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and Legal Change**

Richard Delgado

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Book Review

RICHARD DELGADO*

Rodrigo's Homily: Storytelling, Elite Self-Interest, and Legal Change

One Night in America: Robert Kennedy, Cesar Chavez,
and the Dream of Dignity**

The Hollow Hope: Can Courts Bring About Social Change?***

I

IN WHICH RODRIGO PAYS ME A SURPRISE VISIT

I had been toiling away one gray afternoon in December and wishing that the stack of bluebooks piled high on my desk were smaller, when a polite cough at my office door caused me to look up.

"Rodrigo!" I exclaimed at the sight of my lanky young friend.¹
"What a surprise. I didn't know you were in town."

* Professor of Law, Seattle University. J.D., University of California-Berkeley, 1974. Thanks to Jean Stefancic for incisive comments and to Kara O'Bryon, Nick Cassell, and Tatyana Margolin for invaluable research assistance.

** *One Night in America: Robert Kennedy, Cesar Chavez, and the Dream of Dignity*, written by Steven Bender, James and Ilene Hershner Professor of Law and Director of Portland Programs, University of Oregon School of Law.

*** *The Hollow Hope: Can Courts Bring About Social Change?*, written by Gerald N. Rosenberg, Associate Professor of Political Science and Lecturer in Law, University of Chicago.

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

My visitor smiled warmly. “Giannina and I flew in to see her old obstetrician.² She’s pregnant with our second child, as you know, and

to the United States to investigate graduate law (LL.M.) programs. At the suggestion of his half sister, famed U.S. civil rights lawyer Geneva Crenshaw, see DERRICK BELL, AND WE ARE NOT SAVED 7 (1987), he seeks out “the Professor” for career advice. Despite their age difference, the two become good friends, discussing affirmative action and the decline of the West, *Rodrigo’s Chronicle*, *supra*; law and economics, Richard Delgado, *Rodrigo’s Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993) [hereinafter *Economics and Politics of Race*]; love, Richard Delgado, *Rodrigo’s Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993) (book review) [hereinafter *Third Chronicle: Care & Competition*]; legal rules, Richard Delgado, *Rodrigo’s Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) [hereinafter *Fourth Chronicle*]; the critique of normativity, Richard Delgado, *Rodrigo’s Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993) [hereinafter *Fifth Chronicle: Civitas*]; relations between men and women, Richard Delgado, *Rodrigo’s Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993) [hereinafter *Sixth Chronicle*]; Enlightenment political theory, Richard Delgado, *Rodrigo’s Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994); black crime, Richard Delgado, *Rodrigo’s Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994); narrative jurisprudence, Richard Delgado, *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 RICHARD DELGADO, *THE RODRIGO CHRONICLES* (1995)); the rule of law, Richard Delgado, *Rodrigo’s Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994) [hereinafter *Ninth Chronicle: Legal Instrumentalism*]; affirmative action, Richard Delgado, *Rodrigo’s Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995) [hereinafter *Tenth Chronicle: Merit and Affirmative Action*]; clinical theory, Richard Delgado, *Rodrigo’s Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996); legal formalism, Richard Delgado, *Rodrigo’s Thirteenth Chronicle: Legal Formalism and Law’s Discontents*, 95 MICH. L. REV. 1105 (1997); the problem of desperately poor border settlements, Richard Delgado, *Rodrigo’s Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997); interracial indifference, Richard Delgado, *Rodrigo’s Remonstrance: Love and Despair in an Age of Indifference—Should Humans Have Standing?*, 88 GEO. L.J. 263 (2000) (book review) [hereinafter Delgado, *Remonstrance*]; white self-interest, Richard Delgado, *White Interests and Civil Rights Realism: Rodrigo’s Bittersweet Epiphany*, 101 MICH. L. REV. 1201 (2003) [hereinafter *Epiphany*]; Latino civil rights, Richard Delgado, *Rodrigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997); Richard Delgado, *Rodrigo and Revisionism: Relearning the Lessons of History*, 99 NW. U. L. REV. 805 (2005) (book review) [hereinafter Delgado, *Revisionism*]; postcolonial theory, Richard Delgado, *Rodrigo’s Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1691 (2007) [hereinafter *Corrido*]; and many other topics over the next few years. During this period, the brash, talented Rodrigo earns his LL.M. degree and embarks on his first teaching position. The Professor meets Rodrigo’s friend and soul mate, Giannina, and her mother, Teresa, with whom the elderly gent is immediately smitten. He also learns that Rodrigo’s father’s family immigrated to America via the Caribbean. His father Lorenzo looks black and identifies as such, but speaks perfect Spanish.

² See *Third Chronicle: Care & Competition*, *supra* note 1, at 402 (introducing Giannina, Rodrigo’s partner and, now, wife, a published playwright, poet, and new law student).

wanted to see him once before switching to a local doctor. I didn't know until the last minute that he'd be able to squeeze us in or I would have called first."

I motioned him to come in. "It looks like you're busy," he said, gesturing toward the stack of papers piled high on my desk and the smaller one on the floor.³

"Grades aren't due for a week, so I've got plenty of time. Can I offer you some coffee?"

"You know my weakness," he said, eyeing my new office espresso maker, of which I was very proud. "I have something for you, too—a new thesis I think you'll find interesting."

"I'd love to hear it," I said, ladling a measure of beans into the machine. "Have a seat. How long will you be in town?"

"We're flying back early tomorrow. But we were hoping we could treat you and Teresa to dinner. Giannina even picked out a nearby restaurant that she read about in the hotel guidebook. It's Italian."

"I'd be delighted," I said. "Teresa's still at that environmental conference, so I'm on my own tonight. All I was going to do is more of this interminable grading. What's that new thesis of yours?"

(As the reader might know, my intellectually audacious young friend had never been shy about sharing new ideas. Over the years, we had discussed a range of topics, including the decline of the West,⁴ affirmative action,⁵ love,⁶ the economics of race and discrimination,⁷ and much more. I had seen him grow from a rambunctious LL.M. student to a young professor and husband.⁸ Even though he had a distracting habit of dropping in unannounced, I always enjoyed his youthful energy. He jarred my jaded, aging sensibilities. And I had gotten some great law review articles and not a few books out of our conversations.)

³ Like Rodrigo, the Professor is a fictional character, a composite of many persons I have known. As I have drawn him, the Professor is a man of color in the late stages of his career, teaching at a major law school in a large city.

⁴ See *Rodrigo's Chronicle*, *supra* note 1.

⁵ E.g., *Tenth Chronicle: Merit and Affirmative Action*, *supra* note 1.

⁶ E.g., *Third Chronicle: Care & Competition*, *supra* note 1.

⁷ E.g., *Second Chronicle: Economics and Politics of Race*, *supra* note 1; Richard Delgado, *Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 NW. U. L. REV. 215 (1998).

⁸ See, e.g., *Rodrigo's Chronicle*, *supra* note 1; *Third Chronicle: Care & Competition*, *supra* note 1 (tracing his origins and legal education); *Ninth Chronicle: Legal Instrumentalism*, *supra* note 1 (describing his entry into law teaching).

“Law and social change,” he said, looking up eagerly as I got out two mugs and placed them, some condiments, and a glass decanter of steaming coffee on a tray in front of us.

We were silent for a minute while Rodrigo stirred in the ingredients. Then, he took a deep gulp from his cup and began:

II

ONE NIGHT IN AMERICA: ROBERT KENNEDY, CESAR CHAVEZ, AND THE FARMWORKERS

A. *The Backstory*

“Professor, I wonder if you’re familiar with Steve Bender’s latest book?”⁹

“You mean the one about the farmworkers?” (Rodrigo nodded.) “I saw it on a list of new books our librarian sent around. I gather you’ve read it already?”

Rodrigo slipped a slender black and white volume out of his backpack and held it up for me to see. “I finished it on the plane. It’s about Latinos and the sixties.”

“I’m not surprised it caught your eye,” I said. “Even though you look black, you have latinicity on both sides of your family.”¹⁰ Anyway, tell me about that book. Does Bender have a thesis?”

B. *The Farmworkers Movement and the Sixties*

“Not as such—although I do,” Rodrigo said with that combination of bravado and insouciance that I found charming, at least in the young. “What it offers is an absorbing story with a lot of rich detail.”

Pointing at the cover photo of a smiling Cesar Chavez and Robert Kennedy, leaning toward each other over a table, their shoulders touching, their heads almost together, I said, “I gather he uses the relationship of those two as a springboard.”

“He does, beginning with a late-night meeting shortly before the California primary.”¹¹ The two visionaries, each from opposite sides

⁹ STEVEN W. BENDER, *ONE NIGHT IN AMERICA: ROBERT KENNEDY, CESAR CHAVEZ, AND THE DREAM OF DIGNITY* (2008) [hereinafter BENDER, *ONE NIGHT IN AMERICA*].

¹⁰ See *Rodrigo’s Chronicle*, *supra* note 1, at 1359; *Fifth Chronicle: Civitas*, *supra* note 1, at 1582 n.5 (describing Rodrigo’s family history).

¹¹ See BENDER, *ONE NIGHT IN AMERICA*, *supra* note 9, at 2.

of the tracks,¹² immediately hit it off. The friendship they forged that night in the course of a discussion of JFK's presidential campaign created new rights for migrant farmworkers,¹³ broadened the civil rights coalition,¹⁴ and solidified the Democratic Party's hold on minorities and the poor."¹⁵

"I can see why Bender focused on that moment. The air must have been crackling with electricity."

"It was. Bender tells of events leading up to their meeting and its repercussions for electoral politics,¹⁶ immigration policy,¹⁷ public education,¹⁸ poverty,¹⁹ and even war and national security.²⁰ With chapters devoted to the Kennedy clan,²¹ the farmworkers movement,²² Cesar Chavez's career, including his dramatic twenty-five-day fast,²³ and the role of women such as Dolores Huerta,²⁴ it's a great read."

"You mentioned that the book is about social change. Does Bender think that the reforms of that period were structural and permanent, or merely phenomena of their time?"

"He admits that subsequent administrations have not fully embraced the two men's hopes.²⁵ But the changes they set in motion did continue for at least a time, and history may ultimately prove the two right."

"Or wrong," I countered, determined to press my protégé a little. "I just read that Latinos are one of the poorest groups in this country, with family incomes not much higher than those of blacks²⁶ and

¹² Kennedy was the son of a wealthy and powerful East Coast family; Chavez, the son of poor migrant farmworkers. *See id.* at ix.

¹³ *See id.* at 59–66.

¹⁴ *See infra* notes 42–43 and accompanying text.

¹⁵ *See* BENDER, ONE NIGHT IN AMERICA, *supra* note 9, at 36–44, 127–43.

¹⁶ *See id.* at 127–43.

¹⁷ *Id.* at 102–24.

¹⁸ *Id.* at 97–98, 101, 121–22, 128 & 174.

¹⁹ *Id.* at 4, 9, 42, 82–101, 140 & 157.

²⁰ *See id.* at 37, 41–43, 76–91, 115–16 & 124.

²¹ *See, e.g., id.* at 2–7, 36–50.

²² *Id.* at 8–26.

²³ *Id.* at 8–35.

²⁴ *E.g., id.* at 6, 32, 47–48, 50, 74–75, 109 & 177.

²⁵ *Id.* at ix, 53–66.

²⁶ *See* Richard Delgado, *Locating Latinos in the Field of Civil Rights: Assessing the Neoliberal Case for Radical Exclusion*, 83 TEX. L. REV. 489, 503 (2004) (book review) [hereinafter *Locating Latinos*] (discussing studies). For further information about the

school dropout rates that are even higher.²⁷ If you considered all African Americans in the United States as a separate country, it would rank thirty-first in the world on a combined index of social well-being including educational attainment, infant mortality, access to health insurance, longevity, and a few other measures.²⁸ Latinos would rank thirty-fifth.²⁹ What's more, I have the impression the movement started to fade soon after Robert Kennedy's death."

"From the bullet of an assassin while reaching out to shake hands with a Mexican American hotel worker,"³⁰ Rodrigo added. "But even after it, the farmworkers' campaign went on for a while longer, culminating in a broad coalition with blacks, Filipinos, and liberal whites that changed the face of America."³¹

"Well, rural America, maybe," I conceded.

"And possibly, one day, more than that," Rodrigo replied quietly. "But that's where my thesis comes in."

"Which I very much want to hear. But before you start, how about another cup of coffee?"

Nodding energetically, Rodrigo held out his cup. "Superb. French roast?"

"Yes, your favorite. Finish it. I shouldn't have any more, or I'll be up all night."

C. Law, Narratives, and Social Change

"I'd been meaning to ask how you and Teresa are doing," Rodrigo said. "I don't want this conversation to be entirely about me."

"I was actually going to write you about something going on at my law school.³² Teresa and I might be leaving."

"Oh, no," Rodrigo replied. "You're so close to retirement. And you two just bought that condo. What's going on?"

"I'll tell you sometime. We haven't completely decided."

"Can you at least tell me whether the precipitating event was the usual faculty politics, or something else?"

group's legal history and current status, see RICHARD DELGADO, JUAN F. PEREA & JEAN STEFANIC, *LATINOS AND THE LAW: CASES AND MATERIALS* (2008).

²⁷ *Locating Latinos*, *supra* note 26, at 503.

²⁸ *Id.*

²⁹ *Id.*

³⁰ BENDER, *ONE NIGHT IN AMERICA*, *supra* note 9, at x.

³¹ *E.g.*, *id.* at 9-10, 45-48, 63-64, 67 & 84-85.

³² *See supra* note 3 (describing the Professor).

"I can't quite put my finger on it. But please go on."

"OK. The lesson I draw from Bender's book is that for a minority group to advance, it needs two things: a powerful narrative, or story, and interest convergence—reform must appear to coincide with the interests of elite whites." Rodrigo looked up expectantly.

"An elegant thesis, Rodrigo," I said. "A number of scholars have written about each element separately,³³ but you may be the first one to put them together that way."

"By shining a light on one group, over a relatively short period of years, Bender's book lets you see how the two forces—a favorable narrative and majoritarian self-interest—work together. He doesn't quite put it that way. But I do."

"Tell me more about the book. As you know, I'm interested in social change."

"I'm glad to. I like the way you push me, Professor."

1. *A Sympathetic Story*

"As you might expect," he began, "the farmworkers at first met resistance.³⁴ But by the mid-sixties, everything started to line up in their favor. The national narrative about them turned positive. Abetted by Robert Kennedy and a host of Hollywood celebrities, the farmworkers emerged as hard-working, pious, nonviolent men and women who merely wanted to work in safe conditions for a decent wage.³⁵ Their leader, a gentle nonviolent figure, evoked Martin Luther King and Mahatma Gandhi."³⁶

"He also prayed, fasted, and led his followers in song, if I recall."

"He did, which of course increased his appeal to the public. Although the growers tried to circulate a different story, they failed."³⁷

"Those Hollywood figures must have helped."

"They did. RFK's advocacy, too. Time after time, he took a break from his busy schedule to appear with the farmworkers, walking their

³³ E.g., Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279 (2001) (identifying the two strains—idealist and materialist—of scholarship about race).

³⁴ E.g., BENDER, *ONE NIGHT IN AMERICA*, *supra* note 9, at 9–11, 21–23.

³⁵ *Id.* at 26, 67.

³⁶ *See id.* at 14, 24 & 27–37.

³⁷ *See id.* at 13–18 (describing effort by the growers to paint the strike as the work of "outside agitators").

picket line or speaking at rallies.³⁸ He was on hand when Chavez broke his epic twenty-five-day fast.³⁹ The sight of the vigorous, expensively dressed national figure breaking bread with the wan, exhausted Chicano leader awakened America's conscience."

2. *Interest Convergence*

After a short pause, I added, "What about interest convergence? It can't have been in Americans' interest to vote higher food prices for themselves."

"Hold on a second," Rodrigo said. "Oh, here it is, the section of pictures. This one (he held the book up) shows Kennedy passing a communion wafer to Cesar Chavez to break his fast in Delano, California.⁴⁰ And here's another showing Kennedy looking solemn and preparing to deliver some remarks a few minutes later."⁴¹

"Those are heart-warming photos. But you were going to say how interest convergence comes in."

"Oh, right. The Democratic Party desperately needed the rural vote in the vital California primary. After a lifetime of labor organizing, Chavez was well equipped to deliver it.⁴² He also commanded the loyalty of many urban Mexican Americans and had begun to forge an alliance with blacks."⁴³

"So the combination of a favorable story and something that powerful whites wanted paved the way for change."

"Exactly. Without either, little would have happened. But with them, the farmworkers were able to enact legislation banning dangerous pesticides, permitting unionization, requiring field sanitation, and bringing higher wages for those who picked the nation's crops.⁴⁴ The end of the Bracero program helped, of course.⁴⁵ By means of two strikes, one centering on lettuce, the other on grapes, the movement actually managed to change America's eating habits as many shoppers refused to buy produce lacking the union label."⁴⁶

³⁸ *E.g., id.* at 18–19, 25–26 & 29–34.

³⁹ *See id.* at x, 29–32.

⁴⁰ *See id.* at 124 (illustrated in the photographs between pages 124 and 127).

⁴¹ *See id.*

⁴² *See id.* at 10–11.

⁴³ *See id.* at 2–7.

⁴⁴ *Id.* at 14, 22, 64 & 124.

⁴⁵ *See id.* at 107–08, 111–16 & 124.

⁴⁶ *Id.* at 8–26, 60–61.

"Oops!" We both started when my office telephone, which I had forgotten to switch off, rang loudly. I answered, then passed the receiver to Rodrigo. "It's for you."

Rodrigo looked nonplussed for a second, then quickly recovered. "It's Giannina. She's finished at her doctor's and wants to meet us at the restaurant in five minutes."

III

SOCIAL CHANGE AND ITS LIMITS

In seconds, we were scrambling out the door on our way to the sidewalk. "Did she say how she was doing?" I asked as we rode the elevator down.

"Very well, according to the doctor. He gave her the name of someone in our city. An obstetrician he went to medical school with and says is really good. By the way, Giannina says she is so hungry she could eat a horse."

I smiled at the thought of the slender Giannina, who couldn't have weighed more than 120 pounds, eating with gusto. But then I remembered my late wife's two pregnancies and how her appetite had increased keenly each time.

"Has she had any unusual cravings?" I asked, as we strode down the sidewalk in the darkening light in the direction of the restaurant.

"Just for Italian food," Rodrigo said, peering at the number on a shop we were passing. "Oh, here's the restaurant."

Minutes later, we were seated at a corner table with a red and white checked tablecloth in the homey restaurant. We told the waiter we were waiting for a third, and he left three menus, served us water, and left.

"He looks Middle Eastern," Rodrigo said idly.

"He did," I agreed. "His accent didn't sound Italian, either." Then: "What looks good to you?"

"I'm going to try the steak tartare. I bet Giannina will want one of these Neapolitan dishes, maybe pasta primavera. How about you?"

"It all looks great," I said, trying to remember my doctor's orders to take things easy and drop a few pounds. "Maybe that seafood salad. It doesn't sound too rich or dangerous for my diet."

"Hi, you two. Have you been solving the world's problems?"

I looked up to see the familiar, animated face of Rodrigo's wife. I leaped up to pull out her chair, but she grabbed me, gave me a hug, and sat down. "I'm starved. How's that menu?"

We were silent for a few minutes while she studied the long list of tempting dishes. After she decided—pasta primavera, just as Rodrigo had predicted—we gave our orders to the waiter, who had been waiting patiently nearby, and continued as follows:

A. In Which Rodrigo Extends His General Theory

“So, has my dear husband been entertaining you with his two-part theory of social change?” Giannina asked, as the waiter gathered up our menus and left.

“He has,” I said. “He said it occurred to him on reading the latest from Steve Bender. Although the book is about Latinos, he thinks it holds true more generally.”

Giannina nodded. “On the plane he began outlining how his theory applied, not just to Latinos but to other groups, including Asians, blacks, and sexual minorities.⁴⁷ He’s planning to write it up for his sabbatical project.”

“Did I tell you, Professor, that I have my first one coming up?”

“Has it been that long?” I asked. “It seems just yesterday that you were interviewing for your first job.”

“I just finished my fifth year. I have to send in my proposal next month.”

“Maybe this conversation will help. I’m certainly finding it useful. I don’t know if I told you, but I’m teaching a seminar next year on law reform. If I stay at my current school, that is.”

“Did Gus tell you that he and Teresa are thinking of moving?” Rodrigo asked. “They’ve run into some kind of trouble that he promises to tell us about, but maybe not tonight.”

“That’s one reason why I want to hear more,” I said. “In a curious way, your two points resonate with what has been going on at my school.”

“As Duncan Kennedy once said, politics is personal. It starts with the workplace.”⁴⁸

⁴⁷ See JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 179–486 (2d ed. 2007) (applying some of these ideas to nonblack minority groups); see also *infra* note 104 and accompanying text (discussing recent scholarship on the black-white binary paradigm of race).

⁴⁸ See DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (New York University Press 2004); LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS* 73, 84 (2005); Cynthia L. Estlund, *The Workplace in a Racially Diverse Society*:

"But back to you. I'm dying to know if your theory explains not only progress, but regression—times when social reform fails and the arrow of progress seems to be pointing backward, like now."

"Or the mid-seventies," Giannina added, "when the gains of the heady civil rights era began to be rolled back. My reading group was just discussing an article by a critical race theorist⁴⁹ that showed that interest convergence explains not only the advent of breakthrough events like *Brown v. Board of Education*⁵⁰ and the 1964 Civil Rights Act"

"Which came about, in large part, because this country needed a few symbolic victories for blacks to burnish the country's image in the eyes of the rest of the world," Rodrigo added. "We were competing for the loyalties of the Third World"

"Much of which was black, brown, or Asian," Giannina interjected.

"Right. Competing for their loyalties against the forces of soulless, monolithic Communism."

"Every time the world press splashed headlines about a lynching or a southern sheriff beating peaceful civil rights protesters, the communists made capital at our expense," I added. "Derrick Bell⁵¹ and Mary Dudziak showed that."⁵²

"So elite decisionmakers, especially in the Department of State, quietly conspired to produce a spectacular breakthrough for blacks," Rodrigo concluded.

"And the article I was reading showed that when interest convergence faded and Black Power appeared on the scene, right around then, black civil rights came to a screeching halt,"⁵³ Giannina said. "The Latino variety, too."

"Say, that's something I can use!" Rodrigo exclaimed, looking over at his wife with appreciation. "Bender, who describes himself as

Preliminary Thoughts on the Role of Labor and Employment Law, 1 U. PA. J. LAB. & EMP. L. 49 (1998).

⁴⁹ See Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369 (2002) (book review) [hereinafter *Rise and Fall*].

⁵⁰ 347 U.S. 483 (1954).

⁵¹ See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

⁵² Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

⁵³ *Rise and Fall*, *supra* note 49, at 380–83.

an optimist,⁵⁴ does not devote much attention to it, but the *demise* of the Brown Power movement is just as important to explain as its birth. The Professor just nailed me about that, and he's right. Interest convergence and narrative analysis may allow us to see how that happened, as well." He went on excitedly, the words spilling out: "Bender's book spreads the whole dismal story out in its last half, even though the author treats it as a case of subsequent administrations that were less receptive to the farmworkers' plight, as though these presidents just didn't understand."⁵⁵

"But if he had seen the downturn in terms of your twin forces," I added, "he would have gotten a glimpse of what has to happen today to revive Latinos' fortunes."

"Exactly," Rodrigo exclaimed, leaning forward excitedly. "And nothing could be more urgent. The story about Latinos is as unfair as it's ever been. Radio hosts and TV broadcasters,⁵⁶ along with a dozen right-wing websites . . ."⁵⁷

"And even a few liberals like Sam Huntington,"⁵⁸ Giannina added.

"Right," Rodrigo said. "Even some of them join in the attacks on this poor group, painting them as a bunch of fast-breeding, border-jumping louts and criminals, who just want to enter our freedom-loving, generous society and rake in social benefits while having baby after baby, all of whom automatically become U.S. citizens."⁵⁹

⁵⁴ BENDER, *ONE NIGHT IN AMERICA*, *supra* note 9, at 177–78.

⁵⁵ See *supra* notes 25–26 and accompanying text.

⁵⁶ For example, see almost any segment of *Lou Dobbs Tonight: Broken Borders* (CNN weekly television broadcast), <http://loudobbs.tv.cnn.com/category/broken-borders/> (last visited July 9, 2009); see also Lou Dobbs, *Big Media Hide Truth About Immigration*, CNN, Apr. 25, 2007, <http://www.cnn.com/2007/US/04/24/Dobbs.April25/index.html>; Lou Dobbs, *NY Governor Needs a Learner's Permit*, CNN, Oct. 31, 2007, <http://www.cnn.com/2007/US/10/30/Dobbs.Oct31/index.html>; Julia Preston, *Lives Are Growing Harder, Hispanics Say in Survey*, N.Y. TIMES, Dec. 14, 2007, at A30 (reporting that half fear deportation).

⁵⁷ See, e.g., The Minuteman Project, <http://www.minutemanproject.com> (last visited July 9, 2009); The Federation for American Immigration Reform ("FAIR"), <http://fairus.org/site/PageNavigator/about> (last visited July 9, 2009).

⁵⁸ See, e.g., SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 206, 216, 221–56 (2004).

⁵⁹ See FAIR, *Anchor Babies: Part of the Immigration-Related American Lexicon*, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters4608 (last visited July 9, 2009).

"Never mind that the group, as a whole, has the highest rate of participation in the workforce of any, including whites,"⁶⁰ Giannina added. "I was reading this just the other day. Their crime rate is also low, especially for such a young group."⁶¹ Not surprising, when you think about it, since the group, on the whole, is Catholic, pious, from small towns and villages, and is fearful of coming to the attention of the authorities."

"And because they are much younger and healthier than the average citizen, they use social services less."⁶² Even the undocumented contribute to Social Security, payroll and sales taxes, so that the group's net contribution is greater than the cost of the services they consume, including public education for their children,"⁶³ I added. "I saw that, too, maybe in the same article."

"The public associates them with illegality, disease, crime, and other social ills,"⁶⁴ Rodrigo went on. "Lou Dobbs and right-wing talk show hosts editorialize against them, charging that they don't want to assimilate."⁶⁵

"The unfairest criticism of all," Giannina interjected. "Since they are eager to learn English and American ways, which are, of course, the keys to jobs and upward mobility."

Just then, the waiter arrived with our steaming plates of delectable looking food and an enormous salad for me. "Will there be anything else?" he asked.

"It looks great," we all said in unison. He promptly departed, and we ate in tacit silence for a few minutes.

Then, I looked up. "How's your food?"

⁶⁰ See *Corrido*, *supra* note 1, at 1730 & n.155; Richard Delgado & Jean Stefancic, Editorial, *Let's Welcome Latinos to Pittsburgh*, PITTSBURGH POST-GAZETTE, Sept. 18, 2005, at K2 [hereinafter *Welcome*].

⁶¹ See Robert J. Sampson, Editorial, *Open Doors Don't Invite Criminals*, N.Y. TIMES, Mar. 11, 2006, at A15; see also Erin O'Donnell, *Latinos Nix Violence*, HARV. MAG., Sept.-Oct. 2006, at 15 (describing Sampson study); *Welcome*, *supra* note 60; *infra* note 63 and accompanying text.

⁶² See *Welcome*, *supra* note 60; Mary Engel, *Latinos' Use of Health Services Studied*, L.A. TIMES, Nov. 27, 2007, available at 2007 WLNR 23398288.

⁶³ See *Welcome*, *supra* note 60; Max Boot, *Immigration Exaggeration*, Editorial, PITTSBURGH POST-GAZETTE, Dec. 9, 2007, at G1.

⁶⁴ See, e.g., *Corrido*, *supra* note 1, at 1723-38; Southern Poverty Law Center, *Immigration Backlash*, INTELLIGENCE REPORT, Winter 2007, available at <http://www.splcenter.org/intel/intelreport/intrep.jsp?iid=43>.

⁶⁵ See *supra* note 56.

When both of them pronounced it delicious, I asked, "Well, Rodrigo, if this hardworking group labors under such an unfavorable image with few powerful friends, what's the solution? It's not enough to say that the times are bad and that we have to wait until the stars line up again. Your theory must offer more than that. What does it have to say about today?"

IV

MANON OF THE SPRING

"This part of my thesis isn't fully worked out," Rodrigo began. "But I think that for any beleaguered group to advance, a favorable story must begin to circulate. In addition, the majority must begin to see its own self-interest as aligned with that of the group. Possibly my two factors are related."

"A tall order," I said. "Especially in combination. I gather you've given this some thought?"

A. *A New Story*

"Professor, have you seen the movie *Manon of the Spring*?"⁶⁶ Rodrigo began.

"You mean the French movie with Gerard Depardieu?"

"Right. It's the second of two movies by director Claude Berri, starring Depardieu, who plays an earnest hunchback family man with a good work ethic but who nevertheless comes to naught."⁶⁷

"I think I saw them some time ago," I said. "But my memory is a little foggy."

"Giannina and I watched both of them last weekend," Rodrigo said. "They form a single, unbroken narrative, featuring many of the same characters and actors. In *Jean de Florette*, a French family consisting of Depardieu and his wife, an opera singer, and young daughter, leave comfortable lives in the city for the bucolic countryside. They want to make a fresh start, with clean air, plants, and no big-city problems such as noise, crime, and congestion."

"Then what happens?"

"It's enough to cure you of any romantic notions of country living," Giannina said. "Or even of the innate goodness of human nature. Jean, the main character, inherits a little country land in

⁶⁶ (Orion Classics 1986).

⁶⁷ The other film is *JEAN DE FLORETTE* (Orion Classics 1986).

Provence. The inheritance comes at a time when he and his family are thinking of abandoning city life. So he packs up wife and child and moves into an old stone farmhouse, planning to make a living by raising vegetables and rabbits.”

“A tax accountant in his former life,” Rodrigo continued, “he approaches his new calling with both boundless energy and book learning. He has read of the theory of exponential increase and believes he can apply it to rabbits, which he can sell for food. His plans call for starting with an expensive, very large breeding pair, then breeding their offspring, and so on. He will soon have four rabbits, then eight, sixteen, thirty-two, and so on. To feed the rabbits, he will raise lettuce, which in turn requires water.”

“He thinks he has allowed for that,” Giannina said, “having studied meteorological charts and learned that the region typically receives enough rainfall to support a garden for the family and all their rabbits.”

“Don’t forget the neighbors in the nearby village,” Rodrigo said.

“Oh, right. The neighbors make fun of Jean behind his back. He plants his vegetable garden in the sun, when they have traditionally planted in the shade. When one well-meaning neighbor asks him about it, he gives a scientific explanation: He expects enough rain to ward off parching, and the vegetables will grow faster in the sun than the shade.”

“But it turns out that the neighbors have a dark side,” Rodrigo went on. “The local village elder, played by Yves Montand, and his son have long had their eyes on Jean’s land. They know that if the hunchback fails, they can buy it from him cheap. When Jean inherited the land, it came with a map showing a spring. He never expects it to be important, because the charts show that the area gets plenty of rain.

“But the neighbors know better,” he continued. “They also know that Montand and his son have secretly blocked the spring with concrete, changing its course. But they keep quiet about it and wait for the inevitable.

“And sure enough,” Rodrigo continued, “summer arrives and with it scorching heat unrelieved by rain. Jean’s vegetables wither and his rabbits begin to die. He frantically begins carrying water by mule and on his own back, filling containers from a communal well in the distant village. He does this several times a day, until his mule dies of overwork. His wife pitches in, but their journeys on foot with heavy barrels on their backs bring them close to breakdown.

"In desperation, Jean asks Montand to lend him his mule. The elder turns him down, explaining that he needs the animal for work around his own farm.

"Even nature seems to conspire against the hunchback. A dramatic thunderstorm with lightning and torrential rain barely bypasses the area, as Depardieu and his family watch disbelievingly."

"Don't forget to tell about the role of Montand's son," Giannina said.

"Oh, yes," Rodrigo said. "The son is an appealing fellow, but weak and, unfortunately, ugly. His father fears the lad will never marry, and since he is the only one left, the family line will die out. The movie ends with Montand aging, the son still single, and the hunchback near death from exhaustion. After he dies, it comes out that he and Montand, unknown to either, are blood relatives. If Montand had come to his rescue, the family line would have continued. Montand dies a broken man."

I shivered a bit at the film's bleak insight into human nature. "Come to think of it, I may have missed that movie. But I'm pretty sure I saw the second, since the characters sound familiar. Remind me what happens in the sequel."

"The second film⁶⁸ begins ten or fifteen years later," Rodrigo began. "The ugly son has become prosperous by raising carnations but is still unmarried. Jean is dead of overwork, and his farm lies idle. His daughter, however, has grown up and is now a beautiful recluse making a living as a shepherd woman in the surrounding hills. One day, the ugly son sees her bathing nude and falls desperately in love with her. She finds him repulsive, however, and her revulsion only deepens when she discovers the hidden spring, blocked with concrete in a cave, and realizes that had it not been for his and Montand's dirty work, her father would have made a success of the farm and would still be alive.

"Vowing revenge, she changes the course of the underground stream a second time, causing the village's well to grow dry. Montand dies, realizing that his own greed has brought about disaster for his village and the end of his family line."

"What a tale!" I exclaimed. "Jean's good nature and boundless energy are no match for his neighbors' superior knowledge and greedy designs. The villagers, all of whom are complicit in the plot to destroy him, end up destroyed themselves."

⁶⁸ MANON OF THE SPRING, *supra* note 66.

"Exactly," Giannina said. "Mankind's selfish nature brings about its own denouement. The beautiful daughter marries a handsome lad from a different village, and they are the only ones to live happily ever after."

The courteous waiter, who must have been hovering nearby, materialized at our table. "Would you folks like some dessert?" he asked, holding up a slender, one-page menu.

"I'll never eat rabbit meat again," said Giannina. "Even though the doctor this afternoon told me to get plenty of protein. Let's see those menus, though. Maybe some gelato?"

"I recommend the spumoni," the waiter said. "It's our specialty."

My two young friends settled on that, while I opted for an abstemious strawberry sorbet.

After the waiter left, I looked up at my two companions. "And I suppose you think the movie offers a lesson for social reformers?"

1. *The Role of Stories in Law Reform*

"We do," Rodrigo said. "Giannina and I were talking about this the other day. In *Manon*, the villagers and Jean come to a sorry end because of a lack of imagination and empathy. The locals did not see the new arrivals as like themselves, as parts of their human family. They did not identify with them and made fun of their fumbling efforts. Not realizing that Jean was one of two surviving males in the family line, his death, which they could easily have forestalled, meant little to them."

"In fact," Giannina continued, "if they had seen a continuity between themselves and the struggling family—had recognized them as kin—both sides would have been better off. The hunchback would have had plenty of water, while the villagers would have had enough, too, plus their family line would have continued instead of coming to an abrupt end."

"Sometimes if you give to others, your gift comes back manifold,"⁶⁹ I said. "Trite as it might sound, human love is a powerful instinct that often points you in a direction that will ultimately turn out for the best. But what does this have to do with social change? I don't see the connection."

⁶⁹ See *Third Chronicle: Care & Competition*, *supra* note 1.

"The idea is to tell stories like *Manon*,"⁷⁰ Rodrigo said quietly. "But with Latinos and other despised groups in the role of the heroic hunchback. These tales can tap Biblical themes about receiving through giving and about the role of reciprocity in human affairs."⁷¹ Right now, the American public see Latinos as aliens, radically unlike them."

"Even the common name for them reinforces their otherness," Giannina said, shaking her head. "What a comment on lack of charity. We call them illegal aliens, as though any human being should be so marginalized, even in the very name."

"So, what we need is to circulate stories," Rodrigo began.

"Which should be easy, since they are the truth," Giannina added.

"Right," Rodrigo continued. "Stories about hardworking, law-abiding immigrants from Latin America and the West Indies who merely want to clothe their families, get jobs, and send part of their wages home to pay for their children's education and for medicine for the grandparents."

"Very human things," I added. "Things everyone can relate to, since we've all had needy parents or hungry children at one time or other in our lives."

"Who will write these stories, and will the public want to hear them?" I asked.

"We should all tell these stories, white people, black people, and, of course, Latinos. We should flood the world with stories,⁷² of our own group and others. Stories can humanize, decreasing the gap between others and us. A well-told story invites the reader into a world other than his own, heightening empathy and cross-cultural understanding."⁷³

Just then, the waiter arrived with our desserts. "I've almost lost my appetite," Giannina said, "recalling the terrible ending for Jean de

⁷⁰ On the legal storytelling movement, which proceeds on the basis of a similar premise, see Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) [hereinafter *Oppositionists and Others*]. For examples of this genre, see Bell, *supra* note 1; PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

⁷¹ For a somewhat-related argument, see *Third Chronicle: Care & Competition*, *supra* note 1; see also Stephen Shie-Wei Fan, Note, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202 (1997).

⁷² See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 65 (1988) (making a similar suggestion).

⁷³ *Oppositionists and Others*, *supra* note 70, at 2439-40.

Florette and his self-centered neighbors. Not to mention all those poor rabbits.”

“You must eat to keep up your energy,” I said, immediately feeling a little taken aback by my presumption. But, determining to throw caution to the winds, I added, “We must all do so. Telling those stories—and telling them well—is hard work. We shouldn’t be ashamed to take a break to eat, to support each other, and to watch an occasional movie. Especially ones like *Manon*.”

Then, after a pause, during which we all dived into our desserts, I looked up and said, “Rodrigo, you have made a powerful case for storytelling. But earlier, you said that reform also requires interest convergence. In these difficult times, when everyone is concerned about their job, their retirement, and the value of their homes, how can you persuade white folks that it’s in their interest to open the door to a million job-hungry immigrants a year? What’s in it for them?”

2. *In Which Rodrigo Addresses the Relation Between Stories and Interest Convergence*

“Remember what happened in *Manon*,” Rodrigo said. “Transcendence is one of the strongest human drives. We all want our progeny to go on after we are gone.”

“We also want someone to take care of us in our old age,” Giannina added. “Usually, that’s children. Sometimes it’s other caregivers. But we all know that at some point, we will need someone to take care of us when we are old and frail. That’s an aspect of transcendence, too. Leaving on a good note.”

“And the new immigrants play a part in this?” I said. I was beginning to catch a glimmer of where my young friends were going and wanted to hear more.

“America is an aging society,” Rodrigo replied. “We need new workers in every sector for the economy to grow. But the growth rate is barely above replacement level. Where will the new workers come from, if not from immigration?”⁷⁴

⁷⁴ See, e.g., Boot, *supra* note 63; Welcome, *supra* note 60 (noting that the alternatives are unattractive—sending jobs away or relying more on imports).

“Some communities are having to close schools because too few children are being born,”⁷⁵ Giannina added, patting her stomach. “Even though I’m doing my bit to help out.”

“And, Professor, I’m sure you’ve heard about the Social Security pyramid.”

“Of course. Only a few years ago, twelve workers were supporting one retiree drawing contributions from the common fund. Because of the growth in the number of retirees and the slow replacement rate through new births, that ratio is now down to three to one. Soon, economists say, it will be down even more, with two active workers supporting one retiree.”⁷⁶

“The arithmetic is inescapable,” Rodrigo continued. “The country needs a constant stream of immigrants or the whole system will collapse.”

“Even before we reach that point, all those baby boomers will need nursing care. That will be one of the few growth industries in the days ahead.”⁷⁷

“And who will make all those beds, empty those bedpans, and clean the rooms of the aging crowd?” Rodrigo asked.

“Immigrants?” I posited. “Hard working, conscientious immigrants willing to start at the bottom and work their way up.”⁷⁸ Without them, two-earner families, now barely able to make ends meet, will have to take time out or quit their jobs to take care of Grandpa or Grandma. Something must give.”

Both my young friends nodded. “So, it all comes together. We need stories that humanize the hard-working Mexicans, Guatemalans, and Caribbean immigrants who are desperate to come here—movies, novels, and simple word-of-mouth tales that show how they are very much like us, how by helping them we help someone who, at bottom, is our kith and kin. We need economists and other social scientists to

⁷⁵ *Welcome*, *supra* note 60; TaMaryn Waters, *Board Weighs School Closures*, TALLAHASSEE DEMOCRAT, Apr. 27, 2008, at 1A; Jeremy P. Meyer, *School Closes, Just Days Before Classes to Begin*, DENVER POST, Aug. 17, 2007, at B1.

⁷⁶ *See supra* note 75; Richard Delgado, *Rodrigo’s Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 60–61 (2006) [hereinafter *Roundelay*].

⁷⁷ *Roundelay*, *supra* note 76, at 60–61.

⁷⁸ *Id.* Much of what Rodrigo posits has already begun to occur in European countries. *See, e.g.*, Michael Kimmelmann, *Italy Gives Cultural Diversity a Lukewarm Embrace*, N.Y. TIMES, June 25, 2008, at E1; Elisabetta Povoledo, *Italian Plan to Deal with Migrants Could Affect Residents Who Rely on Them*, N.Y. TIMES, June 21, 2008, at A6.

help dispel the lie that they are dirty, lazy, and uninterested in fitting in. We need to get to know them, to be less afraid of them.”

“Like Montand,” Giannina added, “we need to realize that by helping them overcome obstacles, we will both feel better and, perhaps, prosper ourselves.”

“Our national economy will remain strong, as a vibrant low-tech sector complements our strong high-tech sector,” Rodrigo said.

“And, we gain the services of a young, energetic population unafraid of hard work”

“Including taking care of an aging population,” added Giannina.

“Not to mention ordinary workers”

“Some of whom hold down two, or even three, full-time jobs,” I added. “Laying carpet, installing dry wall, replacing lawns, and bussing tables in restaurants.”⁷⁹

“Contributing to the Social Security fund and, through that, to transcendence—the ability to see oneself into the future, as part of a great cycle of life,” she concluded.

V

THE END, FOR NOW

The waiter arrived with the check, which I quickly seized. When Rodrigo looked stricken, I said, “Please, it’s a generational thing. The old pay for the young. You two are seeing to the next generation, while I’m rapidly approaching the golden sunset. You’ll be taking care of oldsters soon enough. In the meantime, please allow me.”

“OK,” said Rodrigo. “Next time is on us. Let’s make sure it’s soon.”

After assuring Rodrigo that I’d be glad to let them pay next time, we stood and bade the waiter goodbye. “Don’t miss *Green Card*,”⁸⁰ he said in lightly accented English. “It’s about immigrants and also features Depardieu. The cinematography is excellent, if I may say so myself. The camera angles, too.”

We did a quick double take and thanked him for the suggestion.

⁷⁹ See, e.g., *Welcome*, *supra* note 60 (on the occupations these immigrants fill); Steven Greenhouse, *Foreign Workers at Highest Level in Seven Decades*, N.Y. TIMES, Sept. 4, 2000, at A1; Aaron W. Godfrey, *Island's Necessary, Invisible People*, N.Y. TIMES, June 13, 2004, § 14 Long Island, at 23.

⁸⁰ (Green Card Productions 1990).

As I rode the taxi toward my empty apartment, I reflected on what we had said. I thought that Rodrigo's interpretation of Bender's book was both astute and helpful, especially in identifying the forces that ushered in change but now stood in its way.

I found my young friends' discussion of the *Manon* films intriguing and wondered if today's storytellers would prove up to the task of countering the tide of nativism washing over the land. I wondered if average Americans could come to see their own futures as connected to those of immigrants, not just economically but at a human level. I wondered whether we might someday enter a new period, like Reconstruction or the sixties, when prominent Anglos and leaders of color worked together to make the world a better place.

As the taxi slowed to a stop, I looked forward to Teresa's return. I knew she would enjoy hearing my account of our conversation. She would no doubt grill me about what each of us ate. And, my Italian wife, the mother-in-law of a young black law professor of great promise, would no doubt insist on ordering the air ticket to their city right away. A little like that two-part *Manon* series, I thought, relishing the next chapter in our conversation.

But, dear reader, may I confess something? Despite the rosy glow in which our conversation had left me, I couldn't help wondering whether I had pushed Rodrigo hard enough. It's the function of the old to help the young sharpen their critical tools, I reminded myself. Had I discharged that function? Could stories really change how a nation thought about immigrants and Latinos? As I walked up the stairway and got out my key, I made a mental note to look for weak spots in Rodrigo's theory.

VI

FOUR CRITIQUES

That opportunity came sooner than I expected. Teresa returned from her conference cross over having missed out on Rodrigo and Giannina's visit. Maybe it was the lost opportunity to try that Italian restaurant. More likely it was the missed chance to talk with her newly pregnant daughter, with whom she enjoyed a strong bond.

At any rate, we caught a plane to Rodrigo's city the very next weekend, and, within an hour of landing, were carrying our bags inside their apartment while Rodrigo made tea in the kitchen.

"We're going to need a larger place," Giannina said, as we laid our things out in the tidy guest room. "Little Gus is getting big enough to

need a room of his own.”⁸¹ She gestured toward the sweet-faced five-year-old who minutes earlier had given us big hugs and was now raptly reading a book in the corner.

“I know that Rodrigo wants to hear about things at your school. Me, too.”

She led Teresa and me into the living room, where Rodrigo had placed the teapot, cups, and an assortment of nuts, dried fruits, and biscuit cookies on a tray.

“While he’s busy,” Rodrigo said, gesturing at his son, “why don’t we have a few appetizers and catch up. I gather you two talked about Giannina’s pregnancy already?”

Both women assured us they had, by phone. “So,” Rodrigo went on. “His attention span with a book like that is usually about half an hour. We can continue over dinner, if necessary.”

I looked over at the dark-haired youngster steadily turning pages in what, judging from its cover, was a book of science fiction. “What a good little reader,” I said. Then: “So, what do you two want to talk about first—us or last week’s topic? I have a number of follow-up thoughts to share with you.”

“Either,” said Rodrigo. “You pick.”

A. Limits on Storytelling

“Your *Manon* story was powerful,” I began. “So much so that I think I suspended my critical judgment. But since returning home, I ran across something that gave me pause.”

1. Change Through Texts—A Hollow Hope?

“What was it?”

“It’s a new, revised edition of Gerald Rosenberg’s *Hollow Hope*.⁸² It just came out.”

“I think I saw a reference to it somewhere,” Rodrigo said. “What does it contain that isn’t in the first edition?”

“The author reprises his argument about the difficulty of achieving broad social change through law.⁸³ He says courts are sharply limited

⁸¹ On the couple’s young son, who is named after the Professor, see *Epiphany*, *supra* note 1, at 1216.

⁸² GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2nd ed. 2008) [hereinafter ROSENBERG, *HOLLOW HOPE*].

⁸³ *E.g.*, *id.* at 6–36 (describing the “constrained” view).

in what they can achieve and cannot spark social change unless it was under way already.⁸⁴ They are much less effective in bringing about reform than are a host of extralegal forces, including the market, public opinion, movement activism, and technological change.⁸⁵ They may be good at blocking social reform, but bad at spurring it.⁸⁶

After a pause, I added: "Legal opinions, of course, are a type of story. So, if Rosenberg is right, storytelling as a means of promoting social change may be"

"A hollow hope," Teresa completed my thought.

"Indeed," I said. "In the new edition, he builds on his earlier work with abortion and civil rights to show that courts have proven similarly futile in a host of new areas, including same-sex marriage.⁸⁷ Even the hope that litigation can raise a losing cause's profile and thereby hasten the day that it succeeds is vain.⁸⁸ We find the same charts, tables, and history lessons proving that litigation has accomplished little.⁸⁹ *Roe v. Wade*⁹⁰ did not increase access to abortion.⁹¹ *Brown v. Board of Education*⁹² did little to integrate the country's schools.⁹³ Even the occasional breakthrough case emboldens the opposition, so that the winning side often ends up worse off than before.⁹⁴ He also responds to his critics, including one or two by name."⁹⁵

"Do you find his argument persuasive?"

"In some ways, yes. One could, of course, come up with a few areas where change through law seemed to work, for example rights of the disabled. On balance, though, I think Rosenberg has a point. And if legal opinions, with the advantage of all that power and respect, cannot bring about reform, what does that say about ordinary scripts?"

⁸⁴ *Id.* at 5–6, 155–69, 207–14, 247–65 & 415–19 (giving examples of constraint and judicial inefficacy); 428–29.

⁸⁵ *E.g., id.* at 35, 49–57, 70–72, 105–06, 157–69, 201 & 247–65.

⁸⁶ *E.g., id.* at 5, 431.

⁸⁷ *Id.* at 155–56, 174 & 339–419.

⁸⁸ *Id.* at 72–107, 228–47 & 380.

⁸⁹ *E.g., id.* at 230–34, 433–42.

⁹⁰ 410 U.S. 113 (1973).

⁹¹ *E.g., ROSENBERG, HOLLOW HOPE, supra* note 82, at 207–27.

⁹² 347 U.S. 483 (1954).

⁹³ *E.g., ROSENBERG, HOLLOW HOPE, supra* note 82, at 88, 420–21.

⁹⁴ *See, e.g., id.* at 155–56, 425–26.

⁹⁵ *See id.* at 420–31.

"You two always sharpen my thinking," Rodrigo agreed. "But you intimated that you had a number of different critiques."

a. Critique Number One: The Empathic Fallacy

"I do," I said, taking a deep breath. Usually, Rodrigo dominated our discussions, while I served as his straight man and foil. Now, it was my turn to provide him with a serious, sustained challenge.

"Four, most of them suggested by the Rosenberg book. The first is a variation of something we talked about before. It's that the potential of all narratives to alter mindset is sharply limited."

"We called it the empathic fallacy,⁹⁶ if I recall."

"It's an aspect of that," I said. "In the pathetic fallacy, familiar from literary theory, the reader attributes to human motivation and feeling more efficacy than they have. For example, it is raining, and the poet feels sad. So, he writes 'The world weeps with me.'⁹⁷ In fact, the world of nature has no such feelings; it rains because of atmospheric changes having to do with moisture and temperature in the cloud layer."

"And the empathic fallacy, which you two coined, is a close cousin," Teresa said. "It consists in ascribing more efficacy to narratives than they actually have."⁹⁸

"Right," Rodrigo replied, a little warily. "Every human being has heard thousands of narratives over the course of his or her life. That little boy over there (he gestured toward the corner) right now is internalizing at least one, probably about the authority of science. These narratives include ideas of how the world works, how people operate, what motives and feelings they have, and about right and wrong, responsibility and irresponsibility. Legal narratives concern things like merit, fault, and causation."

"And that stock of narratives confines change,"⁹⁹ Teresa said. "Every new narrative must harmonize with all the others that a person holds at that point in life. Otherwise, he or she won't believe it. It will seem ludicrous, strange, unfamiliar, wrong, since it is out of

⁹⁶ 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, 1261-62, 1281 (1992) [hereinafter *Images*] (coining and defining term).

⁹⁷ *Id.* at 1261-62.

⁹⁸ See *id.* at 1261-62, 1281.

⁹⁹ *Id.* at 1279-82 (explaining this mechanism).

keeping with the stock of narratives the person has heard. At best, she will withhold judgment until she learns more.”¹⁰⁰

“And that,” I went on, “means that the potential for reforming our basic beliefs is much more limited than we like to think. A single story or script won’t have much effect. And the reason is that in a very real sense, we are our stock of narratives.”¹⁰¹ We use our preexisting stock to interpret and evaluate the new one. . . .”

“Such as a story showing that minorities can be smart,” Teresa said. “That they can invent things like the empathic fallacy.”

“Or that they are nice,” Giannina added.

“Complex. Not just happy-go-lucky, musical, romantic” I went on.

“Nor, for that matter, unclean, diseased, hypersexual, and devoted to an impossible, hard-to-fathom language,” Rodrigo added. “You and I talked about this stereotype recently.”¹⁰²

“Or, again, that women can be firefighters,” Teresa chimed on. “Or CEOs.”

“Or that children can have long attention spans,” I said looking over at the youngster in the corner.

“At most, we pronounce the new case an exception,” Rodrigo replied. “I see the force of your criticism, Gus. It’s important for me not to overstate the transformative potential of stories, at least without interest convergence, too. But you said you had some other reservations about my thesis.”

b. Critique Number Two: Stories in a Post-Civil Rights Era

“I do,” I said. “Another is simply that the public are uninterested in civil rights stories right now. We tell ourselves that we are in a post-civil rights era and that race does not matter.”¹⁰³

“We think that we have gotten past race and racism,” Teresa said. “Especially the younger generation. They once had a friend or two of a different color than their own, or they listen to rap music

¹⁰⁰ *Id.* at 1281.

¹⁰¹ *Id.* at 1280.

¹⁰² *See, e.g., Corrido, supra* note 1, at 718–34.

¹⁰³ *See, e.g.,* Michael Leo Owens, *Why Blacks Support Vouchers*, N.Y. TIMES, Feb. 26, 2002, at A25; Jonathan P. Hicks, *Changing of the Guard and Style for Politics of Central Brooklyn*, N.Y. TIMES, Dec. 4, 2006, at A21; Adam Nagourney, *The Pattern May Change, If*, N.Y. TIMES, Dec. 10, 2006, § 4, at 1; *Assessing Black Leadership* (NPR Featured Story June 11, 2008); Marcus Mabry, *A Postracial Campaign in America? We’re Not There Yet*, CLEVELAND PLAIN DEALER, June 15, 2008, at G1.

occasionally, and so they conclude that racism is a thing of the past. The gap in well-being between whites and blacks or Latinos may be as great as ever, and the number of senators and CEOs of color near zero, but they don't consider that a serious problem."

"So, your storytellers, Rodrigo, may have little audience because listeners think they know where the storyteller is going and are tired of hearing it. Even a well-told story may go unheeded if the audience thinks it is *passee*."

"All that may be true," Rodrigo said, setting his jaw a little. "Still, some readers will want to hear new stories about race and society, especially if they are well told. Juan Perea wrote about the black-white binary of race, and he attracted plenty of readers.¹⁰⁴ So did Devon Carbado and Mitu Gulati in their analyses of workplace discrimination.¹⁰⁵ The early abolitionists garnered small audiences at first, and look what happened.¹⁰⁶ Nadine Gordimer wrote in a vacuum for twenty years.¹⁰⁷ Then her stories about South African apartheid caught hold, and she won the Nobel Prize."¹⁰⁸

"And the same is true of Derrick Bell and Catharine MacKinnon," I conceded. "Even though they are old-timers like me, they haven't worn out their welcome, in part because they are always coming up with new things to say. So, I'm glad you're not quite ready to throw away your typewriter. I just hope you realize you may wear out a lot of ribbons before things start to happen."

c. Critique Number Three: *Heroes of Color*

"I do have a corollary, though," I continued, "Last week you urged us all to circulate stories about hard-working, honest minorities and immigrants, living out the American dream. Humanizing stories. Stories that depict them as like us, that make them the central figures or heroes. Admirable, hard working, clever, and so on."¹⁰⁹

A flicker of concern passed over Rodrigo's handsome features. "I suppose you are going to say," he began, "that the idea of a minority

¹⁰⁴ See Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997).

¹⁰⁵ See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

¹⁰⁶ See *Images*, *supra* note 96, at 1281-82.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* See also the cases of Zora Neale Hurston and other black writers, who have lately been "discovered."

¹⁰⁹ See *supra* notes 71-72 and accompanying text.

hero is a conceptual impossibility. Is it because a thousand social scripts construct them as dirty, criminal, stupid, oversexed, and so on?"¹¹⁰

"That's one reason," I said. "But a second is that for them to play the part of heroes would require them to struggle against some outside force and succeed. The problem is that the force that most of them would be struggling against is racism. And that's a story white listeners do not want to hear. It places them in an unfamiliar role—as villain. So, they would find fault with any such story, or declare it one of those tiresome 'message' scripts, and just move on to the next one."

Rodrigo was silent for a moment. "I suppose an author could depict the minority person as struggling against an impersonal force of some kind, like a North Pole explorer or a Mount Everest climber. That would not require depicting white people as monsters or bearers of unearned privilege."

"Stories like that might help a little," I conceded. "Like those coffee-table collections of 'minority contributions' that list black scientists who invented blood transfusions."

"But that do little to overcome racial barriers or preconceptions," Rodrigo said. "They depict the minority doing the same things white people do. The minority mountain climber in those stories might as well be white."

After a pause, Rodrigo continued: "It's beginning to look like stories may be no magic bullet. But what about tales that reinforce interest convergence. Aren't they different? Everyone is on the lookout for their own self-interest, practically by definition."¹¹¹

d. Critique Number Four: The Material Basis for Traditional Racial and Sexual Roles

"Maybe so," I said. "But a foreign student in one of my classes pointed out something recently that gives me pause. He was from

¹¹⁰ See *supra* notes 56–58 and accompanying text.

¹¹¹ See *supra* notes 40–46, 78 and accompanying text (describing the role of interest convergence in law reform).

Southeast Asia, like your old friend Ali.¹¹² (Rodrigo nodded.) And just as steeped in postcolonial thought.”¹¹³

“Which, as we both know, seeks to trace the lingering effects of colonial rule on colonized people,” Rodrigo said. “What did the two of you talk about?”

“Before we start,” Giannina said, “Would any of you like some more tea? We also have some apricot sherbet Rodrigo brought home as an appetizer.”

“Sherbet?” said the young voice from the corner. “What kind? I’m hungry.”

“Help me dish some of it out to our guests,” Giannina said to the child, who had put down his book, which I noticed had a few pages to go. “Then you can have some, too. Not too much—I don’t want you spoiling your appetite for dinner.”

“I hope we’re not going to that place around the corner,” the little boy said. “That was yucky.”

“No, we’re going to your favorite restaurant,” Giannina said. “Here’s the serving spoon.”

Soon we were drinking refills of tea and eating small spoonfuls of the sherbet. The little boy was re-immersed in his book, this time nestled on the couch next to his mother.

“We have about ten minutes before his hunger pangs set in,” Giannina said. “Let’s see if we can’t get to a stopping point by then.”

“Let’s finish hearing Gus’s fourth objection,” Rodrigo said. “That way, we can continue at the restaurant if need be. And, of course, talk about that situation at his school.”

“I’m game,” I said. “What my student was looking at was the origin of race and sex roles.”¹¹⁴

“About time,” Giannina said. “Critical race theorists have yet to tackle, at any deep level, the relationship between racism and sexism.”

“Amen,” Teresa said. “Aside from discussions of intersectionality and essentialism,¹¹⁵ which do little more than confuse the issue. In my opinion, critical analysis hasn’t proceeded very far. The two

¹¹² See *Fourth Chronicle*, *supra* note 1, at 1143 (describing Rodrigo’s fellow LL.M. student, Ali).

¹¹³ On this school of scholarship, see, for example, *Corrido*, *supra* note 1, at 1697–1718.

¹¹⁴ Thanks to J.B. for pointing this feature out to me.

¹¹⁵ See, e.g., *Sixth Chronicle*, *supra* note 1 (describing this body of writing).

forces remain unexplored, especially in relation to each other. I for one am eager to hear what your student had to say.”

Little Gus shifted position, turned a page, and looked up at his mother inquiringly. I knew I had better make this fast.

“OK,” I said. “Consider how racial and sexual roles form a two by two matrix: Black man, black woman, white man, white woman. Oh, of course, there are Latinos and Asians and Native Americans, and so on. But that’s the basic structure—white, nonwhite; male, female.”

When the three nodded, Rodrigo a little warily, I continued: “And consider how deeply inscribed the roles are for each group in stereotype and myth, and how this may have come about. During early colonization, England and other countries would send detachments to the recently subdued territory to rule the place.”¹¹⁶

“Which might be India, Africa, or Australia. Or in Spain’s case, Latin America,” Giannina chimed in.

“Right,” I acknowledged. “Belgium and Portugal had their empires, too, although they were smaller. But focus for now on England. The English would dispatch a contingent of soldiers and administrators. And who would those be?”

“Men, most of them,” Teresa hazarded.

“Exactly,” I continued. “And the reason is that it was simply too expensive to send the women.”

“As well as dangerous,” she added.

“Right. So the women stayed home. They kept the home fires burning. They studied French and played the piano. Or I should say they supposedly did this, being, at least in theory, the bearers of culture and refinement.”

“And since they supposedly had low libidos,” Teresa added, her eyes sparkling, “they would gladly wait years, if need be, for their men to return. In fact, many of them didn’t. Wait, I mean.”

“So that’s the source of early role differentiation,” I said, “for whites, anyway. The white male is the conqueror striding across the

¹¹⁶ See, e.g., *Corrido*, *supra* note 1, at 196–98. On the role of sexuality in colonial times, see, for example, *HAUNTED BY EMPIRE: GEOGRAPHIES OF INTIMACY IN NORTH AMERICAN HISTORY* (Ann Laura Stoler ed., 2006); ANN LAURA STOLER, *RACE AND THE EDUCATION OF DESIRE* (1995).

land. Today, he is the CEO of the major corporation.¹¹⁷ The wife stays at home and cultivates refinement."¹¹⁸

"There may be something to that," said Rodrigo. "But what about black men and women?"

"Women of color were the concubines of the white men. During this period, doctors believed that men had to have sex, or they would go crazy.¹¹⁹ Abstinence produced insanity. But it was too costly and dangerous to send the white women to the new land, at least right away. Concubines of color, drawn from the native population, filled the bill. These women lived in the houses of the white men and did their cooking, laundry, and housekeeping. At night, they saw to the men's sexual needs.¹²⁰ This all saved a lot of money."

"And that explains," Teresa chimed in, "the origin of the myth of black female sexuality. The native women emerged as a sort of vessel whose role was to satisfy the white man's desire. A hundred scripts incorporate this theme, even ones by antiracist writers and painters such as Gaugin."¹²¹

"And as such, those stories form part of the backdrop of narratives and received wisdoms against which new stories have to compete. And the ones for black men aren't much better."

"I can guess what you are going to say," Rodrigo said. "The black male, in the colonies at least, would emerge as the angry rival of the white man.¹²² He didn't know his place and could easily explode with jealousy and envy. He might even rape a black woman, if he could get his hands on one—or, even more seriously, a white woman when they started to come to the colonies."

"And so the myth of the hypersexual black would-be rapist got its start. And so, there you are. The two by two matrix, with powerful economic"

¹¹⁷ See, e.g., DOUGLAS M. BRANSON, *NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM* (2007).

¹¹⁸ See, e.g., *id.*

¹¹⁹ See, e.g., HAVELOCK ELLIS, *STUDIES IN THE PSYCHOLOGY OF SEX* 178–216, ch. 6 "The Problem of Sexual Abstinence" (1910).

¹²⁰ See, e.g., DURBA GHOSH, *SEX AND THE FAMILY IN COLONIAL INDIA: THE MAKING OF EMPIRE* 69–206 (2006) (describing conjugal relations between Indian women and British men during colonial period); Hanneke Ming, *Barracks-Concubinage in the Indies, 1887–1920*, 35 *INDONESIA* 65 (1983).

¹²¹ E.g., PHILIPPA LEVINE, *PROSTITUTION, RACE, AND POLITICS: POLICING VENEREAL DISEASE IN THE BRITISH EMPIRE* (2003).

¹²² See *id.* at chs. 2, 3 & 6; JOCK MCCULLOCH, *BLACK PERIL, WHITE VIRTUE: SEXUAL CRIME IN SOUTHERN RHODESIA, 1902–1935* (2000).

"And legal," Rodrigo interjected.

"Right," I concluded. "With powerful historic, economic, and legal forces underwriting the social construction. A compartmentalization that made sense then. . . ."

"And continues today," Teresa added. "You mentioned white male CEOs, who in some ways are like those earlier conquerors striding around and taking command of new worlds."

"And the black or Latino beast, requiring control and tutelage,"¹²³ I added.

"I can see how this complicates my interest-convergence hypothesis," Rodrigo said.

"It does, a little," I said. "You can't just show that dominant society would be a bit better off if it admitted a few more immigrants who will contribute to the Social Security fund or perform work no one else wants to do. You have to show that powerful whites want those things enough that they are willing to let go of the benefits they reap from the role differentiations we just discussed."

"Perhaps feminists will join in," Rodrigo said. "The legacy you mentioned relegates women to pretty demeaning roles. (Teresa and Giannina nodded knowingly.) That way, storytellers seeking a better image for Latinos and blacks will receive support from women, both white and otherwise."

"I'm starved," the little boy announced, closing his book with a resounding slap. "When do we eat?"

CONCLUSION

We soon left for the restaurant, which turned out to be one of those warm, noisy family affairs with the tables packed close. We had little opportunity to continue our discussion, other than Rodrigo's announcement, during a rare quiet interlude, that he had greatly benefited from our critique and planned to incorporate it into his work. I asked him to send me a copy of his sabbatical proposal if he wanted comments and feedback, and he agreed to do so.

I wondered if I had been too hard on him. I found his and Giannina's *Manon* analysis genuinely moving and hoped I hadn't discouraged him from pursuing this line of scholarship. In the past, his hard-hitting critiques had moved my own thought forward, and I thought his advocacy of storytelling and counter storytelling was

¹²³ See, e.g., *Images*, *supra* note 96, at 1263-66, 1273-74.

sound, if a little soft. Coupled with interest convergence, it might contain the right hard edge, though; only the future would tell.

We never got to talk about my own troubles. On our way home, I told Teresa that I might send him a letter. Like many young people, he was understandably absorbed in his own thoughts and ideas. But when on occasion I had asked him about something that was on my mind, he had exhibited a sharply honed intelligence and helped me think things through. He's always been good about writing back, she said. During the return flight, I occupied myself writing down notes for that letter.

