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### Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence

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# RODRIGO'S FINAL CHRONICLE: CULTURAL POWER, THE LAW REVIEWS, AND THE ATTACK ON NARRATIVE JURISPRUDENCE

RICHARD DELGADO\*

## I. INTRODUCTION: RODRIGO AND I MEET AT THE AALS

I was sipping a cup of nondescript, institutional tea in hopes of soothing my jangled nerves in the low-budget, take-out restaurant in the basement of the huge, 1200-room hotel where the Association of American Law Schools (AALS) was holding its annual meeting.<sup>1</sup> It was only the third day of the conference, and I felt wearier than usual. I wondered whether this was because of my advancing age, or because I was simply suffering from overload: too many colleagues, too many hyperkinetic five-minute conversations with persons I hadn't seen in years, too many panels, too many speeches.<sup>2</sup>

I had escaped to the dimly lit dive in hopes of dodging the flocks of highly wired law professors, all dressed in neat suits and carrying green vinyl AALS briefcases, who frequented the more high-toned eating establishments upstairs. This year's meeting was being held in a resort city, and many of the conferees had brought their families. Along the restaurant wall a group of young teenagers were playing at

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1. The Association of American Law Schools (AALS) is a semi-official organization of U.S. law schools and professors, with a membership of about 159 schools and 7446 professors and administrators. It holds an annual meeting and many regional workshops. The annual meeting, held in different cities every year, spans several days, draws over 1000 professors, and includes 50 to 100 section meetings, workshops, and plenary sessions, all held in one or more large, conference-type hotels. See, e.g., ASSOCIATION OF AMERICAN LAW SCHOOLS, 1994 ANNUAL MEETING PROGRAM [hereinafter 1994 ANNUAL MEETING PROGRAM] (on file with author).

2. The "professor," like Rodrigo, is a fictional construct, a composite of several persons I have known and not to be identified with any single individual. As I have constructed him, the professor is a man of color teaching at a law school located in a major U.S. city and in the late stages of his career.

the video arcade. After the steady diet of high-paced talk with which I had been bombarded the last three days, their aimless chatter oddly reassured me.

I was halfway through my tea and had just noticed that my hands were no longer shaking when I heard a familiar voice from behind me.

"Professor!"

I looked up. "Rodrigo! What are you doing here?"

"I'd been hoping to run into you," my young friend and protege replied.<sup>3</sup> "But this place is crawling with law professors. No offense intended, but after awhile they all look the same. I'd practically given up when I came down here. And here you are."

"I like your beard," I said. "How long have you been in Orlando?"

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3. For a description of Rodrigo and his family history, see Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1357-63 (1992) (reviewing DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991)) [hereinafter Delgado, *Chronicle*]. The son of an African-American serviceman and an Italian mother, Rodrigo was raised in Italy when his father was assigned to a U.S. outpost there. He attended the base high school, an Italian university, and then "the oldest law school" in the world (Bologna) on a scholarship from the Italian government, graduating near the top of his class. *Id.* at 1359. *Chronicle* opens when Rodrigo visits the professor, at the suggestion of his sister, civil rights lawyer Geneva Crenshaw, to discuss Rodrigo's prospects for a career in teaching law. Rodrigo and the professor immediately become good friends. Over the course of the next year, they discuss law and economics, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993) (reviewing RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992)) [hereinafter Delgado, *Second Chronicle*]; caregiving and free market economics, Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993) (reviewing ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992)) [hereinafter Delgado, *Third Chronicle*]; the effect of neutral jurisprudential principles on blacks, Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) (reviewing DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE SUPREME COURT* (1992); GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* (1993)) [hereinafter Delgado, *Fourth Chronicle*]; civic republicanism, Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993) [hereinafter Delgado, *Fifth Chronicle*]; essentialism, anti-essentialism, and the role of small groups in bringing about change, Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993) [hereinafter Delgado, *Sixth Chronicle*]; race and the liberal state, Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994) [hereinafter Delgado, *Seventh Chronicle*]; and black crime, Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994) [hereinafter Delgado, *Eighth Chronicle*].

"Four days. I came for the new professors' workshop, then stayed on.<sup>4</sup> Giannina joined me yesterday. We're both on a panel tomorrow."

"I came down here to get away, but to tell the truth I'm delighted to see you. Sit down. I was going to leave a note on the message board if I didn't run into you soon. How are things going with your new position? And did you and Giannina ever figure out how to arrange things with your far-flung jobs and the commute?"<sup>5</sup>

"It's not working out too badly. She's keeping her place in the Village and I got a flat in town not far from the airport. We take turns commuting. She says her total travel time to come see me is no greater than that of some of her friends who take the train to work every day."

"How's the teaching going?"

Rodrigo looked up to catch the waiter's attention. "Not bad. Do you mind if I join you? I could use a cup of coffee or a snack."

"Not at all. I have nothing on my calendar tonight except getting caught up on what has been happening with you."

"The classes are a lot of work. Fall semester I had two new preps, but this spring I just have my seminar. I finished my blue books last night in the hotel, and I'm looking forward to getting some writing done, starting next week in fact."

"You don't waste any time," I said admiringly. "What are you going to write about?"

"Either trusts and estates . . ."

I must have made a face, because Rodrigo quickly said, "I know. It's one of the courses they assigned me. But I have a topic that I actually find kind of interesting. The other area is civil rights. Actually, I was hoping to ask your advice on something. Whichever one I

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4. After graduating from the University of Bologna Law School, serving a short apprenticeship in Dublin, and solving a knotty immigration problem, see Delgado, *Chronicle*, *supra* note 3; Delgado, *Second Chronicle*, *supra* note 3, Rodrigo returned to the U.S. and earned an LL.M. degree from a well-known law school located in the professor's city. See Delgado, *Second Chronicle*, *supra* note 3, at 1183-86.

5. On Rodrigo's friend Giannina and her career, see Delgado, *Third Chronicle*, *supra* note 3, at 402; Delgado, *Fourth Chronicle*, *supra* note 3, at 1137; Delgado, *Sixth Chronicle*, *supra* note 3, at 640-42.

write first I'm thinking of writing in the narrative, or storytelling, mode."<sup>6</sup>

"Storytelling?" Secretly, of course, I was delighted, because I had been writing in that mode myself and indeed am considered to have made a modest contribution to the genre. Yet no one was more aware of its risks than I.

"Rodrigo, as you must know, the whole movement is under attack. Some consider it mushy, unrigorous, even nonlegal. You should think carefully before writing in that vein. Unless you have exceptional colleagues, it might be best to hold off until you have tenure."<sup>7</sup>

"I've heard of the attack on narrativity, in fact I've just been reading about it. I'd love to talk things over with you, if you have the time, because I'm genuinely undecided."

The waiter appeared. "Are you gentlemen ready to order?"

## II. RODRIGO AND I DISCUSS THE CRITIQUE OF NARRATIVITY AND TRY TO DECIDE WHAT A YOUNG PROFESSOR SHOULD DO

A few minutes later, we were finishing our sandwiches—pastrami on Rodrigo's part, a vegetarian special on mine—when Rodrigo looked up and began:

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6. On legal storytelling, see generally Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (containing articles by Mari J. Matsuda, Derrick Bell, Milner S. Ball, Steven L. Winter, and Richard Delgado); Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1 (1991) (discussing the new approaches to racial justice and scholarship forms by Critical Race scholars). For critiques of legal storytelling, see, e.g., Arthur O. Austin, *Deconstructing Voice Scholarship*, 30 HOUS. L. REV. 1671 (1993) [hereinafter Austin, *Deconstructing*]; Arthur O. Austin, *Storytelling Deconstructed by Double Session*, 46 U. MIAMI L. REV. 1155 (1992) [hereinafter Austin, *Double Session*]; Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) [hereinafter Farber & Sherry, *Out of School*]; Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992) [hereinafter *Degradation*]; see also William Van Alstyne, *The University in the Manner of Tiananmen Square*, 21 HAST. CONST. L.Q. 1 (1993) (employing storytelling to criticize the diversity movement in university governance).

7. On the critique of storytelling (narrative jurisprudence), see Austin, *Double Session*, *supra* note 6; Farber & Sherry, *Out of School*, *supra* note 6; Kennedy, *supra* note 6; Tushnet, *Degradation*, *supra* note 6; Van Alstyne, *supra* note 6; see also Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994) (responding to challenges to the pragmatic perspective on storytelling).

"As I see it, the attack on narrative scholarship takes two or three forms. Farber and Sherry say that narrative writing, especially within Critical Race Theory, rests on essentialist premises,<sup>8</sup> which of course isn't true. None of us is under the illusion that *all* minority scholars write in the voice of color, much less that we always employ narratives or stories."<sup>9</sup>

"Of course not," I said. "Derrick Bell's famous *Serving Two Masters* article<sup>10</sup> is a classic of the cases-and-policies mode. And every now and then one of us tosses off the standard 300-footnote blockbuster full of case-crunching citations and cites to Fuller and Dworkin."

"The kind that are passing into history."

"Agreed. Yet other Critical Race scholars do write chronicles, parables, and narratives. We use them to explore ideology and mindset. Stories are a great device for probing the dominant narrative. We use them to examine presupposition, the body of received wisdoms that pass as truth but actually are contingent, power-serving, and drastically disadvantage our people."<sup>11</sup>

"But these are exactly the types of writing that are under siege right now. In addition to the essentialist accusation, Farber and Sherry charge that stories—our kind, at any rate—are inauthentic, atypical, and untrue.<sup>12</sup> Moreover, they are apt not to be tied adequately to legal analysis and doctrine.<sup>13</sup> They wonder why articles of this sort appear in the law reviews and ask why law schools should

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8. Farber & Sherry, *Out of School*, *supra* note 6, at 809-19.

9. See, e.g., Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 668-69 (1993) [hereinafter Delgado, *In School*]; Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991) (analyzing the extent to which black scholars' writing reflects black experience).

10. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

11. On the use of stories to accomplish these purposes, see, e.g., Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) [hereinafter Delgado, *Plea for Narrative*]; Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean Conflict: How We Constructed "Los Angeles"*, 66 S. CAL. L. REV. 1581 (1993).

12. Farber & Sherry, *Out of School*, *supra* note 6, at 831-40.

13. *Id.* at 846-53.

give their authors tenure.<sup>14</sup> There is no way to evaluate them, because they are *sui generis* and fall outside the scholarly paradigm."<sup>15</sup>

"That's not all," I added. "Scholars like Mark Tushnet say we don't merely fall outside the scholarly paradigm. We are positively damaging it.<sup>16</sup> The degradation of constitutional discourse, of which he not so delicately accuses us, includes flat-out lying and distortion, carried out by some of the genre's best exponents.<sup>17</sup> He also accuses us of playing politics with our stories, of choosing just one interpretation—say racism—in explaining an incident at a clothing store, for example, when other explanations are just as valid."<sup>18</sup>

"Pretty harsh," Rodrigo replied. "But we do have our defenders. Tom Ross,<sup>19</sup> Gary Peller,<sup>20</sup> Jane Baron,<sup>21</sup> and Kathy Abrams<sup>22</sup> write of the legitimacy and power of narratives, and the way they help readers understand the social world."

"Don't forget a third group," I added. "There's a vast iceberg out there of skeptics who are basically friendly to narrative scholarship but want us to play by conventional rules. I'm thinking of people like Ed Rubin<sup>23</sup> and Mary Coombs.<sup>24</sup> They think it's fine if we write in stories and narratives, so long as we can be evaluated and graded in some way. They're worried that when young firebrands like you come up for tenure their colleagues won't have the slightest idea how to vote. They won't understand what you've written, or if they do, won't

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14. *Id.* at 809, 830-54.

15. *Id.* at 809, 854 & n.244 (citing Geoffrey Stone, *Controversial Scholarship and Faculty Appointments: A Dean's View*, 77 IOWA L. REV. 73, 74-75 (1991) and Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 929 (1992)).

16. Tushnet, *Degradation*, *supra* note 6, at 251, 260-77.

17. *Id.* at 260-77 (discussing distortions and exaggerations).

18. *Id.* at 263-76.

19. For examples of Professor Ross' writings in the narrative-analysis vein, see, e.g., Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990); Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053 (1989); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1 (1990); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989) [hereinafter Ross, *Richmond Narratives*].

20. Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313 (1992).

21. Jane Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994).

22. Kathy Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

23. Rubin, *supra* note 15.

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

know how to evaluate it. With case analysis the norms are well understood. But who's to say if Derrick Bell's *The Space Traders*<sup>25</sup> is better or worse than Patricia Williams' Benetton story,<sup>26</sup> or Marie Ashe's *Zig-zag Stitching* piece?"<sup>27</sup>

"That's not so hard," Rodrigo said. "Pungency, irony, insight, vividness. Illumination of a new perspective or angle of analysis. Narrative coherence. I don't see why it's so difficult to come up with criteria. The ones I just mentioned would be a start."

"I agree that eventually those ideas may take hold. But in the meantime, narrative writing is highly controversial. You know, of course, about Lani Guinier,<sup>28</sup> and how Derrick Bell had to leave Harvard."<sup>29</sup>

"But she didn't write narratives, and Derrick left on principle because his school refused to hire a black woman."

"But his narrative scholarship may have played a part. And she was a Critical Race Theorist who challenged current notions of political and electoral fairness."

Two of the boys from the video parlor interrupted us politely to ask if we had any change. Rodrigo and I exchanged amused looks, dug deep into our pockets, produced what we had, and the youths nodded wordlessly and ran off.

"Nice kids. Where were we? Oli—maybe we need to distinguish different kinds of storytelling," Rodrigo continued. "I've noticed that there are at least two types, with one being much more controversial than the other."

"And the two are . . . ?" I coaxed.

"Actually there are three. On our side, there is the so-called 'agony' tale, or first-person account, usually of some outrage the

25. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 158-94 (1992) [hereinafter BELL, *BOTTOM OF THE WELL*].

26. See PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 44-51 (1991).

27. Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989).

28. President Clinton nominated Professor Guinier for the position of Assistant Attorney General but withdrew the nomination when it became controversial. See Alexander Aleinikoff & Richard H. Pildes, *In Defense of Lani Guinier*, WALL ST. J., May 13, 1993, at A15; Clint Bolick, *Clinton's Quota Queens*, WALL ST. J., Apr. 30, 1993, at A12.

29. Derrick Bell, *The Charms of a Devoutly Angry Man*, N.Y. TIMES, Oct. 28, 1992, at C1; *Harvard Law Notifies Bell of Dismissal for Absence*, N.Y. TIMES, July 1, 1992, at A19.



author suffered.<sup>30</sup> And then there is the 'counterstory,' the one that mocks, jars, displaces, or attacks some majoritarian tale or narrative, such as without intent no discrimination exists; or the free market will drive out discriminators; or some other such tenet of the majoritarian faith."<sup>31</sup>

"And you mentioned that one of these is more controversial than the other?"

"Yes, by far."

"Which one?"

"Everyone loves the agony tale. They find them so poignant, so moving, so authentic, so true. They accept them immediately and call them poetic and soulful."<sup>32</sup>

"I agree," I said. "The reaction often reminds me of the Harlem Renaissance, when white folks discovered black culture. Suddenly, black writers, jazz musicians, and painters found themselves in vogue, their work a counterbalance for the predictability and blandness of the broader culture.<sup>33</sup> But you think counterstories are another story, so to speak?"

"Yes, they don't go over nearly as well. Consider, for example, the strong reaction Derrick Bell's *Space Traders* elicited.<sup>34</sup> The point of the chronicle is that white self-interest drives the civil rights movement, accounting for the many zigs and zags of our racial history. It ends by showing that white America would sell out the cause of black rights today, just as it did 200 years ago, if the price were right."<sup>35</sup>

"When one of us takes on one or more of these comforting myths of racial progress, of course there is trouble. But you mentioned that there is a third kind of story."

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30. See, e.g., Farber & Sherry, *Out of School*, *supra* note 6, at 835-38 (applying the term "agony tale").

31. On counterstories, see Delgado, *Plea for Narrative*, *supra* note 11, at 2412-18, 2429-35; Ikemoto, *supra* note 11.

32. On this and similar responses to the new Critical Race Theory generation of narrativists, see, e.g., Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992) [hereinafter Delgado, *Ten Years Later*].

33. On the romanticization of all things Black during this period, 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, 1266 (1992) [hereinafter Delgado & Stefancic, *Images*].

34. See BELL, *BOTTOM OF THE WELL*, *supra* note 25.

35. See *id.* at 192-94.

Rodrigo was silent for a moment. "Oh, yes. There is the 'majoritarian' story or tale. White folks tell stories, too. But they don't seem like stories at all, just the truth. So when one of them tells a story, such as the pool is so small or affirmative action ends up stigmatizing and disadvantaging able blacks, few consider that a story or ask whether it is authentic, typical, or true.<sup>36</sup> No one asks whether it is adequately tied to legal doctrine, because it and others like it are the very bases by which we evaluate legal doctrine. White tales like these seem unimpeachable—when one of us tells a counterstory, the counterstory comes under attack, not the original story itself."

"Something like that once happened to me," I said. "Early in my career I wrote an article that in some respects was a classic agony tale, except I didn't tell stories, just quoted cases and social scientists. It was an early piece on hate speech. I pointed out that the tort system provided little remedy for racial insults and name-calling."<sup>37</sup>

"I know that article. Even though it's not on the computerized databases, I ran across a citation to it and looked it up. I liked it."

"So did all of my friends, including, interestingly, a lot of white people. I would go to conferences like this one, and people I never even knew would come up to me and say how much they loved the article, how moved they were, and how terrible it was that the law didn't redress the harm of racist insults."

"And you say you find this surprising?" Rodrigo looked up with interest.

"Don't misunderstand me—I still think you should be very careful if you plan to write in the narrative mode. You can do it, just be cautious, and maybe wait till you have tenure. You see, I finally figured out *why* everyone loved that first article. It's because they could empathize with the black subjected to the vicious racial slur. They could say how terrible it is that our legal system doesn't provide redress. They sincerely felt that way. Indeed, I think it allowed them to say to themselves how much they loved the First Amendment. They loved it so much that they had to sacrifice these unfortunate

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36. On the "small pool" argument, see, e.g., Kennedy, *supra* note 6, at 1762-65. For responses to this argument, see Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872, 1875-76 (1990); Ross, *Richmond Narratives*, *supra* note 19.

37. For an example of an article in this vein, 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).

Negroes and Mexicans, for which they were genuinely sorry and apologetic."

"So that was your agony story. Were there others?" Rodrigo prompted.

"Oh, yes. A few years later I wrote one on the campus hate-speech controversy.<sup>38</sup> In this one, I didn't so much make a case for curbing hate speech as I did for the indeterminacy of the usual First Amendment analysis. I showed that the problem of campus hate speech can be approached in one of two ways. You can either see it, basically, as a liberty or an equality problem, with mirror-image consequences flowing from the two approaches, except of course going off in opposite directions.<sup>39</sup> This one my liberal friends welcomed much less, although in a way it was a more sophisticated analysis. Then, recently, I published a piece showing that the marketplace of ideas is unable to redress systemic injustice—although it can correct minor social ills and errors—because the more deeply inscribed, systemic ones are simply invisible: we don't see them as such at the time.<sup>40</sup> My ACLU buddies absolutely hated this one. They ignored my argument and all my historical evidence for what I called the 'empathic fallacy,'<sup>41</sup> and kept saying they knew of cases where speech in their opinion worked."

"Which of course wasn't your point at all," Rodrigo added.

"No, it was that the First Amendment doesn't work, not speech itself."

Rodrigo was silent for a minute while we sipped our drinks. "So, Professor, you think I should hold off on writing this sort of stuff until I get tenure?"

"I know it's ironic. I myself was counseled to do something similar in my early days.<sup>42</sup> And here I am telling you to do the same thing."

"I could write about something safe, like civil procedure. But what if I do write a narrative, and it gets accepted at a top review?"

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38. See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. REV. 343 (1991).

39. *Id.* at 344, 345-48.

40. See Delgado & Stefancic, *Images*, *supra* note 33, at 1259, 1260, 1277-80.

41. *Id.* at 1261, 1281.

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

"You might think that ought to satisfy any tenure committee. But there's the risk that your colleagues will dismiss it as the product of yet another level of affirmative action, namely that of the law review editors who lean over backward to accept an article written by a minority professor. It's a case of the reverse reasoning you and I discussed before.<sup>43</sup> They insist that we meet the merit criteria, but when we do they dismiss our accomplishment. Since professors of color virtually by definition lack merit, when we do demonstrate it in any of the classic ways, this is disconcerting. There must be a reason for such a strange event. And they find the reason in the very factor, affirmative action, that raises a question about our competence in the first place. When faced with deciding between two propositions—that Rodrigo Crenshaw, the affirmative action candidate, had merit after all (indeed more than most of them, who have never once published in the *Harvard Law Review* in their entire careers) or that affirmative action accounted for Rodrigo's article getting accepted at the top law review—guess which one they will choose to believe?"

"We can't win. Our successes are laid to affirmative action of one sort, and our failures to another."

"A double bind," I said.

"I could write a 600-footnote case-cruncher," Rodrigo said, a little doubtfully.

"I'm sure you could," I said. "And some of your colleagues would love it. That's the kind of article they wrote to get tenure twenty-five years ago. They'd see themselves in you. They'd be all smiles."

"The trouble is that I'd never get an article of that kind in *Harvard*. They're passé. The good reviews realize that that vein of formalistic scholarship has run dry and is producing fewer and fewer breakthroughs."<sup>44</sup>

"If it ever produced any," I added.

"All the good writing these days is either Critical or interdisciplinary. Yet the old-timers on our faculties roll their eyes when they meet this kind. Especially when it's written by one of us."

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43. Delgado, *Chronicle*, *supra* note 3, at 1362-63.

44. We had discussed legal scholarship and the changing paradigm before. See Delgado, *Seventh Chronicle*, *supra* note 3, at 748.

"Well, let's put format aside. What are you thinking of writing about? You mentioned something about Trusts and Estates. Sounds a little dull, but I'm sure you'll find a way of making it interesting," I added.

"I'd like to show that the famous public-trust doctrine that Joseph Sax pioneered in environmental protection law a quarter of a century ago put a halt to the search for more far-reaching reform in that area.<sup>45</sup> I would argue that the theory was both conservative and progressive at the same time—conservative, because it imported ideas from trust law that ultimately froze environmental law into an unproductive model, and progressive because it offered a way to control some of mankind's worst impulses. The other paper I'm thinking about writing is a civil rights piece."

"It seems to me you could write the first one in the standard cases-and-policies mode."

"I could. But I could also write it employing narratives, analyzing the rhetoric and logic of reform. I could show, for example, that the language and mental pictures of Sax's trust approach are essentially male, revealing an unconscious fear of what might happen if we did not place the valued property beyond our reach, in the hands of someone else. It's a little like what wealthy men do for their children—fearing that they otherwise might be tempted to spend the child's college funds on a sports car."<sup>46</sup>

"Like Ulysses lashing himself to the mast. I like this other approach much better. It lets you do more, go to the core of the problem, namely the way we think about natural goods like parks, beaches, and animal species."

"I thought so, too," Rodrigo replied a little wryly, "but then I talked to a few of my colleagues. They all preferred the standard version. A couple of them showed thinly disguised scorn when I spoke of using a storytelling and narrative-analysis approach."

"There was a session at this very conference yesterday on problems of law review publishing. The program note says the session was to be a gathering of legal scholars concerned about the battle for what they call authorial authority. Evidently many law professors

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45. For a recent article that foreshadows Rodrigo's analysis, see Richard Delgado, "Our Better Natures": A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform, 44 VAND. L. REV. 1209 (1991).

46. See *id.* at 1215 (making a similar point).

think that law review editors are pushing them around, exercising too much control, too much judgment over articles."<sup>47</sup>

"I heard about that," Rodrigo replied. "I couldn't go. But I heard that some of those present voiced unhappiness over the way in which law reviews are publishing storytelling articles, feminism, and Critical Theory pieces all to the exclusion, as they see it, of 'real law.'<sup>48</sup> Some argued that the only solution is a faculty takeover of the law reviews; at one school something similar already has happened.<sup>49</sup>

I shuddered. "I hate to think what that would mean for innovative scholarship. Students are not perfect, and the law reviews every now and then do make mistakes. A bad article creeps in; a good one gets turned down. But on the whole students are much more open to new forms and authors than our colleagues are. Some of the latter are open-minded, to be sure, but too many would use their position on the board of advisors to perpetuate sameness—to assure that law review writing today looks exactly like what they remember from their youth—boring, circular, 100-page blockbusters full of case analysis, shuffling and reshuffling doctrine, and going nowhere.<sup>50</sup> Nothing could bring greater disrepute to legal academia. In the eyes of sister disciplines, we are seen as always being a little behind. A faculty takeover of the law reviews would make us the laughing-stock of the scholarly world."

"I agree," Rodrigo said, "and that's why this session on control of the law reviews worries me."

"But that's not solving your own problem. Are you going to write that trusts-and-estates article in the narrative mode or not? And what was that other topic you were talking about?"

"It's all tied up with figuring out why there is such resistance to narrative scholarship and storytelling. I'd love to explore this with you, if you have the time."

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47. Tape of Annual Association of American Law Schools Meeting, discussing *The Struggle Between Author and Editor for Control of the Text* (Jan. 1994) (Tapes 160-161, on file with author) [hereinafter *Struggle*]; see also 1994 ANNUAL MEETING PROGRAM, *supra* note 1, at 94-95 (describing Open Program on Scholarship and Law Reviews: *The Struggle Between Author and Editor for Control of the Text* and Gathering to Consider Formation as an AALS Section).

48. Round Table, *Law Reviews: A Waste of Time and Money?*, AM. LAW., April 1994, at 50 [hereinafter *Waste of Time*]; *Struggle*, *supra* note 47.

49. *Struggle*, *supra* note 47; see Ken Myers, *Law Review Editing: Profs Enter Where Students Used to Tread*, NAT'L L.J., Oct. 14, 1991, at 4 (describing events at George Mason University School of Law).

50. See Delgado, *Seventh Chronicle*, *supra* note 3, at 752 (discussing a similar point).

"Of course I do," I said. "It sounds like you have been giving this some thought—not surprising since your career may ride on it," I added.

"I'm torn," Rodrigo replied. "I want to write the best possible article, yet I want to survive to fight again another day. Maybe we can discuss it over dessert. Could you use another bite?"

"I could."

### III. RODRIGO PUTS FORWARD HIS THEORY ON WHY APPEALS FOR REFORM SPARK SUCH STRONG RESISTANCE

We returned from the counter, where we had gone to select our desserts—a fluffy apple concoction for my rail-thin friend, an abstemious-looking sherbet for me—and Rodrigo began as follows:

"Professor, have you ever wondered about the connection between law, especially academic law, and social change?"

"Every day of my life. Sometimes I wonder if I'm not just greasing the wheels of industry, turning out young lawyers who will advance the aims of the capitalist state. I wonder whether all my teaching and writing about racial justice will do any good. The job structure out there is fixed; my students have to fit in. Possibly I'm making them even more discontent by preaching to them about a better world when the realities of law practice—billable hours, corporate clients, and so on—mean that they are locked into a certain type of life and practice."<sup>51</sup>

"Some of your students go into public interest practice. You may be more of an inspiration to them than you know."

"But even those who do, find that law is not the trusty instrument of reform we like to think it is."

"And the reasons for that have begun to be explored in recent scholarship, including your own, Professor."<sup>52</sup> Law can do little to

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51. On the discontent of many young lawyers, see Stephanie Goldberg, *Quality of Life Trade-Offs*, A.B.A. J., Apr. 1989, at 38; Stephanie Goldberg, *Satisfaction*, A.B.A. J., Apr. 1989, at 40; Martin Halstuk, *Rising Tide of Lawyers Who Quit*, S.F. CHRON., Oct. 2, 1989, at A1.

52. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1991) [hereinafter BELL, *NOT SAVED*] (commenting on the failures of various civil rights strategies); RICHARD DELGADO & JEAN STEFANCIC, *FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION* (1994) [hereinafter DELGADO & STEFANCIC,

bring about fundamental social change because it operates piecemeal.<sup>53</sup> Courts can only adjudicate the cases before them. Doctrines of stare decisis, standing, mootness, and ripeness assure that.<sup>54</sup> Yet, fundamental reform requires that 'everything change at once.'<sup>55</sup> If you only change one thing, leaving everything else in place, the remaining elements simply swallow up the new decree. Even such a mighty case as *Brown v. Board of Education*<sup>56</sup> ended up changing relatively little in the fortunes of black schoolchildren, whose plight today is little better than it was forty years ago.<sup>57</sup> Pupil assignment rules changed only slightly, especially in the South, and white families compensated by simply moving away, with the result that more African American children attend predominantly black schools today than did in *Brown's* day.<sup>58</sup> Shortly after *Brown*, the number of black teachers and school administrators actually dropped, and today the graduation and drop-out rates of black, Hispanic, and Native American children are an embarrassment to any industrialized country."<sup>59</sup>

Rodrigo was speaking intently now and leaning forward slightly. I nodded and encouraged him to continue: "And you believe all this is not due simply to a lack of will or changes in the political climate, but to a basic limitation in law reform?"

Rodrigo nodded emphatically. "Consider what I'm thinking of calling 'cultural weight.' Every legal decree operates against a background of assumptions, presuppositions, and agreed-upon meanings."<sup>60</sup>

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FAILED REVOLUTIONS] (same); Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990) (on the difficulties of effecting racial reform through litigation).

53. Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995) [hereinafter Delgado & Stefancic, *Social Construction*]; Spann, *supra* note 52.

54. Delgado & Stefancic, *Social Construction*, *supra* note 53.

55. *Id.*

56. 347 U.S. 483 (1954).

57. Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 11-12, 77-86 (1994).

58. *Id.* at 12.

59. On the plight of black schoolchildren today, see, e.g., *id.* at 11-12, 76-86; ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992); Jerome M. Culp, Jr., *Water Buffaloes and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209, 246-47 (1993) (commenting on the situation in law schools).

60. For a similar argument, see Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813 (1992).



In addition, it has to contend with a network of existing social practices and narratives.<sup>61</sup> All of these exercise a kind of gravitational pull back in the direction of the familiar, the known. Thus, when *Brown* was decided a thousand local officials and lower courts were faced with figuring out what it meant in particular situations. Separate is no longer equal—but what did that mean for teacher assignments, public swimming pools, school bus routes, college counseling in the schools, disciplinary due process, and a myriad of other practices?”

“I suppose you’re going to say it meant very little. Is this because local officials were determined to resist *Brown*? Sounds like a conspiracy theory to me.”

“No, I don’t think that was the main way it happened, although *Brown* did indeed spark some ugly resistance, especially in the South.<sup>62</sup> I think the mechanism was both more and less sinister than that.”

“What do you mean?”

“It’s the general weight of culture that stands in the way. No one person does, usually at any rate. Rather, it’s a host of background forces against which legal decrees are played out that confines reform. There’s actually been some recent writing about this.”<sup>63</sup>

“You mean the narratives, presuppositions, and existing practices with which landmark cases like *Brown* have to contend?”

“Yes. These sabotage a decree without any conscious effort on anyone’s part. When the *Brown* decision came down, southern officials interpreted the decree in terms of their own experience, training, and common sense. To them it meant the only thing it could mean—desegregation that came not too quickly, went not too far, and that changed existing personnel, curricula, and general culture as little as possible. Indeed, southern officials at first interpreted the case as applying only to primary schools, and not to public swimming pools, meeting halls, and other facilities.<sup>64</sup> A few even took the view that *Brown* only applied to the school districts immediately before the Court. It took years for the message to get out that *Brown* meant

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61. *Id.*; see also CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) (discussing the way cultural practices and meanings impede reform); Delgado & Stefancic, *Social Construction*, *supra* note 53.

62. Klarman, *supra* note 57, at 85.

63. See *supra* notes 53, 60, 61.

64. Delgado & Stefancic, *Social Construction*, *supra* note 53.

what it said. Even today, forty years later, more black children attend segregated schools than did in *Brown's* day.”<sup>65</sup>

“And you think this is because of culture and not because of outright resistance?” I pressed.

“There was outright resistance, at least at first. But the way *Brown* went against the cultural grain proved even more decisive. In dozens of formal decisions—school disciplinary cases, teacher assignment schemes, and decisions to locate a new school or program in this part of town rather than that—as well as a myriad of informal ones, majority-race school officials interpreted their legal obligation in light of what they knew: Schools should remain as much as possible like they were before.”<sup>66</sup>

“Doctrinal developments didn't help, either,” I added.

“No,” Rodrigo replied. “Courts soon decided that segregation that results from housing patterns is unredressable.<sup>67</sup> Metropolitan desegregation plans are unconstitutional.<sup>68</sup> Education is not a fundamental interest,<sup>69</sup> nor poverty a suspect class,<sup>70</sup> so that state schemes that fund property-rich districts lavishly and property-poor ones in miserly fashion are perfectly legal.”

“All this even though U.S. constitutional law remains perfectly color-blind and committed to the principle of integrated schooling. I gather you think the same applies to law reform decisions across the board.”

“I do. Girardeau Spann wrote a splendid book on the subject.<sup>71</sup> He argues that litigators should not place great faith in the Supreme Court as an instrument of social progress. It is conservative, as are the

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65. *Id.*; Klarman, *supra* note 57, at 11-12, 76-86.

66. Delgado & Stefancic, *Social Construction*, *supra* note 53; see Delgado, *Second Chronicle*, *supra* note 3, at 1193-94 (making a similar argument in the case of automobile licensing rules).

67. *Milliken v. Bradley*, 433 U.S. 267 (1977).

68. Metropolitan desegregation plans are permissible only if segregation is found to have resulted from official discrimination, not individual decisions of white families to flee from black areas. *Id.*

69. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

70. *Id.*; *James v. Valtierra*, 402 U.S. 137 (1971).

71. See GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* (1993) [hereinafter SPANN, *AGAINST THE COURT*].

federal courts in general. And even when they do hand down a ringing victory for us, as they do every decade or so, the gain is quickly cut back by foot-dragging, obstruction, narrow construction, and delay."<sup>72</sup>

"Sometimes the gravitational pull seems to reverse itself," I said. "During the sixties, courts and the general culture were on our side. It was a period of breakthroughs."

"But it did not last long. The arrow of change is as apt to be backward as forward at any given moment. A recent poll showed that black parents think that conditions today are as bad for black families as they have been since the time of slavery."<sup>73</sup>

"I saw that study," I added. "It showed that homicide is the leading cause of death for black youths between ages fifteen and twenty-four. Nearly half of all black children lived under the poverty level in a recent year. Thirty-four percent of all black teenagers looking for work could not find it, a rate twice that of their white counterparts. Nearly half of all black babies were not fully immunized. Sixty-five percent of black adults think their children will be denied jobs because of racial prejudice."<sup>74</sup>

"Grim statistics," Rodrigo said. "Unfortunately, this sort of thing is institutionalizing itself. Black despair is more the norm today than the exception."

"And there is little we law-types can do?" I asked. "In our role as lawyers, I mean?"

"Litigation does little good. Even when the courts do give us a rare breakthrough, it succumbs quietly to cultural weight."<sup>75</sup> I used to think another route had promise for us, but now I'm not so sure."

I looked up, hoping Rodrigo would explain. But just then the waiter approached. "Would you gentlemen like something else?"

I looked at Rodrigo who uncharacteristically shook his head. "Just the bill."

As the waiter disappeared, the lights flickered briefly.

"What's that?" Rodrigo asked.

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72. *Id.* (discussing the instability of court-won gains); see also BELL, NOT SAVED, *supra* note 52, at 26-74 (same).

73. Richard Whitmire, *Adults in Poll: It's Worst Time Since Slavery*, DENVER POST, May 27, 1994, at 2A.

74. *Id.* For further statistics on the black condition, see HACKER, *supra* note 59.

75. See *supra* text accompanying notes 57-66.

"I don't know," I said. "It happened once before. Maybe it's the kids and the video games." I indicated the teenagers tirelessly pressing buttons along the wall. "Or maybe all the professors upstairs plugged in their laptops at once."

"Maybe it's an omen," Rodrigo mused, falling silent.

"I'd love to hear your theory, though," I said. "I'm going strong, and this restaurant has plenty of empty tables. I doubt they'll rush us to leave. Do you have the time?"

"Sure," Rodrigo replied with renewed energy. "It's all related to my career decision, the one we talked about earlier. I consider you my mentor, so I'd love to run it past you. Are you sure you have the time?"

I nodded. Rodrigo was silent for a moment. Then, he began.

#### IV. EXIT RODRIGO: MY YOUNG FRIEND EXPLAINS HOW ONTOGENY RECAPITULATES PHYLOGENY AND THEN GOES OFF TO AN UNCERTAIN FATE

"Until recently, I thought that the solution to law's lock-step was storytelling," Rodrigo began.

"Storytelling?" I asked. "You mean, what we talked about before?"

"Yes. You see, Professor, storytelling has the potential to change the social background against which legal decisions are interpreted.<sup>76</sup> It can make inroads into the interlocking system of meanings, cultural understandings, and interpretations that determine the 'common sense' southern officials and other actors bring to legal and cultural decisions. It can make cases like *Brown* succeed, not fail."

"It can change the cultural weight you were talking about!" I exclaimed, sitting up in the booth cushion into which I had been progressively slumping as the evening wore on.

"Or so I used to think," Rodrigo replied. "Stories—well-told ones, at any rate—like Patricia Williams'<sup>77</sup> and some of yours, Professor—can change the baseline. They can change consciousness, change the narrative stock by which we interpret new stories, like that of

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76. See generally Symposium, *supra* note 6 (discussing the ways in which stories and narratives can modify culture and individual consciousness).

77. See WILLIAMS, *supra* note 26.

*Brown*. Separate is no longer equal. Clever, engaging stories can alter the way we see and interpret the world. Law fails because, as we said, 'everything must change at once.'<sup>78</sup> But law cannot change everything at once.<sup>79</sup> So the surprising new edict is always outnumbered. No wonder new narratives issued by a court bring about little change."

"But persistent, engaged storytelling can change everything at once," I said, leaping a little ahead of myself. I had resolved to remain quiet in order to let Rodrigo develop his case, but my excitement had gotten the better of me. "But please go on."

Rodrigo inconspicuously picked up the bill—something I remarked with surprise and a little satisfaction, akin to seeing my own children grow up. I didn't object, even though I knew his salary as a beginning professor was probably half of mine.

"Let me get this. You've always paid before," Rodrigo said, as though reading my mind. "Legal storytelling is potentially the most revolutionary form of scholarship on the current scene, which, in turn, accounts for the resistance we all see, including here at this very conference."

"How do you know it's not just old-fogyism?" I asked. "Mature scholars always resist new genres of writing pioneered by young upstarts like you. You talk strange lingo and use terms they don't understand like 'hegemony' and 'multiple consciousness.' And you cite authors they've never read. Gearing up to understand these new forms of scholarship takes a lot of work. I struggle with it sometimes, as you know, and I'm a friend and fellow traveler."

"We're grateful for your help, and that of others in your generation," Rodrigo replied quietly. "You don't know what an inspiration you've been. You give us courage to go on, and your advice has been invaluable."

"Not to mention your own native talent," I said. "But please go on. I'd love to know why stories are not the answer, either."

Rodrigo paused. "Do you remember the resistance to stories that we talked about earlier?"

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78. See *supra* text accompanying note 55.

79. See *supra* text accompanying notes 53-55.

"You mean the spate of recent law review articles and journalistic pieces attacking the new jurisprudence, ridiculing it or trying to rein it in?"<sup>80</sup>

"Yes, that. Have you wondered why it exists?"

"I assume you have a theory for it—that you think it's more than simple inertia and resistance to that which is new?"

"I think there *is* more to it than that. There's a double mechanism, which I'll explain in a minute. But underlying everything is the sense, the fear really, that stories if well told can become part of the narrative base and so change the way we understand the world. That's truly subversive. And since societies, like most organic things, do not want to change, at least rapidly, we resist."

"Conservative stories seem to have real effect," I interjected. "Over the last decade or so, stories like the welfare queen, the pathogenic black family, Willie Horton, and so on, have swept the land. Maybe the political right are simply better storytellers than we are."

"I don't think they're better storytellers, although they do seem to have a knack for using the media and for coining catch-phrases, like 'political correctness.'<sup>81</sup> I think the real reason has to do with memory. Conservative stories recall a distant past, which we remember in a rosy glow, when everything seemed to be better. Progressives and reformers urge us to move in directions we've never been. Stories like that raise anxieties. Why abandon the safe ground we're on for an uncharted future?"

"But society sometimes listens to our stories, as it did in the sixties. And even today some of our writers do get a favorable reception. Patricia Williams' book, for example, was well received."<sup>82</sup>

"Stories have to be inveigling, insinuating. Ones that are too frontal create resistance.<sup>83</sup> They have to engage the logic, build on the narratives of the dominant tradition. Agony tales always go over better than the other kind."

"The more hard-edged ones?"

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80. See *supra* text accompanying notes 7, 12-27.

81. For the development of the imposition trope, see Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025 (1994) [hereinafter Delgado & Stefancic, *Imposition*]; Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061 (1994).

82. WILLIAMS, *supra* note 26.

83. Delgado, *Plea for Narrative*, *supra* note 11, at 2415, 2434-35.

"Yes. You've seen something like that in your own experience writing about hate speech. That first article was a classic 'agony' tale. Liberals, and even some conservatives, loved it."<sup>84</sup>

"The reaction was like that of some reviewers of Pat Williams' book, who praised it as so 'poignant,' so 'moving,' so poetic."<sup>85</sup>

"But as happened to you when you wrote about the logic and structure of the hate-speech problem, you saw that you elicited a different reaction."<sup>86</sup>

"I certainly did," I admitted a little ruefully. "I stopped being a cult hero. People started inviting me to lectures in order to *debate* my views. Often they would invite a speaker from the ACLU to present 'the other side.' And then when I started writing about campus speech codes, resistance increased and the decibel level rose even higher. One columnist attacked me and my co-author, calling us fascists, Orwellian censors, and purveyors of dangerous, un-American double-think, all in one article."<sup>87</sup>

"Quite an indictment," Rodrigo said, looking at me intently. "I'm glad to see you haven't begun pulling your punches. Where did the column appear?"

"A national newspaper. At least they gave me a chance to reply, even if it was several months later. But you said you had a theory to explain all this, something to do with a double axis or mechanism?"

A. RODRIGO EXPLAINS WHY SOCIETY RESISTS THE NEW  
STORYTELLERS AND SETS OUT HIS DOUBLE MECHANISM  
BY WHICH WE DEPLOY THAT RESISTANCE

"I do," Rodrigo began. "Recall two related phenomena, both having to do with stories and images." Rodrigo took a long sip of his coffee, which the waiter had obligingly refilled, even though we had paid our bill. "Not bad, for institutional coffee, I mean."

"I gather you mean ethnic imagery, whose history we discussed before."<sup>88</sup> But what's the second one?" I asked.

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84. See *supra* text accompanying note 37.

85. Delgado, *Ten Years Later*, *supra* note 32, at 1366-67.

86. See *supra* text accompanying notes 38-41.

87. Cf. Jonathan Yardley, *The Code Word: Alarming*, WASH. POST, Aug. 16, 1993, at B2.

88. See CATHERINE SILK & JOHN SILK, *RACISM AND ANTI-RACISM IN AMERICAN POPULAR CULTURE* (1990). For a summary of the history of public depiction of four minority groups of color in the U.S., see Delgado & Stefancic, *Images*, *supra* note 33, at 1261-75.

"The other is resistance to reform in general," Rodrigo replied. "If you consider both together, you see what they have in common. And what they have in common explains our predicament and that of today's other storytellers and counterstorytellers, who are trying to get others to take a more humane approach to problems of racial justice."

"I'm not quite sure I see what they have in common. You and I recently discussed the way our culture's system of racial imagery depicts black people over the years. Early on, there were the Sambo and the Mammy images."<sup>89</sup>

"Which we said were necessary to reassure white society that African Americans were content with their lot during slavery and the early Emancipation years."<sup>90</sup>

"Indeed. A different image would have been too disturbing. It would have implied that the slaves wanted a normal life, had human needs, just like the rest of us. But then the image changed."<sup>91</sup>

"During Reconstruction, novels, stories, and early films began depicting blacks as bestial, primitive, hypersexual, with designs on things they did not own or deserve, including white women."<sup>92</sup> Now, what society needed was repression. The new images served this purpose perfectly."

"The images are not always negative. Remember the Harlem Renaissance."<sup>93</sup>

"Yes, society was then turning to other cultures for renewal. They adopted black music and art as a refuge from their own excesses. They found its primitivism refreshing, just as today many Americans look to Southwest culture for relief from the cares of industrialized life."<sup>94</sup> The images of us are never particularly flattering—beast, lackey, primitive, and so on. But they are intensely *functional* for the dominant group, changing as its needs change—now for cheap or slave labor, now for repression, now for entertainment, and so on."<sup>95</sup>

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89. Delgado & Stefancic, *Images*, *supra* note 33, at 1262-64.

90. *Id.* at 1276.

91. *Id.* at 1262-64.

92. *Id.* at 1264-66.

93. *Id.* at 1266.

94. *Id.* at 1275.

95. *Id.* at 1275-76.



"A few courageous souls in every era resist those images, or write a book or play depicting us as normal—like anyone else," I pointed out.<sup>96</sup>

"But they are ignored. The weight of the general system of narratives and images is too great. Harriet Beecher Stowe's novel sold well only after decades of abolitionist agitation had begun to make the American public understand that slavery might be wrong.<sup>97</sup> Nadine Gordimer won the Nobel Prize only as her country was on the verge of repudiating apartheid.<sup>98</sup> Or consider the recent 'rediscovery' of a generation of black novelists and writers, including Zora Neale Hurston and Charles Chesnutt. Those authors were writing many years ago; they had publishers and small audiences. Society was simply not ready to change its images of blacks. These authors wrote about black characters who were normal—like everyone else—who had feelings, hopes, dreams, and so on. They lacked an audience because society did not want to accept that image of blacks back then."<sup>99</sup>

"I'm generally familiar with that functional view of racial imagery," I replied. "But you mentioned there was another strand?"

"Yes," Rodrigo continued. "It's related to the first. Recent work has begun to focus on the problem of social reform in general. A few scholars, like Spann, have analyzed law's role."<sup>100</sup>

"Or lack of it," I added wryly.

"Indeed," Rodrigo went on. "Various writers are studying the natural history of social reform movements, working their way toward a general theory of reform and regression."<sup>101</sup>

"And this mirrors the course of ethnic imagery which you just reviewed for me?"

"In some ways it does. At first social reform movements tend to evoke sympathy and solicitude. We consider ourselves a generous and welcoming people. So we link arms with the newcomers, march with

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96. *Id.* at 1281-82.

97. *Id.*

98. *Id.* at 1281.

99. *Id.* at 1281-82.

100. SPANN, AGAINST THE COURT, *supra* note 71.

101. See *supra* notes 19, 25, 45, 52, 53, 71; see also Richard Delgado & Jean Stefancic, *Pornography and Harm to Women: "No Empirical Evidence?"*, 53 OHIO ST. L.J. 1037 (1992) (discussing social responses to the suggestion that pornography should be regulated).

them, sing 'We shall overcome.' Everyone identifies with the underdog.<sup>102</sup> And so it is with most social movements—feminism, civil rights, environmentalism—at first. Then at some point the tide turns. We begin to see the group as dangerous, aggressive. They are asking for things they have not earned, do not deserve, and demanding concessions we cannot easily give. Now they are no longer in favor. We no longer invite them to fashionable parties. They are whiners, demanding, impossible, never satisfied. Now they are imposing on our just prerogatives. They are in the wrong, we in the right."<sup>103</sup>

"I've seen something like that happen with many social movements, including our own," I said. "In the sixties, they loved us. We could do no wrong. Now we are almost completely out of favor. These days, it's almost a sick joke. When I pick up a newspaper and see a column about racism, it's almost always about Farrakhan, or some outrage a white has suffered at the hands of women or minorities."

Rodrigo nodded, and so I reminded him of the connection I hoped he would make: "And you think all of this has something to do with the resistance to legal stories and storytelling?"

"I do," Rodrigo replied. "The latest round of reaction recapitulates both of these themes. At first, society welcomed the new storytellers. We thought they were cute and endearing, like children. 'Oh, look, they're telling stories,' we said. We deemed the new stories poignant, moving, touching.<sup>104</sup> At this early stage, we considered most of the stories 'agony tales,' personal accounts or journals of the writers' lives.<sup>105</sup> But then we noticed that they were doing more than merely writing about their feelings, doing more than telling us how it feels to be black. They were making points about us, about the ways in which we think and live.<sup>106</sup> And some of their points were not particularly flattering. Some were downbeat and pessimistic, like Derrick Bell's.<sup>107</sup> Now we started to temper our praise, to find fault with storytelling. Reservations appeared. Writers called for criteria to

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102. Delgado & Stefancic, *Imposition*, *supra* note 81, at 1026.

103. *Id.* at 1025-26.

104. See *supra* text accompanying notes 31-32, 36-37.

105. Farber & Sherry, *Out of School*, *supra* note 6, at 835-38; Delgado, *Ten Years Later*, *supra* note 32, at 1366-67.

106. E.g., Kimberlè Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 BLACK L.J. 1 (1989); Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

107. E.g., BELL, NOT SAVED, *supra* note 52; BELL, BOTTOM OF THE WELL, *supra* note 25.

evaluate, to get a handle on this new legal genre.<sup>108</sup> Writers of color then turned to counterstories, tales, and parables that mocked, jarred, or displaced some comfortable majoritarian tale, myth, or narrative. Major tenets of the majoritarian faith were now being called into question.<sup>109</sup> This was disconcerting. It brought sharper attacks. Farber and Sherry appeared.<sup>110</sup> Austin<sup>111</sup> and Van Alstyne<sup>112</sup> began ridiculing the new narrativists openly. Austin said Critics only cite each other."<sup>113</sup>

"A kind of reversal of the imperial-scholar charge,"<sup>114</sup> I observed wryly.

"And Van Alstyne likened us to commissars and thought-police, saying that when he read us he was reminded of the tanks clanking into Tiananmen Square."<sup>115</sup>

"As though we were the ones with all the power," I exclaimed.

"To him, it must actually look that way," Rodrigo replied. "It's a kind of surplus-power phenomenon. Changes from the cultural baseline appear unprincipled, ruthless, and wrong. Oh, and to draw out the parallel I mentioned, it's all there. Early on, we were the Harlem Renaissance—earthy, primitive, simple, appealing."<sup>116</sup> Then we were the simple Sambos and Mammies, cheerfully writing in the civil rights fields but producing little of the really important work.<sup>117</sup> Then the tide changed. Now we are the threatening, bestial, nearly out-of-control blacks of the late 1800s or post-civil rights black exploitation films."<sup>118</sup>

"And so they are right to resist us; they have practically a moral duty to do so, since we are the unprincipled ones, the ones on the offensive."<sup>119</sup>

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108. See *supra* text accompanying notes 23-24.

109. See *supra* text accompanying notes 6, 11.

110. Farber & Sherry, *Out of School*, *supra* note 6.

111. Austin, *Deconstructing*, *supra* note 6; Austin, *Double Session*, *supra* note 6.

112. See Van Alstyne, *supra* note 6.

113. Arthur Austin, *Political Correctness Is a Footnote*, 71 OR. L. REV. 543, 548-51, 554 n.81, 555 (1992).

114. See Delgado, *Imperial Scholar*, *supra* note 42.

115. Van Alstyne, *supra* note 6.

116. See *supra* text accompanying notes 33-34.

117. See *supra* text accompanying note 89.

118. See Van Alstyne, *supra* note 6.

119. See Delgado & Stefancic, *Imposition*, *supra* note 81, at 1025-26.

"True," Rodrigo replied with a slight sigh. "It's all done solemnly and for the best of reasons—academic rigor, due process, the integrity of the personnel and promotions process."

I could sense Rodrigo was about to finish, and so decided to push for clarification of something that had been nagging at me. "Rodrigo, you mentioned earlier the attack on the law reviews.<sup>120</sup> Did you mean to imply that this assault has something to do with the currents we have been discussing?"

"Oh, I should have explained myself better," Rodrigo said. "I think it does. The reviews have been publishing our material, that and the work of the Crits and feminists. The old-time formalistic stuff is passing into history. All the bright young minds in the articles departments know this, realize that formal jurisprudence is playing itself out, has yielded all the insights it is ever going to offer. Postmodern, Critical, feminist, and Critical Race analysis, for now at least, offer much more—genuinely new and exciting ways of understanding our social condition.<sup>121</sup> Many conventional scholars don't like that. Rather than compete intellectually, which would entail retooling and reading and learning to think differently, it's much simpler just to take over the law reviews."

"So you think a faculty takeover really is imminent?" I asked in alarm.

"Not really a takeover, although this may happen in a few schools. What I think is much more likely is some sort of effort to increase faculty participation, certainly in the selection of articles, perhaps also in their editing once they're accepted.<sup>122</sup> You saw evidence of that type of discontent in the ad hoc section meeting we mentioned before. It's the first time, isn't it, Professor, that these matters have been discussed at the AALS annual meeting?"

"I'm not sure," I replied. "I don't go to all of them. But it's the first time that I can remember, although there has been the occasional article or essay in the *Journal of Legal Education* decrying the role

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120. See *supra* text accompanying notes 47-50.

121. Delgado, *Chronicle*, *supra* note 3, at 1365; Delgado, *Seventh Chronicle*, *supra* note 3, at 752; see also Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990) (discussing effect of post-modernism on normative analysis); Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801-1075 (1991) (discussing the changing legal paradigm).

122. See *Waste of Time*, *supra* note 48.

mere students have in editing and selecting our writing.<sup>123</sup> We mentioned the one review that already was taken over.<sup>124</sup> And I wonder if you saw the three articles in a leading review just this last year, calling for reexamination of the role of the law reviews."<sup>125</sup>

"Cultural power always reasserts itself. You make gains, then when you least expect it, there's the backlash.<sup>126</sup> And those who participate in the reaction don't see themselves as counterrevolutionaries at all. Rather, they're just trying to set things right.<sup>127</sup> And so when the law reviews change structure, it will just seem like a little infusion of rigor, integrity. It will seem like a restoration, rather than a destructive movement aimed at aborting a host of promising social movements in the law."

Rodrigo was silent for a moment. Then he continued as follows: "And so you can see, Professor, how the personal, the political, and the academic, even, come together. I really want to get tenure, want to live with Giannina, and yet these forces seem inexorable. They combine. Do you have any doubt that what we see with the history of ethnic depiction, with social reform generally, and with storytelling and the law reviews, is about to play itself out closer to home?"

I wasn't sure what I was hearing. "Rodrigo, you mean that you have decided not to write in the storytelling mode?"

Rodrigo nodded his head glumly. "Stories are potent—as we observed. They can change the base, and through that, law, and through that, society."<sup>128</sup>

"But you're saying," I interjected, "that the base changes *us* as well. Social gravity restores itself, inevitably, after a few moments of exhilarating flight in which you thought you were weightless and could fly."

123. See, e.g., Roger C. Cramton, "The Most Remarkable Institution": *The American Law Review*, 36 J. LEGAL EDUC. 1 (1986); John G. Kester, *Faculty Participation in the Student-Edited Law Review*, 36 J. LEGAL EDUC. 14 (1986); Richard A. Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647, 1656 (1993); *Waste of Time*, *supra* note 48.

124. Myers, *supra* note 49.

125. See *Exchange*, 61 U. CHI. L. REV. 527 (1994) (containing articles by James Lindgren, Wendy J. Gordon, and the Editors).

126. E.g., DELGADO & STEFANCIC, *FAILED REVOLUTIONS*, *supra* note 52; SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991); Delgado & Stefancic, *Imposition*, *supra* note 81; Randall Kennedy, *In Praise of the Struggle for Diversity on Law School Faculties*, 22 SETON HALL L. REV. 1389 (1992).

127. Delgado & Stefancic, *Imposition*, *supra* note 81, at 1026, 1048-49, 1051.

128. See *supra* text accompanying notes 76-77, 79-80 (discussing this possibility).

"It's as though society had a small, but very powerful, unseen homeostat. We replicate ourselves even when we think we are trying most sincerely to transform ourselves and each other. Social momentum is preserved. The more things change, the more they stay the same."

"And so you are forswearing stories, giving up narrative analysis?"

Rodrigo looked me straight in the eye and said nothing.

"But Rodrigo, you can't do that. You *are* a character in a narrative. You would no longer exist!"

"We are all characters in a narrative, Professor. We just fool ourselves into thinking that things are otherwise. Perhaps we want to escape responsibility for our own stories."

The lights flickered again. I hoped our dialogue was not about to be interrupted by a blackout. But the kids over by the wall had been quiet for some time.

"Maybe you'll change your mind," I said. "I've found that when the young wax pessimistic, they never stay that way for long. What other topic were you going to write about? You mentioned there was another one," I said, trying to redirect his thoughts to something less dire.

"Oh," Rodrigo said with a start. "The level playing field. Everyone wants to know whether it is or not. I was going to show exactly in what respects it is not level. I think it's an important topic. Conservatives say things are now leveled, and minorities ought to play by the same rules as everyone else.<sup>129</sup> Liberals and many minorities insist it is not. But everyone is vague on exactly what the concept means, and in what respects minorities are made to play an unequal game. I would have taken two or three principal playing fields as illustration, including the famous First Amendment free market of ideas, the economic marketplace of trades, exchanges, and competition, and perhaps another one. Maybe the problem of law school admissions."

"We talked about something similar to that one before," I said.<sup>130</sup>

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129. E.g., Lino A. Graglia, *Race-Conscious Remedies*, 9 HARV. J.L. & PUB. POL'Y 83 (1986); Suzanna Sherry, *The Forgotten Victims*, 63 U. COLO. L. REV. 375, 376-80 (1992).

130. Delgado, *Chronicle*, *supra* note 3, at 1361-64 (observing that "merit is white people's affirmative action").

"Right," Rodrigo recalled. "The first time we met. Then, I would have employed history, cultural analysis, and close examination of the governing narratives and stories in each area to show precisely what the main disadvantaging mechanisms are that render the playing field uneven."

"Simple, brilliant, and deeply subversive," I said. I could hardly contain my enthusiasm. "What do you mean, 'you would have written'? This is a great project, Rodrigo. It's needed, it's exactly the time to do it—the cultural moment, so to speak. And you're precisely the person to carry it off."

"I wish I were as sure as you are, Professor. I just worry about the possibility that—what do you call it—that one can analyze a thing to death?"

The lights flickered again, then went out decisively. I know they were out perhaps for thirty seconds, because I heard voices in the hallway outside exclaiming.

I sat there quietly reflecting on our conversation. Looking back, I cannot be sure I did not drift off to sleep for a moment, worn out by the fast pace of the three days of convention and the high-pitched, although stimulating, talk with Rodrigo.

When I opened my eyes, a bare booth greeted me. Rodrigo was nowhere to be found. I was certain he had been there—his empty coffee cup remained to remind me of our conversation. But no note, then or later, confirmed this. And future efforts to get in touch with him turned up blank.

After a few minutes, I got up and walked outside the hotel on the off chance he had gone there for a breath of air. No Rodrigo, indeed no one at all. I had the walkway to myself. I looked up at the night sky. A meteor flashed through the dark resort sky and was gone.

Had Rodrigo been, as he put it, just a character in a narrative? And, if so, did he actually succumb to the critique of narrativity? What did he mean by his last lines, of being analyzed to death? Like all storytelling, had he and his lessons been lost in a cloud of abstraction, in which learned commentators paid endless attention to the form, the quality, the procedure of storytelling, and gradually lost sight of the content of the stories themselves? Was Rodrigo right that cultural momentum is preserved, while he himself turned out to be perfectly fallible, perfectly mortal?

The night was chilly. I walked back into the hotel, noticing on an easel just inside the basement door a notice about the meeting on "Publishing." I was sorry I had not attended, and wondered if I had somehow betrayed my young friend and protege by not going.

Once before he had returned from exile as brash and full of life as ever. But this departure somehow to me seemed more final, more dire. I wondered if I would ever see him again.



