *supra* note 119, at 126.

121. *See* Posner, *supra* note 43, at 40 ("Radical legal egalitarianism is distinguished by having a rational fringe and a lunatic core.").

string of snippets, taken out of context, without the supporting argument and evidence the other scholar marshaled for his or her conclusion."[122]

"As Posner, Gey, and even Farber and Sherry do," I added.[123]

"Rosen, as well," added Rodrigo.[124] "For example, several scholars hold up for ridicule some of our statements doubting whether Enlightenment political philosophy is good for persons of color. To them, its goodness is so self-evident that they overlook the reasons why scholars of color might put it in question."[125]

"These reasons include its color-imagery, embrace of universalism—which can easily work to the disadvantage of those, like women or working class people, who were not part of that ideal picture the architects had in mind—and the ease by which some of its framers endorsed slavery and conquest."[126]

"As with Rule 11, these writers seem to think those charges are fly-specking and that any attack on Enlightenment ideals is outrageous and frivolous," Rodrigo said.

"They really should examine the basis for those claims before rejecting them out of hand," I added. "Crafted during a period when ideas of European supremacy and black slavery reigned supreme, it would not be at all surprising if Enlightenment theories harbored at least a tinge of race-coding,"[127] I agreed. "Yet some of our critics treat the merest suggestion that political theories stemming from that grand period might be a source of racism and classism as tantamount to heresy—practically self-refuting, as Judge Posner put it.[128] Any rule of procedure for conducting a dialog on racial justice would not reject that as an area of inquiry, any more than scholars looking for an explanation for the Holocaust should close their eyes to Western complicity—to the tacit toleration of Swiss bankers or British accommodationists, for example."[129]

"I seem to recall Posner guilty of some Rule 11 type behavior when discussing the idea of white privilege.[130] According to prominent feminist scholar Peggy McIntosh, white folks carry with them a nearly invisible backpack of privileges, customs, and courtesies they can rely on every day, for

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122. *See, e.g., id.* at 41 ("In the case of critical race theory, however, criticism is almost secondary. One has only to illuminate the target.").

123. *See* FARBER & SHERRY, *supra* note 5, at 97; Gey, *supra* note 30, at 243; Posner, *supra* note 43, at 41.

124. *See* Rosen, *supra* note 100, at 33 (quoting Rodrigo as saying "[M]inorities should invoke and follow the law when it benefits them and break or ignore it otherwise" and concluding that this language was directly linked to the defense team strategy in the Simpson case).

125. *See, e.g.*, FARBER & SHERRY, *supra* note 5, at 29; Posner, *supra* note 43, at 41.

126. *See* Delgado, *Rodrigo's Seventh Chronicle*, *supra* note 1, at 730-32.

127. *See id.* at 731.

128. *See supra* notes 121-22 and accompanying text.

129. *See, e.g.*, Alan Cowell, *Further Swiss Bank Lists Fail to Calm Uproar*, N.Y. TIMES, Oct. 30, 1997, at A8 (describing how a second list of Swiss bank accounts has resulted in further suspicion of Swiss motives by Holocaust survivors and their families).

130. *See* Posner, *supra* note 43, at 43 (arguing that black lawyers actually have a better chance of being hired for a law school faculty than white lawyers).

example, when out shopping, that folks of color cannot assume will be extended to them. She lists 46 examples,"[131] said Rodrigo.

"I do recall that discussion," I said. "Farber and Sherry are equally dismissive of the idea."[132]

"Without evaluating any of her or any other author's examples, Posner rejects the idea of white privilege without telling us whether it is because white people cannot count on it or whether its components are, in their view, available to all. I wanted to hear more, but the author seemed to think the whole idea so outlandish as not to be worth discussing."

The pilot announced the beginning of our descent.

"Time certainly flies," I exclaimed. Rodrigo grinned at my pun. "Beats reading the paper by a large margin. But tell me, do you have any final ideas of procedural rules that might serve as principles for racial dialog?" I asked. "We'll be landing soon and I don't want to miss anything."

"Only a few more," said Rodrigo. "As with the others, they apply by analogy, not literally. But I do think heeding them would enhance dialog."

As we checked that our safety belts were tightened and raised our seat backs to the upright position, I added: "Speaking of dialog, it occurs to me you might want to send your suggestions to President Clinton's race commission.[133] Under eminent African-American historian John Hope Franklin, a multiracial group is conducting a national discussion on matters of race. It's part of what the President sees as a series of town hall meetings going on across the country on our most intractable problem.[134] Already naysayers and conservative columnists are weighing in against the commission, committing many of the mistakes you have pointed out."[135]

"I might do that," said Rodrigo, brightening up. "Do you think it would do any good?"

"I do," I replied. "Discussions about race often founder on just the shoals you have pointed out. Anything that can enhance the quality of discussion, moving it beyond the predictable exchange of solemn maxims and thought-

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131. *See* Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies, reprinted in* CRITICAL WHITE STUDIES 291, 293-94 (Richard Delgado & Jean Stefancic eds., 1997) (some examples of white privilege include: "I can be pretty sure that my neighbors . . . will be neutral or pleasant to me," "[w]hether I use checks, credit cards, or cash, I can count on my skin color not to work against the appearance of financial reliability," and "I can do well in a challenging situation without being called a credit to my race").

132. *See* FARBER & SHERRY, *supra* note 5, at 5, 22, 24, 153 n.21.

133. *See* James Rosen, *Hope, Caution from Leader of Race Commission*, SACRAMENTO BEE, June 14, 1997, at A6 (reporting establishment of commission to commence national dialog about race).

134. *See id.*

135. *See* Stephen A. Holmes, *Critics Say Clinton Panel About Race Lacks Focus*, N.Y. TIMES, Oct. 12, 1997, at 17 (describing general disappointment over President's newly formed panel on race); William Powers, *Oh My! Angela Oh's Activities on the Presidential Commission on Race Relations*, NEW REPUBLIC, Aug. 11, 1997, at 9 (describing how the first meeting of the panel was marked by the usual dull procedures except for Angela Oh, who actually spoke her mind and was reprimanded by the panel's chairman).

ending cliches, should be welcome. But we digress. Let's hear any more wisdom you've culled from the rules of civil procedure."

"This shouldn't take long," Rodrigo said. "One source is the set of rules that govern the pleading of damages, including mitigation."[136] Some commentators, including Richard Posner in his review of Farber[137] and Jeff Rosen in his review of five crit books,[138] point out that things are getting better for blacks and Chicanos, as though this proves that discrimination is over."

"Of course, it doesn't," I chimed in. "Things are getting better for whites, too, so that the gap between them and us in health, income, family assets, longevity, educational attainment, and many other indices of well-being is staying the same or growing.[139] It's like saying that a burglar who breaks into a house and steals the jewels should be entitled to a reduced sentence because he straightened out the furniture or showed the family that they needed a security system. But the rules pertaining to damages have a lesson for our side, as well. Sometimes we fail to detail our specific grievances and damages stemming from, for example, slavery or conquest, remaining content with simply asserting generalized loss.[140] The rule requiring enumeration of special damages, ones that do not stem ineluctably from the type of harm alleged, would counsel our being a little more careful in this regard."

"Good point, Professor. It would certainly allay some of the impatience conservatives and uncommitted people sometimes display over our sometimes nebulous assertions of cultural damage resulting from events that happened a long time ago."[141]

"Second- and third-generation pathology traceable to the Holocaust is just beginning to be studied.[142] Perhaps we could tap these studies," I pointed out.

"Maybe so," said Rodrigo with interest. "My colleague, Laura Goldstein, is doing some work in this area. Perhaps I'll have a talk with her. She's sympathetic to Critical Race Theory, and even taught a seminar in critical race feminism until last year, when we hired Mary Bergeron."

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136. *See* ARTHUR L. CORBIN, CONTRACTS § 1038, at 236-40 (1964); DAN D. DOBBS, REMEDIES § 3.7, at 186-91 (1973).

137. *See* Posner, *supra* note 43, at 43.

138. *See* Rosen, *supra* note 100, at 30 ("The promises of the Reconstruction Amendments . . . were finally fulfilled by the Civil Rights Acts of the 1960s").

139. *See* Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923 (1988) (book review).

140. One cannot rely on proof of generalized, or historic, social discrimination to state a claim for racial discrimination. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S 469, 498-99 (1989) (holding that a general assertion of industry-wide discrimination does not justify use of a race quota); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-76 (1986) (holding that societal discrimination alone is insufficient to justify a race conscious remedy).

141. *See, e.g.*, DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY (1995).

142. *See, e.g.*, Betty Booker, *So Many Secrets: How Holocaust Survivors' Children Confront History*, RICHMOND TIMES, Apr. 28, 1997, at C1 (exploring psychological effects experienced by second-generation descendants of the Holocaust).

We both heard a bump. "I think that's the landing gear," I said. Do you have any more analogies?"

"Just quickly," Rodrigo replied. "There's the rule about observing precedent. In our setting that would counsel applying the same standard to your targets as you do to your friends. For example, one shouldn't attack storytelling by scholars of color without noticing that some famous scholars of majority-race have done the same thing to great acclaim.[143] Moreover, who has not run into the conservative or anti-PC detractor who begins by recounting: 'I know a story . . . .' and then tells of a mythical professor who was so hounded by PC fanatics that he hung up his coffee cup and retired.[144] No one seems to be able to identify this professor. How well do these stories hold up under Farber and Sherry's criteria that stories be authentic, typical, and true? Similarly, presumptions and burdens of proof should be the same for both sides, unless justified by a good reason. Farber and Sherry, for example, warn that standpoint epistemology leads to relativism and, potentially, Holocaust denial.[145] But they overlook that some of the most ardent embracers of objectivism and the Western canon feel free to minimize the results of slavery, Mexican conquest, Indian massacres, and even Japanese-American prison camp internment, merely because these happened some time ago.[146] The movement in the federal system and many states toward notice, and away from nitpicky code pleading,[147] implies that the scholarly community should be less concerned about scholarship that fails to state a claim in the most familiar manner—that is, in the form of a case-crunching, 600-footnote article, with a predictable linear structure that begins with a review of every single relevant case and authority—and receptive to the newer modes of scholarship, such as the essay and chronicle, which may be full of analysis and new ideas and, in that sense, even more useful than the usual fare."[148]

CONCLUSION

Seconds later, with a slight bump we were on the ground. "Perfect timing," I said. After waiting for the noise of the engines braking to die down, I told Rodrigo, "This has been most stimulating. Although I am sure some readers will quarrel over this or that one of your analogies, I believe you have managed to extend the reasoning of 'The Imperial Scholar' to new realms. Many have

143. *See supra* note 23 and accompanying text (noting that mainstream scholars tell stories, too).

144. *See* JOHN K. WILSON, THE MYTH OF POLITICAL CORRECTNESS (1995).

145. *See* FARBER & SHERRY, *supra* note 5, at 12, 109-10, 199.

146. *See* Delgado, *Rodrigo's Bookbag*, *supra* note 1 (noting that conservative writers sometimes discount the continuing effects of historical racism).

147. *See, e.g.*, FED. R. CIV. P. 8 (establishing guidelines for general rules of pleading emphasizing short and plain statements).

148. *See* Delgado, *Rodrigo's Final Chronicle*, *supra* note 1 (defending new modes of scholarship and arguing that they often contain at least as much that is valuable as does the more conventional version).

called for rules of engagement in law review and similar writing. Looking to rules already laid down and accepted in civil and public adjudication strikes me as a fruitful approach. I hope you send your ideas around."

"As usual, you're too kind, Professor. You have always been my best sounding board."

The plane rolled to a stop. The pilot announced our arrival and all the passengers stood up and began unloading their carry-on baggage.

Standing up and stretching his lanky frame, Rodrigo grinned and said, "And as for sending these ideas around, I think I will. These discussions of race between the left and the right already carry too much baggage. Maybe we need a fresh start."

I smiled, glad to see that for all his brilliance, Rodrigo still had a playful streak and, at the end of an intense two-hour conversation that ranged over large areas of constitutional and private adjudication and sketched the outlines of a new, inclusive theory of racial dialog, he was still capable of drawing on his abundant youthful levity.