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RODRIGO'S NINTH CHRONICLE: RACE, LEGAL INSTRUMENTALISM, AND THE RULE OF LAW

RICHARD DELGADO†

INTRODUCTION

I was sitting dejectedly in the airport waiting lounge, cursing myself for having taken a winter flight that changed planes in a northern city, when I heard a familiar voice from behind me.

“Professor, is it you?”

I turned. “Rodrigo, for goodness sake! What are you doing here?” A foreign-educated LL.M. student at the famous university across town, Rodrigo had sought me out for career advice nearly a year ago on a return trip to the States.¹ The son of an African-

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¹ See Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) [hereinafter *Chronicle*] (introducing “Rodrigo Crenshaw,” my fictional interlocutor and alter ego).

American serviceman and an Italian mother, the brilliant and audacious young scholar saw the United States with new eyes. We had become friends, discussing law and economics, civil rights, essentialism, black crime, and many other subjects over the course of a year.²

"I'm just getting back from job interviews. I think I told you I'm on the teaching market. I did four interviews in seven days."³

"You must be exhausted," I commiserated.

"Oh, it wasn't so bad," my irrepressible protégé replied, "although it went by in something of a blur. I'm afraid I'll get a telephone call from Professor Jones and not remember what school he's from."

"Tell him you enjoyed meeting his colleagues. He may mention a name and that'll ring a bell. The older I get the more trouble I have remembering students' names. But I don't have your excuse—I have them all term long."

Further information about Rodrigo and the Professor appears later in this Chronicle, and in Chronicles Two through Eight. See *infra* note 2.

² See Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993) [hereinafter *Second Chronicle*] (discussing law and economics); Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993) [hereinafter *Third Chronicle*] (discussing love and laissez-faire economics); Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) [hereinafter *Fourth Chronicle*] (discussing the way legal rules resist transformative politics); Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993) [hereinafter *Fifth Chronicle*] (discussing neorepublicanism); 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*] (discussing the relation of small groups and social change); Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994) [hereinafter *Seventh Chronicle*] (discussing Enlightenment political theory); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—on the Social Construction of Threat*, 80 VA. L. REV. 503 (1994) [hereinafter *Eighth Chronicle*] (discussing the social construction of black criminality).

³ For a description of Rodrigo's undergraduate and law school training (all in Italy), see *Chronicle, supra* note 1, at 1359-60. Regarding his LL.M. studies and adventures, see *Second Chronicle, supra* note 2, at 1183-86; *Third Chronicle, supra* note 2, at 388-91, 399-402; *Fourth Chronicle, supra* note 2, at 1135-37. For a discussion of his experiences in the legal hiring market and hopes to become a law professor, see *Chronicle, supra* note 1, at 1359, 1361-64; *Fourth Chronicle, supra* note 2, at 1150-51.

"Your students like you, Professor. If you forget an occasional name it doesn't matter. They know you care about them, just as I know you care about me."⁴

"Enough flattery," I said. "Tell me about your trip. My flight was canceled. I've got nearly three hours before the next one."⁵ I was just sitting here trying to build up courage to open my briefcase, but I'd much rather talk with you."

"I've got plenty of time. I'm arriving early, having caught a standby flight in the nick of time from Chicago. Giannina's⁶ not expecting me till this evening. Can I buy you a drink or cup of coffee?"

"Maybe in a minute. Sit down," I said, indicating the empty seat next to me. "Tell me about your trip."

"Well, as I mentioned, I interviewed at four law schools, all in the Midwest. Next week I'm hitting the Northeast—two in four days. But something interesting happened at the one I left just this morning. If you have a minute, I'd love to tell you about it."

"Please do. As I've told you more than once, I get at least as much out of our conversations as you do. What happened?"

"I was having one of those small group interviews. Four professors and I were meeting in the office of one of them. It was my last one before going to meet the students and the Dean. It really got me going—I've done nothing but think about it the whole flight. It's providential that I met you here. I would have called you in a day or two to talk."

⁴ Like Rodrigo, "the Professor" is a fictional character based loosely on several persons I have known and not to be identified with any one in particular. As I have drawn him, the Professor is a man of color, teaching at a major law school located across town from Rodrigo's, and in the late stages of his career.

⁵ The Professor is traveling to give a speech he promised to give six months ago, which he now regrets having scheduled during deepest winter.

⁶ For a discussion of "Giannina," Rodrigo's playwright friend and life companion, see *Third Chronicle*, *supra* note 2, at 402; *Fourth Chronicle*, *supra* note 2, at 1137; *Fifth Chronicle*, *supra* note 2, at 1605; *Sixth Chronicle*, *supra* note 2, at 640-42; *Seventh Chronicle*, *supra* note 2, at 724-25.

“Was it something that came up during your job talk?”

“Only tangentially. I spoke about the relation of laissez-faire economics and the plight of the black poor, an aspect of my thesis.⁷ One professor apparently got the idea that I’m interested in Critical Race Theory, which of course I am, even though my talk didn’t touch on that at all. So he had this question ready for me when we met later in the office.”

“What was it? The usual one about affirmative action?”

“No, not at all. It was about racial realism,⁸ but with a pedagogical twist. You’re familiar with the critique of Derrick Bell’s work as being too despairing?”

“I am. A number of authors have taken Bell to task for what they consider his undue pessimism, notably Alan Freeman, an otherwise friendly writer, in a review of Bell’s first casebook.⁹ A few of us have even questioned whether preaching gloom and doom is wise, particularly if it ends up discouraging students from going into civil rights or public interest practice.¹⁰ How did you answer the question?”

⁷ Regarding Rodrigo’s LL.M. thesis and its various spin-off writing projects, see *Third Chronicle*, *supra* note 2, at 388-400, 401-15; *Fourth Chronicle*, *supra* note 2, at 1135-38.

⁸ See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) [hereinafter Bell, *Racial Realism*] (putting forward the “racial realist” view that African-Americans are unlikely to make serious gains in our political and legal system, but that the effort must nevertheless be made). For earlier statements of Bell’s thesis, see, for example, Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter Bell, *Interest-Convergence*] (arguing for a shift in focus from the integration of the races within the educational system to the overall improvement of educational quality); Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 13 (1985) [hereinafter Bell, *Foreword*] (using fantasy in the form of imagined chronicles to explore the myth that “racial justice can be realized without sacrificing the material and psychological rewards of racial domination”).

⁹ See Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880 (1981) (reviewing DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (2d ed. 1980)).

¹⁰ See generally John A. Powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV. 533, 544 (1992) (arguing that Bell’s racial realism, while partly sound, is nevertheless excessively bleak and calculated to subdue reform fervor).

"I pointed out that Bell might well be right, and if so, there's little to be gained by holding on to false hopes. But it turned out the professor was making a much more subtle 'as if' argument, questioning whether, even if we thought the condition of Blacks and other minorities of color is unlikely to improve, that is, enjoying only periodic peaks of progress followed by regression,¹¹ we ought to act as though we believed the opposite. Otherwise we'd be paralyzed. There would be no reason to struggle."

"That is a more powerful version," I agreed. "It reminds me of recent writing about myths and the way society organizes itself around certain beliefs and credos.¹² Even if not literally true, the myths help society run more smoothly."

"I conceded as much, but nevertheless stuck to my position. We had a spirited discussion."

"I wish I had been there. Tell me, how did you defend Bell's thesis?"

"I began by laying it out, beginning with the interest-convergence idea—that Whites will support and tolerate gains for Blacks only when these also benefit them¹³—then traced it through Bell's analysis of *Brown v. Board of Education*,¹⁴ and finally into its modern form, *racial realism*."¹⁵

Just then, the public address system announced the arrival of a flight from Dallas, and I realized we would soon have a planeload of passengers streaming past us. "This area is filling up, Rodrigo. I'd

¹¹ See Bell, *Racial Realism*, *supra* note 8, at 373 (stating that "[e]ven those herculean efforts we hail as successful will produce no more than . . . short-lived victories that slide into irrelevance").

¹² See, e.g., JOSEPH CAMPBELL, *THE MASKS OF GOD: PRIMITIVE MYTHOLOGY* (Viking Press 1970) (1959) (describing how similar mythological symbols continue to reappear in different societies); JOSEPH CAMPBELL, *MYTHS TO LIVE BY* (1972) (examining the way myths and symbols create a firm base for the moral order of a society).

¹³ See Bell, *Interest-Convergence*, *supra* note 8, at 522-28.

¹⁴ See *id.* at 524 ("I contend that the decision in *Brown* . . . cannot be understood without some consideration of the decision's value to whites"); see also DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 44-50 (3d ed. 1992) (elaborating on his theory).

¹⁵ See Bell, *Racial Realism*, *supra* note 8, at 363 (declaring that "[r]acial equality is, in fact, not a realistic goal").

love to hear how you answered the professor's question, which incidentally strikes me as both intelligent and admirable. It lets you show how you would deal with a recurring pedagogical issue.¹⁶ And at the same time it allows you to strut your stuff on an important point of legal theory.¹⁷ That professor had obviously done his homework. Why don't we continue this conversation somewhere else? There's a little noodle shop just down the concourse. It smelled good when I passed by. Could you use a bite?"

"Always," Rodrigo replied. "They didn't feed us much on the flight home—just a tiny, dry sandwich."

I made a sympathetic face and stood up. As we walked in the direction of the restaurant, Rodrigo continued: "The myth question wasn't too hard, at least until I started thinking more about it later. I told the group in the office that minorities and members of the majority group need different myths because they are differently situated. With respect to race, what white people need is hope. They need to believe in black progress, because otherwise they would be consumed by guilt. Most of them have a higher standard of living than ours, longer life expectancy, lower rates of incarceration and infant death, and so on¹⁸—all directly traceable to slavery and social neglect. Consequently, they fasten onto any indicator of progress for Blacks or other minorities, even during times when our despair, our misery index, is higher than ever. They read somewhere that there are more left-handed Hispanic plumber's apprentices in Ohio than twenty years ago and seize upon that as proof that things are getting better."¹⁹

¹⁶ That is, whether or not the bleak scenarios Critical Race Theory paints are suitable for classroom presentation. See *supra* note 10 and accompanying text.

¹⁷ Namely, how we should interpret the zigs and zags of racial progress. See *supra* notes 10-12 and accompanying text; see also *Chronicle*, *supra* note 1, at 1373-74 (discussing the current backlash in areas of racial progress); *Third Chronicle*, *supra* note 2, at 410-13 (describing the marginalization of African Americans in society).

¹⁸ See Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?* 97 YALE L.J. 923, 930 n.28, 931 n.31 (1988) (book review) (delivering statistics on Blacks' status in the United States); see also *infra* text accompanying notes 23-26. See generally ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992) (reporting further statistics on Blacks).

¹⁹ For an earlier version of this argument, see Delgado, *supra* note 18, at 931 ("[Whites] manipulate statistics and issue selective progress reports . . . in order to convince [themselves] that [minorities are] progressing when [they are] not.").

"The conservatives aren't consumed by guilt," I pointed out. "They think that if our progress is stalled, it's our fault. We have dysfunctional families or allow ourselves to succumb to a culture of poverty."²⁰

"You have a point," Rodrigo acknowledged. "Yet they do hold to a myth of progress—namely, that the race problem has been solved. The playing field is now level, as a result of the 1960s-era reforms, so that today any Black or Latino who is not progressing has only himself or herself to blame."²¹

"So white folks subscribe to and place great stock in the myth of black progress. I agree with you on that. A recent poll showed that black parents believe things are now as bad for black children as at any time since slavery.²² The same study showed that homicide is the leading cause of death for black youths between fifteen and twenty-four years of age.²³ Nearly half of all black children live under the poverty level, and thirty-four percent of all black teenagers looking for work could not find it, a rate twice that of white teenagers.²⁴ Nearly half of all black babies are not adequately immunized, and fully sixty-five percent of black adults believe that their kids will be denied jobs because of racial prejudice.²⁵ Nevertheless, most of our white friends cannot be made to see that things are getting worse, not better for us. But you mentioned that there is a counterpart myth on our side of the equation."

²⁰ See Mickey Kaus, *The Work Ethic State: The Only Way to Break the Culture of Poverty*, NEW REPUBLIC, July 7, 1986, at 22 (arguing that there exists a "culture of poverty [which is] largely a black culture"); see also Mickey Kaus, *Bastards*, NEW REPUBLIC, Feb. 21, 1994, at 16 (discussing work-oriented welfare plans for, among others, the black underclass culture); *Workfare That Works*, NEW REPUBLIC, Aug. 24, 1987, at 7-8 (examining welfare attempts to transform the "culture of poverty" and the "culture of dependency"). See generally OFFICE OF POLICY PLANNING AND RESEARCH, U.S. DEP'T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 5* (1965) ("[T]he fundamental source of the weakness of the Negro community at the present time . . . is the deterioration of the Negro family").

²¹ See, e.g., Suzanna Sherry, *The Forgotten Victims*, 63 U. COLO. L. REV. 375, 376-80 (1993) (arguing that the race problem is largely solved, at least on a formal level).

²² See Richard Whitmire, "Major Crisis" for Black Children, DENVER POST, May 27, 1994, at 2A (quoting Marian Wright Edelman, president of the Children's Defense Fund, as saying, "We have a major black child crisis—the worst since slavery").

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.*

“Oh, yes. Whites need the myth of civil rights progress to be able to function. We, by contrast, need a stone-cold sober assessment of our chances, even if they are not very good.²⁶ For just as Whites need guilt-avoidance, we need to avoid self-blame. For us, the paralyzing mental process is internalization of the terrible images society has disseminated about us through the ages—unintelligent, lazy, sexually lascivious, and so on.²⁷ We also need to avoid connecting our low estate—our poverty, high crime rate, high degree of social pathology, and so on—with ourselves and our own efforts. We need to keep in mind that our current condition is the direct result of our subordination. For us, this bleak realization is healing, is psychically necessary, just as the more sanguine, upbeat interpretation is what Whites need.”²⁸

The hostess at the restaurant, where we had been waiting briefly, beckoned us to come in. We followed her to a booth, sat down, and picked up the menus. Before we started scanning them in earnest, I asked Rodrigo, “And did that answer satisfy them?”

“It seemed to, for then. At least, we soon moved on to something else. But it didn’t fully satisfy me. On the flight back I realized there’s more to it than that. I’d love to run some ideas past you, if you’ve got the time.”

I nodded enthusiastically. “Should we order first?”

I. IN WHICH RODRIGO RECONCILES MAINSTREAM CIVIL RIGHTS LAW AND THE MORE PESSIMISTIC RACIAL-REALIST (CRITICAL RACE THEORY) VERSION

A few minutes later the waitress took our orders, first patiently explaining to my ebullient young friend how a certain Korean dish differed from one he had learned to like in his favorite restaurant in Chinatown. After she had gone, Rodrigo continued:

“Nice woman. Where were we? Oh, yes—the optimism-pessi-

²⁶ See generally Delgado, *supra* note 18 (making similar observation).

²⁷ For an extensive discussion of the role of racial imagery, see Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992).

²⁸ Cf. Delgado, *supra* note 18, at 923, 928-47 (discussing Derrick Bell’s “somber prognosis” of American race-remedy law).

mism gap. What I realized on the flight home is that it's not enough simply to explain *why* our folks are on the whole less upbeat than Whites. We need a theory of what folks like us should *do*. Should we sit around in despair? Try harder? The principal purveyor of what we called 'bleak chic,'²⁹ namely Derrick Bell, says that the situation is grim, but one must struggle anyway. Even though one knows in advance that the gains will be very slight, the effort must nevertheless be made.³⁰ Yet he doesn't explain why, exactly."

"It seems to be an article of faith, a kind of existential commitment, something which gives life meaning, enabling us to carry on in an otherwise bleak and desolate world,"³¹ I suggested.

"That's the interpretation I drew too, but then I began thinking we can go even beyond that. The theory I propose is not so much a replacement as a modification of Bell's. Under it, subordinated people would acknowledge that in many eras and in many courts, success is really not possible. At these times, it is best to look elsewhere for relief."

"To what Gerry Spann calls 'pure politics,'"³² I ventured, "mass marches, picketing, lobbying, the legislative arena—forums other than courts?"³³

"Exactly. And when these avenues seem foreclosed, when society as a whole seems to close its face to us, we can turn to our own sources, our own communities."

"That's self-help, cultural nationalism, building our own communities, looking to black colleges," I said in excitement. I could see the outlines of the long-awaited theory of social change forming, something that had eluded some of our finest minds. I longed to hear more. "And so, Rodrigo, you think that what's

²⁹ *Seventh Chronicle*, *supra* note 2, at 743 (coining term).

³⁰ See Bell, *Racial Realism*, *supra* note 8, at 373-79 (discussing racial realism, and contending that "[b]lack people will never gain full equality in this country" (emphasis omitted)).

³¹ See *id.* at 377-79.

³² Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1992 (1990).

³³ See *id.* at 1991-95 (arguing that minorities should focus on maximizing their influence on the political process through the use of these media).

needed is an overarching theory to tell us which approach to use at any given moment in our quest for racial justice. The interest-convergence theory tells us there will be times when courts will be hostile or indifferent, but if I understand you correctly, that need not be a source of despair. Rather, it simply means that we should then look to other means for progress and succor.”

“Exactly,” Rodrigo replied. “We should look upon law as we would any other social institution, a tool that is useful for certain purposes and at certain times, but less so for other purposes or at different times. We need not succumb to the totalizing despair of some of our most eminent theorists, one that actually can prove enervating, despite my rather flip answer to the group this morning. Nor need we embrace the saccharine optimism of conventional civil rights theories grounded in liberalism and faith in progress. That’s dangerous too, because it leads to disillusionment and burnout. We need a more sustaining approach, which my more pragmatic view provides. What do you think, Professor?” Rodrigo looked up cheerfully.

“I’d love to hear more details. But my first impression is that the idea has much promise. It has ties with a new legal movement, pragmatism.³⁴ And it offers an approach to our condition that promises to be liberating—to avoid the Scylla and Charybdis of over-optimism on the one hand, and despair on the other. Do you have a name for your brain child?”

Rodrigo looked up and smiled, whether because of my question or because of the arrival of the waitress with a trayful of steaming, savory-smelling bowls, I could not tell. “Legal instrumentalism,” he said, moving aside his water glass and making way for the bowls and dishes full of tempting soups and crepe-type dishes.

II. RODRIGO EXPLAINS AND DEFENDS LEGAL INSTRUMENTALISM AS A CIVIL RIGHTS STRATEGY

“What are you having?” I asked.

“A noodle dish. I can’t remember what it’s called. It’s a lot like

³⁴ On this movement, see Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990).

something Giannina and I have at a Chinese restaurant near where we live. But it's different—it has more ginger. Want a bite?"

We traded morsels, and Rodrigo commented, "Mmmmm. Your stir fry is really good. So you think my theory has promise?"

"Emphatically so. I like its synthetic, umbrella quality, the way it allows for differentiation of strategy depending on the times and circumstances. And I especially like the—well, how shall I call it?—the mental health overtones. It promises a much more liberating way of looking at our civil rights progress and circumstances, one that avoids both false optimism and undue despair. But I'd love to know two things. First, how you thought of it. And second, how you would defend it against the charge of cynicism. You've already explained more or less how it would work—we'd choose whatever tool seemed most promising at a given period in history. And I'd also like to know how you would respond to the accusation, one you are certain to hear leveled against you, that it goes against the rather noble ideal of the rule of law.³⁵ If not frankly 'antilegal,' your theory verges on a demystification of law and litigation, for it seems to say, follow the law when that will work for you, and avoid or break it when it won't. There are precursors of your theory, and they are not all in good favor today."³⁶

A. *Legal Instrumentalism*

Rodrigo paused to spear a last noodle stuck in the bottom of his cup, then continued. "I know about Thrasymachus³⁷ and that other dialogue,³⁸ as well as some of their latter-day versions including 'By any means necessary.'³⁹ But Socrates was not

³⁵ See generally RONALD M. DWORKIN, *LAW'S EMPIRE* (1986) (discussing conceptions of law as a stable, legitimate, and binding moral force).

³⁶ The Professor was thinking of the Greek Sophists as well as some of their more recent incarnations. See *infra* notes 37-39 and accompanying text.

³⁷ See PLATO, *THE REPUBLIC*, reprinted in 1 *THE DIALOGUES OF PLATO* 591, 603 (B. Jowett trans., 1937) [hereinafter *DIALOGUES*] (describing Thrasymachus's view that law is the will of the mighty).

³⁸ See PLATO, *THE APOLOGY*, reprinted in 1 *DIALOGUES*, *supra* note 37, at 418-20 (describing how Socrates rejects his friends' admonition that he flee his impending execution, on the ground that doing so would weaken the legitimacy of the Athenian state).

³⁹ See David Papke, *The Black Panther Party's Narratives of Resistance*, 18 VT. L. REV. 645, 670 (1994) (noting that the Panthers harbored "no deep respect for [the] law" and asserting that "the poor . . . and oppressed had the right to rewrite unjust

vindicating a system of laws that systematically oppressed a minority of its citizens, and so the tribunal that sentenced him to death was much more legitimate than ours, at least vis-à-vis him. Our Constitution excluded Blacks, women, and those without property from the very beginning.⁴⁰ It provided for the institution of slavery in no fewer than ten passages.⁴¹ And even when we abolished that institution a hundred years later, a system of Jim Crow laws kept our people in circumstances little better than those they had just escaped.⁴² It was not until yet another hundred years passed that separate but equal—legal apartheid—began to be repealed.⁴³ We were not the first nation to repeal slavery—not even among the first ten.”⁴⁴

“But surely, Rodrigo,” I interjected, “things have changed. And even if our system of civil rights laws is not perfect, does it not provide at least a degree of protection? What do we have that is any better? Anarchy?”

“Good points,” Rodrigo replied mildly. “I don’t want to exaggerate. Sometimes the courts are our staunchest allies. But sometimes they are not. During these times we should look to other avenues. Otherwise one is just beating one’s head against a stone wall.”

“What you called perseverance before.”⁴⁵

“Actually, your two questions turn out to be related. Legal instrumentalism occurred to me in reflecting on the idea of

laws”).

⁴⁰ See BELL, *supra* note 14, at 26-30.

⁴¹ See *id.* at 9, 26-30.

⁴² See *id.* at 31-34, 109-16; see also JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 338-43 (3d ed. 1967) (discussing the disenfranchisement of Blacks and the Jim Crow laws which followed).

⁴³ See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (holding that the official segregation of schoolchildren by race violates the constitutional guarantee of equal protection of the law).

⁴⁴ See FRANKLIN, *supra* note 42, at 344-51, 365 (discussing the abolition of slavery throughout North and South America, and the United States’s comparative lateness in repudiating slavery).

⁴⁵ See *Chronicle*, *supra* note 1, at 1374 (discussing common reaction to periods of stress and frustration—namely, digging in and working harder and harder at what worked before).

legitimacy and the way in which recent revolutionary leaders have viewed law. Few of the great ones held to any sort of romantic ideal. Gandhi, of course, considered the British system of laws and civil service entirely illegitimate and had little hesitation about ordering strikes and boycotts, even though they were technically illegal.⁴⁶ Martin Luther King believed one had no obligation to obey unjust laws.⁴⁷

"Although King did believe that one should be prepared to suffer punishment as a consequence,"⁴⁸ I interjected.

"To be sure. And in more recent times, the Black Panthers took a position very much like the one I am suggesting.⁴⁹ Their leaders understood that the forces of law would often be arrayed against them, but that sometimes one could employ litigation, injunctions, and other legal strategies to make very real progress for the black community.⁵⁰ Cesar Chavez and the farmworkers seem to have had a similar attitude.⁵¹ There is a long history of outsider groups seeing law in pragmatic terms, as sometimes legitimate and helpful, and at other times not."

"In more recent times, Critical Race theorists have been calling attention to the way this happens, not just in enforcement, police abuses, and the like, but also overtly in legal doctrine. They have been pointing out that wherever legal principles and rules conflict with the interests of the mighty, the law simply coins an 'exception.' In time, the loophole comes to be regarded as ordinary and usual, not even looked upon as an exception at all. Look at all the exceptions and special doctrines the law has carved out in the free speech area.⁵² These days, minorities, gays, and women are calling

⁴⁶ See LOUIS FISCHER, *THE LIFE OF MAHATMA GANDHI* 87-89, 184-204, 298, 391 (reprint 1979) (1968).

⁴⁷ See Martin Luther King, Jr., *Letter from a Birmingham Jail*, in *WHAT COUNTRY HAVE I? POLITICAL WRITINGS BY BLACK AMERICANS* 117, 121 (Herbert J. Storing ed., 1970).

⁴⁸ See *id.* at 122 ("One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty.").

⁴⁹ See Papke, *supra* note 39, at 662-71 (describing the Panthers' knowledge of the law while contrasting their cynical attitude towards it).

⁵⁰ See *id.*

⁵¹ See Cesar Chavez, *Introduction* to MARK DAY, *FORTY ACRES: CESAR CHAVEZ AND THE FARM WORKERS* 9, 11-12 (1971) (advocating nonviolent means of political action).

⁵² See generally Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives*

for hate-speech rules that would punish vicious name-calling and slurs. But our friends over at the ACLU consider this heresy and sue every university that enacts such a code.⁵³ They argue that the First Amendment should be a seamless web, ignoring that we have literally dozens of exceptions that come into play in the case of speech that threatens powerful groups.⁵⁴

"I can think of several," Rodrigo said. "The wealthy and powerful are considered to have a kind of property interest in their reputation, so speech that damages them is compensable even though words are the sole means of causing the harm.⁵⁵ And the same is true for words that violate a copyright,⁵⁶ communicate a threat,⁵⁷ form a monopoly,⁵⁸ or constitute misleading advertising.⁵⁹ Disrespectful words uttered to a judge, teacher, police officer, or other authority figure are also punishable,⁶⁰ as are

in Collision, 85 NW. U. L. REV. 343 (1991) (analyzing college campus rules that prohibit racially offensive speech under the First and Fourteenth Amendments).

⁵³ See generally Richard Delgado & David H. Yun, *Pressure Values and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871 (1994).

⁵⁴ See *id.* at 883.

⁵⁵ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (holding that protection under *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964), applied neither to a public figure nor a public official). The Court explained that "[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehoods." *Id.* at 341.

⁵⁶ See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985) (holding that a magazine's publication of copyrighted material violated the Copyright Act and did not fall under the Act's "fair use" exemption); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-76 (1977) (holding that the broadcasting of a film depicting a "human cannonball" posed an economic threat to the value of the performance and, therefore, was not protected by the First and Fourteenth Amendments).

⁵⁷ For a discussion of the various crimes of threat, see ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 177-79, 448-52 (3d ed. 1982) (describing the crimes of verbal assault and blackmail).

⁵⁸ For a discussion of the prohibition against price-fixing, see LAWRENCE A. SULLIVAN, *HANDBOOK ON THE LAW OF ANTITRUST* 29-30, 132-34 (1977) (describing three offenses under the Sherman Act: monopolization, the attempt to monopolize, and the conspiracy to monopolize).

⁵⁹ On fraud, see PERKINS & BOYCE, *supra* note 57, at 304-08.

⁶⁰ See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685-86 (1986) (upholding the disciplinary proceedings imposed by a public school on the respondent, who made an assembly speech filled with sexual innuendo); *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 421-22 (1918) (upholding criminal contempt charges against a newspaper for criticism of the disposition of a case), *overruled by Nye v. United States*, 313 U.S. 33 (1941). For federal protection of inanimate objects and symbols, see 18 U.S.C. § 707 (1988) (prohibiting the fraudulent

untruthful words uttered under oath or words that disseminate an official secret.⁶¹ Each of these exceptions or special doctrines exists to promote the interests of a powerful group such as the military or consumers.”

“So, you are saying that the rule of law in all its majesty never holds for us, but always for our adversaries or for empowered groups?”

“In general, yes,” Rodrigo said. “Business necessity is a valid excuse for discrimination.⁶² The police can search or arrest you without a warrant if they can show good faith,⁶³ which sometimes takes the form of simply pointing out that you were a black man walking or standing in the wrong neighborhood.⁶⁴ Discrimination is permissible if it cannot be proved intentional.⁶⁵ And the tax code, as everyone knows, contains so many exceptions for the activities of the rich that many who earn over one million dollars a year are able to escape paying taxes altogether.”⁶⁶

use of the 4-H Club symbol); 18 U.S.C. § 711a (1988) (prohibiting the fraudulent use of the name, character, or slogan of Woodsy Owl); 36 U.S.C. §§ 171, 173-174 (1988) (regulating the use of the American flag).

⁶¹ See, e.g., *Snepp v. United States*, 444 U.S. 507, 510 (1980) (per curiam) (upholding the constitutionality of a CIA contract requiring the prepublication review of all materials to be published by an ex-CIA agent); *United States v. Progressive, Inc.*, 467 F. Supp. 990, 1000 (W.D. Wis. 1979) (granting a preliminary injunction to prevent the publication of allegedly classified information concerning the hydrogen bomb, in the interests of national security); see also LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 176 (1986) (arguing that disclosure of secrets in wartime setting is not protected speech).

⁶² See THEODORE EISENBERG, *CIVIL RIGHTS LEGISLATION* 802-06, 837-45 (3d ed. 1991).

⁶³ See, e.g., *United States v. Leon*, 468 U.S. 897, 922 (1984) (holding that the Fourth Amendment exclusionary rule should not apply where officers reasonably rely on a warrant that later turns out to be invalid); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (holding that a gun seized during a reasonable search of the petitioner was admissible as evidence).

⁶⁴ See HACKER, *supra* note 18, at 36-38, 46-49 (discussing treatment of Blacks in the wrong neighborhoods).

⁶⁵ See, e.g., *Washington v. Davis*, 426 U.S. 229, 247-48 (1976) (holding that a racial-discriminatory impact is not enough to prove discrimination under the Fifth and Fourteenth Amendments).

⁶⁶ See DONALD L. BARLETT & JAMES B. STEELE, *AMERICA: WHO REALLY PAYS THE TAXES?* 39-48 (1994). Concerning the way in which deregulation and favorable tax treatment have aided the rich and disadvantaged the poor, see generally Richard Delgado, *Inequality "From the Top": Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100, 129-32 (1984) (discussing legal approaches to governmental favoritism toward its friends).

"Your point, then, is that people of color should straightforwardly recognize that the law will often not protect them because it is designed to promote the interests of others, and that they should make the best of the situation."

"You and I were discussing normativity and the intensely civic-minded turn legal theory has taken recently.⁶⁷ While on the plane, it occurred to me that one of the main uses of normative discourse is to keep people like you and me from criticizing the rule of law. If everyone, including outsiders, can be made to revere the law, even when it is doing obvious and demonstrable harm, we will reason: 'Oh, well, it's a great institution, so we shouldn't criticize.' We'll agree to remain silent, fixating on the few times that legal institutions have really helped us"

"Like the sixties," I said.

"Right," Rodrigo agreed. "And ignore that the rest of the time the law is either indifferent or positively injurious to our well-being. In no other area of human endeavor, with the possible exception of religion, do we succumb to such totalistic, all-or-nothing thinking. Imagine, for example, a butcher who sold rotted meat defending his action by saying, 'But I followed the procedure.' Or imagine a teacher, all of whose students failed standardized tests, insisting 'I taught them that.' In all these other areas we insist on results. Imagine the butcher defending his practice by saying that the institution of butchery does more good than harm. We'd call this the nonsense it is!"

"I see what you mean," I agreed. "Many have pointed out that procedure is something that bad men love and follow most assiduously. Kafka and other novelists wrote about that."⁶⁸

⁶⁷ See *Fifth Chronicle*, *supra* note 2, at 1585-86 (pointing out a new trend in law schools toward "abstract, vaguely aspirational teaching," which is also found in legal theory in the form of "civic republicanism").

⁶⁸ See FRANZ KAFKA, *THE TRIAL* (definitive ed. 1960) (describing the plight of a man who is arrested and taken through the procedures of the state's judicial system, without ever having known the reason for his arrest); see also FYODOR DOSTOEVSKI, *THE BROTHERS KARAMAZOV* 227-45 (Ralph E. Matlaw ed. & Constance Garnett trans., 1976) (1880) (*The Grand Inquisitor*, pt. II, bk. V, ch. V) (describing the allegory of Christ's prosecution for heresy).

"So, minorities should invoke and follow the law when it benefits them and break or ignore it otherwise—when it gets in the way, is unresponsive, or is adverse to their interests. We should treat it like any other social institution, the highway department, for example. No one hesitates to call the highway department to task, to criticize it if it is always fixing the potholes on the other side of town and ignoring the ones in their neighborhood. No one speaks of the majesty of the rule of highway procedure or the grandeur of pothole fixing. If the department is doing its job, we leave it alone or give it a pat on the back. If it's not, we call it to account, or else work out some other way of getting the potholes fixed."

"Rodrigo, you are saying that social reformers should subsume law under their agenda, which is to achieve progress for minorities. Law-types approach things in just the opposite way, insisting on subsuming racial reform under law. Law people place law at the center, and then ask where racial justice should fit in. Should Martin Luther King be allowed to march in the face of an injunction? Should civil disobedience be countenanced? Should a White charged with discrimination be able to escape by showing a business necessity, or a lack of intent or causation?"

"I agree. We should demand the opposite—that race reform be placed in the center, following which we should ask where law fits in. That's the model I'm proposing, and does it not make just as much sense as the other approach?"

"It seems to me," I said, "that it all depends on what is uppermost in your mind, on what your objective is. The law-lover will subscribe to mythic, heroic views about the rule of law and insist that everything else be addressed within that framework. We, by contrast, will take a more utilitarian view of law, as the Panthers did.⁶⁹ We'll ask: 'What can law do for us at this time and place?'"

"And that's the view I suggest under the rubric of 'legal instrumentalism.' We should demystify law, see it as the social institution it is: good for some things, less so for others. As we observed before, theory-fitting is everything. It makes no sense to use Gramsci⁷⁰ to help you prepare a budget, nor law and econom-

⁶⁹ See *supra* notes 39, 49-50 and accompanying text.

⁷⁰ Antonio Gramsci, an Italian intellectual, wrote about social critique and the

ics to try to make this a fairer world for excluded groups.⁷¹ We should avoid counsels of despair. But, by the same token, we should disavow failed liberal programs that achieve too little because they promise too much. Hence, legal instrumentalism: try everything until you find what works.”

B. *Rodrigo Defends Instrumentalism Against the Charge That It Is Unprincipled*

The waitress appeared at our table: “Would you gentlemen like some dessert?” Despite my doctor’s orders to cut down, I looked up at Rodrigo inquiringly, as I very much wanted to prolong our session. His enthusiastic nod did much to allay my guilt. “You’ve been through a lot,” I said. “Besides, I don’t think they’re serving supper on this make-up flight I’m taking in two hours.” We both scrutinized the dessert menu, gave the waitress our orders (apple strudel for my high-energy young friend, an abstemious fruit cup for me), and returned to our conversation.

“Rodrigo, I love your theory. It’s exactly what we need, both tactically and psychologically. As you pointed out, it has much honorable historical precedent. And, it squares with my sense of how law works to preserve the advantage of the powerful, accepts and takes account of that, and enables us to go on nevertheless. But perhaps your theory is something that we should not speak of too openly. Perhaps we should keep it in-group. Perhaps it should remain on the level of myth, as you spoke of before, and not be put out for public consumption.”

“Why would we do that?” Rodrigo looked concerned.

“I meant no criticism of your theory as a way to interpret and organize experience. On that level, it’s a fine insight. But won’t mainstream scholars accuse you of cynicism, of weakening the social fabric? And won’t they have a point? You do seem to be saying that obeying the law is not important, at least for minorities.”

relations among classes of people. See ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS *passim* (Quentin Hoare & Geoffrey N. Smith trans. & eds., 1971).

⁷¹ See *Second Chronicle*, *supra* note 2, at 1202 (offering examples of theory-fitting).

"I believe deeply in the social fabric," Rodrigo replied, suddenly solemn. "But I don't equate that with the law any more than I think we should equate society with the highway department, or with the institution of conscription. Each of these is a means to an end. Anyone who argued that we should venerate the highway department or the military draft would be seen as a little strange. I'm suggesting that we think of the law in the same way, and that for minorities, at least, there are even stronger reasons for doing so. None of us was at the Constitutional Convention, only three of us have been elected to the Senate and none to the presidency or vice-presidency,⁷² and there is not a single black CEO of a Fortune 500 company.⁷³ Not to mention the way in which legal doctrine, the law on the books, as well as the law in action, are almost always arrayed against us."⁷⁴

I was silent as Rodrigo stole a look at the items on the tray of the waitress as she passed by our table. "Those look good. Too bad they're not for us," he continued. "Notice that large institutions never subscribe to the rule of law, at least never venerate it the way everyone tells minorities they are supposed to. A corporation that calculates that it is cheaper to market a product with a design defect the corporation knows will cause *X* injuries or *Y* deaths will often do so if it figures it can get away with it or that the cost of compensating the victims is cheaper than that of retooling its assembly line."⁷⁵

"Or they reason that some members of the public won't sue. The victims may know they have been injured but not by whom.⁷⁶ Or they may not want to make trouble. Or they may fear that filing a lawsuit will take too long and cost too much money.⁷⁷ So a

⁷² See *Seventh Chronicle*, *supra* note 2, at 734.

⁷³ See Shelly Branch, *America's Most Powerful Black Executives*, BLACK ENTERPRISE, Feb. 1993, at 78, 82.

⁷⁴ See *supra* notes 52-66 and accompanying text (describing how the law addresses inequalities for minorities by carving out exceptions to the rule rather than transforming the rule itself).

⁷⁵ See generally RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (1965) (discussing the reluctance of the automobile industry to commit resources to safety research and design).

⁷⁶ For a discussion of the problem of the "indeterminate plaintiff," see Richard Delgado, *Beyond Sindell: Relaxation of Cause-in-Fact Rules for Indeterminate Plaintiffs*, 70 CAL. L. REV. 881 (1982).

⁷⁷ On the high costs of litigation, see, for example, John E. Morris, *Cut the Going*

corporation that causes ten injuries may only be sued five times. The cost of repairs may be great enough that they simply decide to internalize the deaths, broken bones, and cases of cancer as costs of doing business," I added.

"Corporations are not the only ones who behave this way. Nations do as well. If a large power needs to take action to promote its interest, it will often do so even if this violates international law or a treaty to which it is a signatory.⁷⁸ In doing so, it realizes this will have a cost—that other nations will be resentful and will not trust it so much in the future. It knows its action will weaken the tenuous compact among nations to be law-abiding, even when there is no superpower to enforce the rules. It knows these things, but factors them in as just another cost of its course of action, like the lives and airplanes that will be lost in the invasion or coup."⁷⁹

"Great political theorists, old and new, have recognized this: Nations act in their own self-interest."⁸⁰

"I'm sure we're thinking of the same people," Rodrigo added. "It only makes sense to approach civil rights law nonideologically. We should be zero-based and as dispassionate as possible, choosing legality when doing so will benefit us, and straightforwardly pursuing other means when it does not. Ideology, which includes the slavish devotion to law, always has costs. It prevents you from making alliances with the other side, from pursuing an avenue that might bring you benefit. Nietzsche thought that was its whole purpose.⁸¹ He may have had a point."

Rate, AM. LAW., Sept. 1993, at 5; Gary Taylor, *Counsel to Firms Goes In-House: Legal Costs Are Leading Firms, Like Their Clients, to Look Inside for Advice*, NAT'L L.J., July 18, 1994, at A1.

⁷⁸ See HENRY KISSINGER, DIPLOMACY 59-77 (1994) (attributing modern nations' pursuit of self-interest to a tradition begun by Richelieu's *raison d'état*, and stating that the post-Cold War challenge is to restrain nationalistic assertions of self-interest); ZBIGNIEW BRZEZINSKI, OUT OF CONTROL: GLOBAL TURMOIL ON THE EVE OF THE TWENTY-FIRST CENTURY 87-101 (1993) (asserting that the distinction between exclusively foreign and exclusively domestic issues has blurred).

⁷⁹ See KISSINGER, *supra* note 78, at 805 ("The absence of both an overriding ideological or strategic threat forces nations to pursue foreign policies based increasingly on their immediate national interest.").

⁸⁰ See, e.g., *id.* at 59-77; cf. NICCOLO MACHIAVELLI, THE PRINCE 79-84 (Hill Thompson trans., Heritage 1954) (1513).

⁸¹ On morality as a means of manipulating the masses, see FRIEDRICH W.

"There's been some writing on a similar notion, namely that minorities ought to rethink their historic, and now near-reflexive, embrace of the Democratic Party.⁸² Some are beginning to point out that this alliance has been yielding the minority community fewer and fewer gains.⁸³ They suggest that Blacks should consider switching allegiance to the Republicans, at least to the moderate wing of that party. If the Democrats are allowed to think they can count on our vote no matter how diffidently they treat us, no matter how little attention they devote to our problems, why should they not begin withdrawing from us and begin courting conservative Whites?"⁸⁴

"Something like this seems actually to have happened," Rodrigo observed. "I wasn't here for most of the period you are describing, but I read of it in the Italian newspapers, which take a lively interest in your affairs. And I read that article you are referring to."

"The zero-based one?"

"Yes. Oh, those look great!" The waitress had brought our desserts. As she placed them in front of us I asked Rodrigo: "I hope we can get through at least two more matters before I have to head off. First, I'd like to know what thoughts you have on whether legal instrumentalism—which, by the way, I think is bound to draw fire from centrists and even some of our friends—will not turn out to be just a phase, or moment, in civil rights history. As things improve for us, as society becomes more multicultural and demography shifts, will we not join the majority and then have a stake in proclaiming the rule of law as loudly as anybody else? And second, are there not risks in adopting such a calculating view of law? If one makes trades and compromises, is there not a danger that these

NIETZSCHE, *BEYOND GOOD AND EVIL* 103-31, 106 (Marianne Cowan trans., Gateway ed. 1955) (1907) ("What is essential and invaluable in every system of morals, is that it is a long constraint."); FRIEDRICH W. NIETZSCHE, *THUS SPAKE ZARATHUSTRA* 51 (A. Tille trans., J.M Dent & Sons 1958) (1883) ("Joy in the herd is older than joy in the I: and while good conscience is called herd, only the bad conscience saith I").

⁸² See, e.g., Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 *GEO. L.J.* 1929, 1940-44 (1990) (arguing that a zero-based critical analysis indicates that the nonwhite poor should consider aligning themselves with the principled right of the Republican Party).

⁸³ See *id.* at 1929-33.

⁸⁴ See *id.* at 1933 (noting that "alliances that are too automatic will eventually yield suboptimal results").

things may come back to haunt one? Perhaps it's better to stick to principle, after all."

Rodrigo's look twinkled for a moment as he glanced up from his strudel. I caught his meaning, so backtracked slightly. "I know it's kind of a big order, all for dessert. (Rodrigo snorted at the double entendre). But maybe we could make a start. Actually, I've got (I looked at my watch) almost an hour. So, if you have the energy, why don't we start."

Rodrigo took a deep breath and began.

III. RODRIGO EXPLAINS WHY SELF-INTEREST, NOT IDEALISM, IS THE BEST COURSE FOR MINORITIES, AND WHY ONE SHOULD RARELY PUT TOO MUCH FAITH IN INTEREST-CONVERGENCE WITH THE DOMINANT GROUP

A. *Why Self-Interest Is the Safest Course for Disempowered People*

"We can only look to our own self-interest, Professor, and rarely to the altruism of the majority group because our social construction, the images and pictures of us that the majority culture disseminates and consumes, limits the amount of altruism that comes our way. We discussed some of this before—the way in which the dominant society finds it convenient to depict us as lazy, criminal, lascivious, not very smart, and so on.⁸⁵ Over time these pictures begin to seem like the truth, begin to seem real."

"Some Whites escape those forces," I replied quietly. "Some of them are humane, generous, treat us as equals. You mentioned your thesis advisor, for one."⁸⁶

"True," Rodrigo conceded. "But I'm talking about politics, about large numbers. And when you look at that level—by which I mean the level of polls, attitudes, the ways the American people as a group look at race—you find something that I call 'guilt by definition.'"

⁸⁵ See *supra* notes 26-28 and accompanying text.

⁸⁶ See *Third Chronicle*, *supra* note 2, at 400 (describing Rodrigo's thesis advisor "as a good teacher, even though he didn't warm up to . . . [Rodrigo's] paper"); *Eighth Chronicle*, *supra* note 2, at 541 (describing Rodrigo's thesis advisor as seeming to be "genuinely open").

"The term is new to me, but I think I know what you mean. We're a group whose very social construction inclines members of the majority race to fear us, to regard us as potential troublemakers, to cross the street when we approach them on the sidewalk at night, that sort of thing?"

"That is indeed part of it. We discussed this earlier when we talked about black and white crime.⁸⁷ But now I think that some of those earlier observations can be generalized into an argument for legal instrumentalism as the only sane approach to civil rights—for Blacks and people of color, at any rate."

"Let me guess how that generalization might go," I said. "You are going to say that incessant characterization of Blacks in demeaning terms means that the average member of society virtually equates any one of us with trouble. We come to be seen as absent fathers, welfare mothers, lazy office worker 'quota queens,' and so on. Once this sets in, we have little chance of appealing to the better natures of persons who hold this unconscious image of us. The image renders us 'Other.' It means people simply don't think of us as individuals to whom love, respect, generosity, and friendliness are due. We are 'beyond love,' as you and I discussed before.⁸⁸ The psychological experiments of helping behavior show this conclusively. A black female confederate spills a bag of groceries and only Blacks will help her. A blond, blue-eyed woman does and Whites rush to her aid. And the same with stranded motorists and other people in distress.⁸⁹ Is this the general mechanism you were thinking of?"

⁸⁷ See *Eighth Chronicle*, *supra* note 2, at 508-16 (discussing how society virtually equates crime and the black underclass).

⁸⁸ See *Third Chronicle*, *supra* note 2, at 401-08 (discussing how American society excludes Blacks both from the economy and from networks of love).

⁸⁹ See, e.g., Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546, 548-49 (1980) (describing the shopping bag experiment, which found that Whites tend to give help to people of their own race); Stephen G. West et al., *Helping a Motorist in Distress: The Effects of Sex, Race, and Neighborhood*, 31 J. PERSONALITY & SOC. PSYCHOL. 691, 693-94 (1975) (discussing the broken-down motorist experiment, which found that black victims were helped faster in black neighborhoods and that white victims were helped faster in white neighborhoods). See generally Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673 (1985) (arguing that although much has changed since 1964, racism remains a prominent part of American life).

"Yes. And to anticipate your question, I do believe one can extrapolate from the personal to the political level—what is true of individuals is also true of groups. So that any theory of race must take into account this lack of good will or fellow-feeling. Do you have a garden, Professor?"

The question took me by surprise. "Yes, I have a small one. Not that I have been tending to it as much as I should. We had a much larger one before we moved here. What connection are you trying to make between gardening and civil rights?" I half winced, knowing of Rodrigo's penchant for colorful metaphors and extrapolations. It turned out that my fears were unfounded.

"If you've gardened, Professor, you know about the concept of weeds. A weed is any plant that a society deems undesirable, such as dandelions. Yet, in my home country, there are regions where dandelions grow wild, populate entire hillsides, and are regarded as rather beautiful."

"I remember," I said. "I was in your country not long ago. As you know, I spent last summer at a conference study center in northern Italy. While there, I drove through the Dolomite mountains in the late spring. The fields of bright yellow dandelions were very beautiful."

"Racial features are like weeds and dandelions. There is no DNA divide that separates common weeds, like thistles, dandelions, and clover on the one hand, from fine grasses and flowers on the other. The category is constructed and varies from society to society. The same is true of race. Our facial features, skin color, and hair do not set us apart in any important way from white people, who according to scientists share virtually all of their genetic makeup with us.⁹⁰ We are the same species. It is only because society chooses to regard the small physical differences between Blacks and Whites as marking out different races that we even

⁹⁰ On the great overlap between the black and white populations in their genetic composition, see, for example, Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, 12 CRITICAL INQUIRY 21, 21-22 (1985) (noting that aside from visible differences in skin, hair, and bone, "there are few genetic characteristics to be found in the population of England that are not found in similar proportions in Zaire or in China; and few too (though more) which are found in Zaire but not in similar proportions in China or England").

construct such categories instead of some other ones, such as heavily-eyebrowed persons versus thin-eyebrowed persons or something similar."⁹¹

"But we do, and the categories come loaded. We place value judgments on them—they are not neutral," I said, building on Rodrigo's observation. "We notice color not just as a curiosity, as a minor difference of no great importance, but in order to organize society, to assign people to statuses. You and I are the weeds, they the flowers."

"Our very category implies that we are one-down, the sort of people whom majority society can afford disparate, and usually worse, treatment, all with impunity and while feeling perfectly ethical about it."⁹² Therefore, we need to tend our own gardens. My approach—legal instrumentalism—is simply radical individualism applied to the racial predicament. If our construction were different, this approach might not be necessary. But because of our history and culture, because of how we were brought here, the institutions of slavery, conquest, Bracero programs, racist immigration quotas, and so on that kept minority populations suppressed for years, it is."⁹³ In a way, it's like the bootstrapping and self-help approaches that neoconservatives like Sowell and Loury have been urging, but for different reasons."⁹⁴

"The negative images may change, may even now be changing,"

⁹¹ On the social construction of race, see generally Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 1 (1991) (arguing that the United States Supreme Court's use of color-blind constitutionalism fosters "white racial domination"); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice,* 29 HARV. C.R.-C.L. L. REV. 1 (1994) (explaining and critiquing theories of race).

⁹² See Delgado & Stefancic, *supra* note 27, at 1260-62, 1275-76 (explaining that the use of images serves both to reassure those who disseminate them, and to legitimate their position vis-à-vis those who are demonized).

⁹³ On these and other sorry chapters in U.S. history, see generally BELL, *supra* note 14, at 1-71; Delgado, *supra* note 18.

⁹⁴ For a discussion of some of these conservative themes, see *Chronicle*, *supra* note 1, at 1373-76 (noting that conservative authors currently argue that culture need not change direction to survive, but rather must try harder at the things that were done before); Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race,* 91 COLUM. L. REV. 1547, 1548 (1991) (book review) (arguing that left- and right-leaning scholars are in substantial agreement with regard to what is wrong with the liberal civil rights program).

I said, determined to play the devil's advocate as long as possible. "In every era, some mainstream writers or moviemakers take our side, depict us sympathetically. The image may in time be supplanted by a more nuanced, humane one."

"I know," Rodrigo conceded. "The trouble is that our defenders tend to have no audience. Their work is seen as political, as 'message' pieces.⁹⁵ It is only later, after consciousness changes, that we see that they were right after all. Harriet Beecher Stowe's abolitionist novel sold well only after decades of activism had sensitized the American public to the possibility that slavery might be wrong.⁹⁶ Nadine Gordimer won the Nobel Prize only when her country was on the verge of repudiating apartheid.⁹⁷ And have you heard of the role of 'attestors,' Professor?"

I strained, trying to remember where I had recently read about such a thing. "Does it have to do with authentication of the slave narratives?" I asked.

"It may arise there," Rodrigo said. "But I was reading about it in connection with the work of some early African-American poets."

"Oh yes, now I remember," I said. "Phillis Wheatley was one. Didn't the American publishing world refuse to believe that she, a onetime slave, actually wrote certain collections of poems?"⁹⁸

"Exactly. Several Bostonians, including the Governor of Massachusetts and John Hancock, had to step in. They knew Ms. Wheatley and testified that she indeed had written the poems in question.⁹⁹ Most others in American letters did not believe an African-American woman was capable of such a thing. But the odd thing is that the attestors themselves were not poets at all, whereas Wheatley had gained recognition in Boston and in England for her poetry. It's like going to the local mayor for confirmation that Alexander the Great was really a major political figure."

⁹⁵ See Delgado & Stefancic, *supra* note 27, at 1262-67, 1275-76, 1281.

⁹⁶ See *id.* at 1281-82.

⁹⁷ See *id.* at 1281.

⁹⁸ See Lucy K. Hayden, *The Poetry of Phillis Wheatley*, in *MASTERPIECES OF AFRICAN-AMERICAN LITERATURE* 451 (Frank N. Magill ed., 1992).

⁹⁹ See *id.*

"And you think the presence of attestors shows something about our social quandary?"

"It does. Attestors wouldn't be necessary if we had an equal chance to be recognized on our own merits. And when society today hears from, say, Frank Michelman or Gary Peller that minority work is good, it comes as a surprise, like hearing a scientist say that a certain kind of common weed in your garden might be good."¹⁰⁰

"I believe you had said earlier that the situation today is even worse than it's been, that we are more ensconced as weeds now than in recent years."

Rodrigo smiled at my use of his metaphor. "I did. Not only are we one-down, we are on the defensive when we merely want to rise, want to change our position. Affirmative action, under which a paltry few of us get hired, has come under attack as unprincipled and an affront to innocent Whites.¹⁰¹ Our poverty is seen as a choice, as something we enjoy or wallow in, as evidence of the pathological nature of our culture, values, or family structure. Our demands for justice are seen as requests for entitlements, for things we don't deserve."¹⁰²

"Consider the whole 'political correctness' movement," I suggested.

¹⁰⁰ See Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 847 (arguing that the use of "race consciousness in the scholarly work of critical race theorists [has] reopen[ed] a political discourse that was closed off in the 1960s"); cf. Frank Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV. C.R.-C.L. L. REV. 339, 344 (1992) (noting that there are "countless potential contributions to . . . debate that cannot, without fatal loss of point and meaning, be completely purged of possible racially stigmatizing content").

¹⁰¹ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) ("[O]nly a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embodied in the Fourteenth Amendment that 'our Constitution is color-blind.'" (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))); Lino A. Graglia, *Race-Conscious Remedies*, 9 HARV. J.L. & PUB. POL'Y 83, 83 (1986) ("It should be obvious that granting preferences to some individuals on the basis of race cannot be justified . . . as a means of remedying disadvantages suffered by other individuals.").

¹⁰² For a discussion of these and other forms of turnabout, see Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025 (1994).

"A prime case. Our detractors apply the term to those who are merely asking for a slight modification in the canon, the list of books that are taught at universities. It's applied to those who ask for ethnic studies courses or departments in universities that offer hundreds of other courses of study, to those who ask for controls on vicious slurs like 'nigger,' 'kike,' 'spic,' and 'fag.' The conservatives who wield the term put us on the defensive, as though we were nags pursuing petty concerns."

"Yet their label has certainly caught on," I conceded ruefully.

"Despite its disreputable history. I wonder why nobody has pointed this out. Political correctness is little more than a modern, sanitized, prettified version of an old term. It means one who sympathizes with the Blacks, who takes their point of view."

"I'm sure we both know what word you mean," I said.

"Nigger lover," Rodrigo replied with distaste. "That's what it comes down to. Although it's naturally a sanitized version, that's what it means. Those who use it ought to be ashamed of themselves. Yet they are not, which proves my point about our current estate. Most of our defenders, most liberals, do not identify the term for what it is, but rather back away from the accusation. 'Oh, no,' they say. 'I'm not being politically correct, I just . . .'"

"Just like in the old days," I observed wryly.

Just then the waiter arrived to ask if we wanted anything else. Rodrigo moved to get out his credit card, but I said, "Please let me. The airline said they'd pay. I have this voucher because of the canceled flight. Would you like some coffee?"

"Do we have time?" Rodrigo asked.

"I do. And I'm looking forward to hearing about that last point you promised to address. Two coffees, please—one decaf, the other . . .?"

"Do you have espresso?" Rodrigo asked. The waitress nodded. "A double please."

B. *Rodrigo Explains Why His Plan Is Better Than Interest-Convergence, Which Can Easily Lead Reformers to Take the Short View and Make Sacrifices That Turn out to Be Unwise*

"I forgot to say regular," Rodrigo said with a slightly worried look on his face. "I've noticed that more and more places are selling decaffeinated espresso, which I consider practically a contradiction in terms, like a nice weed."

I looked at my animated, rail-thin young friend with his exuberant manner and said, "Don't worry, I have a feeling she'll bring you the high-octane kind. If not, we can send it back. I did order decaf, but that's no reason she should assume you'd want the same."

Rodrigo was silent for a moment then looked up. "Oh yes, I remember the last point. It has to do with a serious disadvantage of the interest-convergence approach. I don't want to be too critical. My approach is intended to reconcile the best of interest-convergence and the excessive and unwarranted optimism of liberal civil rights theory.¹⁰³ So, in a way, legal instrumentalism includes interest-convergence as a special case and doesn't really contradict it."

"Never mind," I said. "Criticizing their elders is what young people do. Everyone expects it. People like Bell and me have come in for much worse criticism than what I imagine you are likely to deliver. So, get on with it. Do you mean that interest-convergence sends you looking for the rare miracle—the one moment in a decade or century when white and black interests coincide—and leaves you without direction the rest of the time?"

"It does have that drawback," Rodrigo said. "But I think there's a more serious one that Bell, for all his brilliance, did not see." Rodrigo paused.

"I do want to hear it. I never thought I would accuse you of being too respectful, and here you are holding back. Besides, I've

¹⁰³ See *supra* notes 13-27 and accompanying text.

got to catch a plane in," I glanced at my watch, "less than forty minutes. They could announce my flight any time now."

The waiter arrived with our coffees. "Decaf for you, Professor," she said. "And the real thing for you," she added, smiling. I wondered idly how she knew I was a professor.

"Mmmmm. This is good," Rodrigo said, slurping his espresso. "I'm glad you suggested this." Then, after allowing me to take a sip of my own brew, he continued as follows:

"You know how the few great ringing victories—the sort of thing that happens once a decade or so, like *Brown v. Board of Education*¹⁰⁴—have a way of slipping away, cut back by narrow interpretation, obstruction, or delay?"¹⁰⁵

"Of course. Bell and others have pointed out that more black school children attend predominantly black schools now than was the case forty years ago, when the Supreme Court decided *Brown*.¹⁰⁶ The South mounted real resistance.¹⁰⁷ And in the North many white families simply moved away.¹⁰⁸ Courts eventually decided that segregation that results from housing patterns is irreparable.¹⁰⁹ Education is not a fundamental interest,¹¹⁰ nor poverty a suspect class,¹¹¹ so that property-rich school districts may offer first-rate educations while poor districts have much less to offer. Our youth suffer suspension, dropout, and assignment to

¹⁰⁴ 347 U.S. 483 (1954).

¹⁰⁵ See BELL, *supra* note 14, at 1-71; Bell, *Interest-Convergence*, *supra* note 8, *passim*; see also Richard A. Delgado & Jean Stefancic, *Brown v. Board of Education and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1994).

¹⁰⁶ See Bell, *Interest-Convergence*, *supra* note 8, at 518 (stating that "today, most black children attend public schools that are both racially isolated and inferior"); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 12 (1994) (noting that "de facto school segregation in all large urban school districts has intensified since the late 1960s").

¹⁰⁷ Cf. Klarman, *supra* note 106, at 11 (asserting that *Brown* crystallized southern white resistance).

¹⁰⁸ See Delgado & Stefancic, *supra* note 105, at 562.

¹⁰⁹ See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (holding that "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy").

¹¹⁰ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

¹¹¹ See *id.* at 26-28; *James v. Valtierra*, 402 U.S. 137, 141-43 (1971).

special education tracks and classes at rates that ought to be a national embarrassment."¹¹²

Rodrigo agreed. "We seem destined, as Bell puts it, for periodic peaks of progress followed by valleys of regression. Once every blue moon the stars line up, and the system grants us a seeming victory for reasons of its own"

"Such as Cold War politics, as Mary Duziak and Bell have noted," I interjected.¹¹³

"And other reasons, too," Rodrigo continued. "And in a way that points out a deficiency with the interest-convergence theory for understanding racial politics. It can deceive you into thinking the convergence will last longer, and prove more stable than it will, when in fact the stars have only found themselves lined up for a moment, like in an eclipse. But a more serious problem," Rodrigo continued, "is that one can easily take the short-term view and get so caught up with capturing and exploiting the approaching convergence that one gives away a long-term asset of inestimable value."

"Do you mean that we can become so hungry for a victory, so anxious for some sign of progress that we leap to the bait regardless of whether we should?" I didn't quite get Rodrigo's drift and hoped he would explain.

"Let me give an example from recent history," he said. "Recall the period just before *Brown v. Board of Education*. Everyone knows that we were then in the early stages of the Cold War. Russia had emerged as a world power. We were engaged in a worldwide struggle for the loyalties of the uncommitted Third World."¹¹⁴

¹¹² See generally HACKER, *supra* note 18, at 170-78 (describing how schools have failed to serve black children well).

¹¹³ See Bell, *Interest-Convergence*, *supra* note 8, at 524 (stating that *Brown* gave credibility to the United States's struggle for democracy in the Third World); Mary L. Duziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 63 (1988) (explaining that "efforts to promote civil rights within the United States were consistent with, and important to, the more central U.S. mission of fighting world communism").

¹¹⁴ See Duziak, *supra* note 113, at 62-63 (stating that our "ability to sell democracy to the Third World was seriously hampered by continuing racial injustice at home").

"Most of which was black, brown, or Asian," I added.

"Indeed, Bell's thesis holds that is the reason why the U.S. establishment intervened on behalf of civil rights. It would hardly do for us to be maintaining that our system was better than godless communism when the front pages of newspapers around the world carried stories and pictures of lynchings, cross burnings, Whites-only drinking fountains, and the Emmet Till murder."¹¹⁵

"So, according to Bell, the American establishment pushed for civil rights breakthroughs, not to advance black interests, but their own. Mary Dudziak recently confirmed Bell's hypothesis through an analysis of State Department and other government documents, which showed that the U.S. Attorney General finally decided to throw its weight behind the NAACP Legal Defense Fund only when the State Department sent it various urgent messages requesting that it do so."¹¹⁶

"And so we got *Brown*," I added.

"And singing and dancing in the streets followed by disappointment a few years later when we learned the decision was scarcely going to restructure American society or even benefit that many black school kids."¹¹⁷

"And you think that instrumentalism avoids this mistake?" I asked.

"I think excessive optimism is always a risk with a group that has been excluded, that has been down so long. But instrumentalism at least points us in the right direction, gets us to ask the right questions: Will this strategy work? What will happen to this breakthrough a few months or years later? If we put *X* dollars into

¹¹⁵ See Bell, *Foreword*, *supra* note 8, at 66 (discussing both the importance of presenting a positive American racial image to the Third World after World War II and the effect of this policy); cf. Bell, *Racial Realism*, *supra* note 8, at 372 (discussing, in light of the Clarence Thomas confirmation hearings, "how frequently in American history Blacks became the involuntary pawns in defining and resolving society's serious social trends").

¹¹⁶ See Dudziak, *supra* note 113, at 98-112 (discussing the State Department's attempts at "international impression management").

¹¹⁷ Delgado & Stefancic, *supra* note 105, at 550.

litigation this year, will the Supreme Court reward us, with what, and for how long? Interest-convergence just tells you that this may (or may not) be the time to strike. One should always look further down the line and ask what the practical effect of anything will be."

"That seems to me quite useful," I observed. "But does it amount to anything more than reminding ourselves that 'interest' ought to be seen longitudinally, as a long-term thing? Smart revolutionaries do that now."

Rodrigo winced. "Touché. But let me go on a bit. Perhaps instrumentalism—the theory that one ought to resort to law in the way one would resort to any tool, like the yellow pages, only when it promises concrete benefits—does indeed offer a more fruitful approach than either of the principal alternatives."

"Just a minute," I said, indicating that I had heard something. We were silent a moment while I absorbed a message coming through on the loudspeaker. "Oh, no," I groaned. "Another twenty minute delay. Well, at least my flight seems to be coming in, even if it's late. Take your time, then. My gate is only two or three down the concourse, and I'm already checked in."

"My point is cautionary only. The idea is that you must always be careful about pursuing interest-convergence with the dominant group, because in your eagerness you can easily give away the store, sacrifice something of too great value. The dominant group gives you what you wanted, but the value of what you've gained quickly erodes, so that you have little left in the long run, and in the meantime you have forfeited something even more precious."

"I assume you are thinking of more than the thousands of hours of gallant lawyering and tens of thousands of dollars in legal costs that went into bringing about the *Brown* victory?"

"Those as well as human costs of a different sort. They have to do with self-definition. If a community begins to think of itself in terms of its relation to a different community, it may start to lose its sense of itself, who it is. If we and our folks are constantly placing ourselves in the mind-set of powerful white folks, trying to see what they will want, how they will factor us in, trying to stage-manage interest-convergence, we can easily start to change not just

what we want, but who we are. Human beings are coterminous with their social surroundings. Our identities largely derive from whom we identify with, whom we try to please, whom we empathize with imaginatively. In some respects, the black community is safeguarded from overidentification with the majority of society because of the way the majority regards us."

"As we discussed earlier," I commented.¹¹⁸

"Right. But some of us do have a tendency to try to identify with them. They have all the power, can dispense rewards, control who is seen as beautiful, smart, acceptable, and so on."

"It's a trap all subordinated people can fall into," I said. "Psychologists call it identification with the aggressor.¹¹⁹ A milder term is assimilation."¹²⁰

"And so this can easily happen. But a more serious problem arises from another means by which groups define themselves and change their contours: expulsion. At any given time, a subordinated group has leaders, theorists who rail against the group's mistreatment and are able to articulate it. These may be writers, playwrights or Marxists—persons with an acute understanding of the group's condition and a fervent commitment to changing it."

"And you're saying that a minority group bent on pursuing the interest-convergence strategy may too easily jettison, too easily ostracize geniuses such as these?"

¹¹⁸ See *supra* notes 85-102 and accompanying text (discussing how categorization, originally based on small physical differences, eventually serves to organize society and to assign certain statuses to various groups).

¹¹⁹ On this phenomenon, see generally ROBERT J. LIFTON, *THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM* 439 (1961) (discussing how a "coercive approach to changing people" could result in "identification with the aggressor" (quoting ANNA FREUD, *THE EGO AND THE MECHANISMS OF DEFENCE* 117 (Cecil Baines trans., 1946))); Bruno Bettelheim, *Individual and Mass Behavior in Extreme Situations*, 38 *J. ABNORMAL & SOC. PSYCHOL.* 417, 447-51 (1943) (describing the tendency of prisoners in German concentration camps during the late 1930s to adopt Gestapo values as their own); Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 *INT'L J. CRIMINOLOGY & PENOLOGY* 69, 95 (1973) (noting that prisoners in a simulated prison study "sided with the guards against a solitary fellow prisoner").

¹²⁰ See Peller, *supra* note 102, at 761 (discussing the critiques fueled by "black nationalists" of "integrationism as [being] either inevitably, or at the very least historically, linked to assimilation").

"There have been many examples. In our day, there could soon be more."

"Could you give me an example?" I asked.

"Two recent leaders who come to mind are Paul Robeson¹²¹ and W.E.B. Du Bois.¹²² Both were major figures, extremely serious losses. Both died in bitterness and sorrow, effectively cut off from their communities—purged really.¹²³ All this happened because black leaders decided, in the late 1940s and early 1950s, that they were too radical, that they had too many ties with the Soviet Union.¹²⁴ Du Bois, in particular, was a giant figure, yet he was expelled from the NAACP, an organization he had helped found decades earlier, only to be later reinstated, but relegated to a minor role.¹²⁵ Both men were casualties of the Cold War, pure and simple. Our community expelled them, traded them in hopes of presenting a purified, sanitized, non-Communist front. The strategy worked—it brought about *Brown v. Board of Education*. But in one way of looking at it, it was not worth the price. *Brown* quickly faded, while the penetrating critiques these two figures had to offer were muffled and lost. It was not until the advent of the Black Panthers and of Malcolm X decades later that anything approaching a radical critique of American institutions and racism sprang up again. We sold our birthright for a mess of pottage."

¹²¹ On the life and thought of the great singer-actor-athlete, see generally MARTIN B. DUBERMAN, *PAUL ROBESON* (1988).

¹²² On the life and thought of W.E.B. Du Bois, see generally W.E.B. DU BOIS, *THE AUTOBIOGRAPHY OF W.E.B. DU BOIS* (1968) [hereinafter *DU BOIS, AUTOBIOGRAPHY*]; W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (1973).

¹²³ See *DU BOIS, AUTOBIOGRAPHY*, *supra* note 122, at 394-95 (explaining that Du Bois's status was emasculated to the point that "colored children ceased to hear his name"); MANNING MARABLE, *W.E.B. DU BOIS: BLACK RADICAL DEMOCRAT 171-75* (1986) (discussing Du Bois's removal from the NAACP).

¹²⁴ See MARABLE, *supra* note 123, at 173 (noting that NAACP leaders felt that the organization was "vulnerable to charges that it was a 'Communist organization'"). I am grateful to Peter Jon Perla for bringing to my attention some of the sordid infighting that took place in black leadership circles during this period. See Peter J. Perla, *From Left to Center: The Appropriation of Anti-Communist Rhetoric by the Black Press and Leading Black Opinion-Makers, 1946 Through 1948*, at 95-118 (Apr. 1, 1992) (unpublished honors thesis, University of Colorado (Boulder)) (discussing the downfall of Du Bois and Robeson in the NAACP).

¹²⁵ See MARABLE, *supra* note 123, at 201 (noting that Du Bois was invited to attend programs and hand out awards at ceremonies); Perla, *supra* note 124, at 113-18 (describing Du Bois's expulsion and subsequent return as Co-Chairman of the Council on African Affairs).

"And you think this is inherent in interest-convergence philosophy?"

"No, not inherent. But it is an ever-present and very real risk. If you place momentary interest and alignment with the major power players as your first priority, what is to stop you from sacrificing your leaders, your young, or anything else that stands in the way, for that matter?"

"I see what you are saying. Instrumentalism at least makes you stop and ask whether the action you are taking has long-term costs. It also prompts you to think whether the more powerful interest group you are trying to get to act in certain ways may not at the same time be seeing *you* in instrumental terms. The approach's radical individualism reminds you that others may not have your interests at heart, a useful thing for subordinated groups to keep in mind. You are less inclined to tell a towering figure like W.E.B. Du Bois he or she is not needed anymore. By the way, you seem to have been reading up on this period in history. Was Du Bois's banishment merely a coup within the NAACP, or broader than that?"

"Much broader," Rodrigo replied soberly. "The entire black community was turning to the right, just as America was jumping aboard the anti-Communist bandwagon, McCarthy was holding hearings, and people were seeing Communists under every bed.¹²⁶ Before that time, the African-American community had been quite receptive to radicalism.¹²⁷ Marxists and labor unionists had been given places of honor.¹²⁸ Paul Robeson even traveled to the Soviet

¹²⁶ See GERALD HORNE, *BLACK & RED: W.E.B. DU BOIS AND THE AFRO-AMERICAN RESPONSE TO THE COLD WAR, 1944-1963*, at 1 (1986) (noting that by 1948, the NAACP "was well on its way toward anticommunism and an internal witch hunt"). See generally Perla, *supra* note 124, at 51-87 (tracing the growth of American anti-Communism).

¹²⁷ See I HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE* 139 (1978) (noting that "[i]n tandem with New Dealers, black politicians, and Southern liberals, the American Left made the struggle for black equality a part of the progressive agenda"); Perla, *supra* note 124, at 20-30 (examining the ties between African Americans and the Left).

¹²⁸ See SITKOFF, *supra* note 127, at 156 ("Mordecai W. Johnson, president of Howard University, told a meeting of church leaders: 'I don't mind being called a Communist. The day will come when being called a Communist will be the highest honor that can be paid to any individual; that day is soon coming.'"); Perla, *supra* note 124, at 26 (noting that Communists were among the leaders of the black community

Union.¹²⁹ Then, the tide changed. African-American newspapers, ministers, and other leaders began speaking out against communism, began urging black people to rekindle their patriotism, join the army, and so on, in hopes of securing better treatment as a race.¹³⁰ If successful, it was only marginally so. The fifties were not a good period for us, and the sixties, although a time of breakthroughs, established little in the way of a lasting foundation.¹³¹ Yet we lost the beginnings of radicalism, and, as a result, today we are flailing about trying to find out where to start, how to see our condition anew."

My reverie was disturbed by an urgent message: my flight was boarding right now. With a start, I realized I must have missed the boarding announcement in my fascination with Rodrigo's story.

"Is that your flight?" Rodrigo asked.

"Unfortunately, yes," I replied, scrambling to pick up my things. "Will you give the cashier this voucher? It should take care of everything. It's been stimulating as always, Rodrigo. I'll call you when I get back, okay?"

We shook hands quickly, wished each other well, and three minutes later I was fastening my safety belt in preparation for take-off.

CONCLUSION

As the plane banked steeply and gained altitude I wondered why, after forty years of civil rights scholarship, it was left to Rodrigo, a mere graduate student and youth of twenty-five years or so, to hit upon such an obvious solution as legal instrumentalism. Did it have something to do with Dewey, whom Rodrigo recently

during the 1930s).

¹²⁹ See SHIRLEY GRAHAM, PAUL ROBESON: CITIZEN OF THE WORLD 223-27 (1946) (describing Robeson's trip to Moscow in 1935).

¹³⁰ See HORNE, *supra* note 126, at 62 (noting that these leaders "did not root for the red scare with vigor but conceded that because of pressure generated, '[they felt] it necessary' to make the obligatory anticommunist vow" (citation omitted)).

¹³¹ See Bell, *Racial Realism*, *supra* note 8, at 375 (discussing how the prevailing conditions "transformed the 'We Have a Dream' mentality of the 1960s into the trial by racial ordeal so many Blacks are suffering in the 1990s); see generally Delgado & Stefancic, *supra* note 105.

had described to me as a much-neglected, and very brilliant, philosopher? I realized that Dewey had written that experience and problem situations were what called upon and enabled people to develop intelligence. In that sense, all the brilliant constitutional scholars I had read would be unlikely to have come up with Rodrigo's insight. Not experiencing racial injustice as immediately or acutely as a Black such as Rodrigo, they might not think as probingly, as clear-headedly, or as urgently, as one who has suffered such bigotry. I wondered if this solved the problem of "racial voice" and justified resisting imperial scholarship, the domination of civil rights theory deplored by some minority-race writers. Did it validate the unique insights of scholars of color, or were we just as likely to succumb to the intellectual and moral sins of sloth, lazy thinking, cowardice, and co-optation as anyone else?

Once again, I realized what good fortune I had to be a teacher, exposed to minds such as Rodrigo's. I pulled down the tray table from the seat in front of me and prepared to work on the speech I was to deliver the next day, taking pleasure in the thought that Rodrigo was not unique—many African-American students had the same talent, the same insight of my friend and protégé—that there were many Rodrigos, all of them growing up, waiting to take their places in the world.