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# Book Review

## Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary

ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE. By Louise Ann Fisch.<sup>†</sup> College Station: Texas A&M University Press, 1996. Pp. xiii, 224. \$32.95.<sup>‡</sup>

Reviewed by Richard Delgado\*

Introduction: In Which Rodrigo and I Catch Up on the News and Each Other's Adventures

"Rodrigo, here I am," I announced, raising my voice over the din of the airport loudspeaker and voices of fellow passengers waiting at curbside.<sup>1</sup> "How kind of you to pick me up."

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<sup>‡</sup> Hereinafter cited by page number only.

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1. See Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1357-59 (1992) (book review) [hereinafter Delgado, *First Chronicle*] (introducing my interlocutor and alter ego, Rodrigo). The son of an African-American serviceman and an Italian mother, Rodrigo was born in the U.S., but raised in Italy when his father was assigned to a U.S. outpost. 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, Rodrigo has returned to the U.S. to investigate graduate law (LL.M.) programs. At the suggestion of his sister, famed U.S. civil rights lawyer Geneva Crenshaw, see generally DERRICK BELL, AND WE ARE NOT SAVED (1992) (describing Crenshaw's contributions to the African-American struggle for civil rights), Rodrigo seeks out "the professor" for career advice. Despite their age difference, the two become good friends, discussing over the next three years affirmative action and the decline of the West, see Delgado, *First Chronicle*, *supra*, law and economics, see Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993) (book review), love, see Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993) (book review) [hereinafter Delgado, *Third Chronicle*], legal rules, see Richard Delgado, *Rodrigo's*

"No problem. Giannina's back home, reviewing for a midterm.<sup>2</sup> Here, let me take that bag."

"Nice car," I said. "Did you have it last time?"

"No, it's new. We tried doing without one, but our schedules are so different now that we needed it in order to have any time at all together. So, we got this little beauty."

"It's Italian, right?" I asked.

"Right. Mom and Dad had one when I was growing up, although it was the larger model.<sup>3</sup> Have you ever driven one?"

"I don't think so," I said. "At my age, my tastes run to something a little more sedate."

"You can take it to your meeting tomorrow if you want. I'm staying home for the day. You could drop Giannina off at her law school on the way."

"We'll see," I said as Rodrigo slowed for the short-term parking booth. He showed his ticket to the attendant, who waved him on—"Free, less than thirty minutes"—and then I asked, "I gather you've been doing some traveling, too."

*Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) (book review) [hereinafter Delgado, *Fourth Chronicle*], the critique of normativity, see Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993), relations between men and women, see Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993) [hereinafter Delgado, *Sixth Chronicle*], enlightenment political theory, see Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994), black crime, see Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994), narrative jurisprudence, see Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995) (constituting the final chronicle in the first cycle of chronicles and the final chapter of RICHARD DELGADO, *THE RODRIGO CHRONICLES* (1995)), the rule of law, see Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994), affirmative action, see Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995), clinical theory, see Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996) [hereinafter Delgado, *Eleventh Chronicle*], the problem of desperately poor border settlements, see Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. (forthcoming Feb. 1997), and legal formalism, see Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism and Law's Discontents*, 95 MICH. L. REV. (forthcoming Feb. 1997) [hereinafter Delgado, *Thirteenth Chronicle*]. 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 soulmate, Giannina, and learns that Rodrigo's father's family immigrated to America via the Caribbean. Rodrigo's father Lorenzo looks black and identifies as such, but speaks perfect Spanish.

2. See Delgado, *Third Chronicle*, *supra* note 1, at 402 (introducing Giannina, Rodrigo's life companion and soulmate). A published poet, see Delgado, *Eleventh Chronicle*, *supra* note 1, at 69 n.26, and playwright, see Delgado, *Fourth Chronicle*, *supra* note 1, at 1137, Giannina recently decided to enroll in law school, see Delgado, *Thirteenth Chronicle*, *supra* note 1.

3. See *supra* note 1 (explaining Rodrigo's 10 years spent in Italy as a youth and his part-Latino heritage).

"I have," Rodrigo replied. "I just got back from a two-day conference hosted by the Latino law students of a major school. It drew an impressive cast, with speakers like Rodolfo Acuña and Carlos Muñoz, as well as the usual complement of law professors.<sup>4</sup> I've been meaning to ask you about something, if you're not too tired."

"Not at all," I replied. "My flight was nonstop and, despite my best intentions to get some work done, I spent the last half of it sleeping. I'm wide awake—ask away."

"As I mentioned, Professor, the event was richly interdisciplinary. But the panel that sparked the most excitement, among the law types at any rate, focused on the role of racial mixture in America's future."

"As a multiracial person yourself, I can see how you must have found that one intriguing. Were you one of the speakers?"

"No," Rodrigo replied. "I was on a different panel. But on this one, practically every one of the speakers was a member of the group called Latino-Critical scholars, or Lat-Crits, that has sprung up over the last two years or so."<sup>5</sup>

"I've been reading about them," I said. "They seem to be a spinoff group from Critical Race Theory (CRT),<sup>6</sup> which in turn traces its origins to earlier progressive movements, including CLS.<sup>7</sup> What were some of the issues discussed at the panel?"

"Mainly interracial marriage and adoption. But afterwards some of us were talking about the role of Latinos in American politics. We wondered why our relatively large group has had so little impact on national civil rights policy, especially in areas like immigration reform, bilingual education, poverty, and English-only.<sup>8</sup> On all these fronts, we've been relatively ineffectual, compared to blacks. Some thought it had to do with exomarrriage and assimilation, and the way the Latino community lacks co-

4. The conference and cast of characters are real; the identity of the school is withheld for reasons that become apparent later. Rodolfo Acuña and Carlos Muñoz teach ethnic studies at University of California, Northridge and the University of California at Berkeley, respectively. Both were activists in the 1960s civil rights movement, and both are authors of leading works on Latino history and politics.

5. On the Lat-Crit movement, see Jean Stefancic, *Latino and Latina Critical Theory: An Annotated Bibliography* (1996) (unpublished manuscript, on file with the *Texas Law Review*). For the movement's history and precursors, see generally Symposium, *Latinos & the Law—20 Years of Advocacy & Lessons for Future Advancement*, 14 CHICANO-LATINO L. REV. 1 (1994).

6. On Critical Race Theory, see generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993) (listing and annotating articles within the CRT corpus).

7. On Critical Legal Studies (CLS), see generally *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984).

8. Cf. JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA (1996) (arguing that conservatives have urged successful campaigns in the areas of English-only; proposition 187 and immigration reform; IQ, race, and eugenics; affirmative action; welfare; tort reform; and campus multiculturalism).

hesion, being made up of so many different national-origin groups. But after reading a certain book on the flight home, I think it's something different."

"You mean that one?" I said, pointing to a volume lying on the back seat of the little car, a neat bookmark sticking out. "I saw it when I got in."

Rodrigo craned around. "Yes, that one. I brought it along to show you. Entitled *All Rise: Reynaldo Garza, The First Mexican American Federal Judge* and written by a Washington, D.C.-area writer, it details the life and career of Reynaldo Garza. It's a good read."

#### I. In Which Rodrigo and I Discuss *All Rise* and What It Teaches About the Structure of Civil Rights Thought

"I think I saw a notice for it the other day," I said. "And of course I'm familiar with some of the judge's opinions; in fact I've taught one or two of them in my courses over the years. What does the book say about him? Nothing too harsh, I hope. It's tough being a first of any kind. Sometimes biographers and critics expect more of you than you can possibly deliver."

"It's favorable," Rodrigo replied. "As well as intelligently written. Like all good biography, it helps you understand the person and his or her times—how the circumstances in which he or she lived affected the possibilities for that person's life and thought."

"What's the general thesis?" I asked. As a member of the judge's generation, I was anxious to hear the author's judgment.

"Her thesis is that Judge Garza was able to combine a successful career as a lawyer and a judge and maintain his Mexican-American ties and roots at the same time.<sup>9</sup> The book details his early years as a relatively secure child in a large family of middle-class Mexican immigrants who operated a hardware store in Brownsville, Texas.<sup>10</sup> It shows his early encounters with hardship, racism, and exclusion and the way he fought against those forces by trying harder.<sup>11</sup> It traces his college and law school career at The University of Texas,<sup>12</sup> one of only two Mexican-American students in his law school class,<sup>13</sup> and then his rise in Democratic politics and the state bar,<sup>14</sup> all concluding in his appointment as the nation's first Mexican-American federal judge."<sup>15</sup>

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9. See pp. ix, x, 3, 52-53, 170.

10. See pp. 1-18.

11. See, e.g., pp. 14-16, 19-20, 24-25, 32-33, 45-46, 83, 88, 90.

12. See pp. 16-35.

13. See p. 29.

14. See pp. 36-69.

15. See pp. 70-87.

"Wasn't he once offered a cabinet position?" I asked.

"U.S. Attorney General during the Carter administration," Rodrigo replied. "He turned it down because he didn't want to uproot his family.<sup>16</sup> Later he was appointed to the Fifth Circuit.<sup>17</sup> Serving during a time of intense civil rights activity,<sup>18</sup> he handed down many noted decisions, especially in the areas of labor law where, according to the author, his familiarity with working class people and conditions enabled him to write opinions notable for their progressivism."<sup>19</sup>

"He sounds like a commendable human being," I observed. "In some ways he reminds me of some of the early African-American federal judges of my own generation who struggled to validate themselves in a skeptical world while trying to hand down rulings that advanced the cause of social justice."

"A difficult balancing act," Rodrigo acknowledged. "But I think that with Judge Garza it was harder, somehow. And this brings me back to what we were talking about at the conference."

"Harder because of who he was, or because of social conditions at the time he went on the bench?" I asked.

"Both, in a way," Rodrigo replied. "When he was appointed, it was a time of intense ferment, almost all on behalf of blacks. The Chicano movement came much later.<sup>20</sup> His own community, Brownsville, was more than eighty percent Spanish-speaking.<sup>21</sup> Many people were poor, but according to his biographer this resulted more from structural poverty and a lack of jobs than from outright discrimination.<sup>22</sup> Nor did the legal system consider Chicanos a suspect class. Like the Indochinese and other Asian groups, they occupied a sort of limbo—minorities, but not clearly entitled to the special protection of civil rights law."<sup>23</sup>

"Don't the Lat-Crits have a special name for this?" I asked.

"The black-white binary,"<sup>24</sup> Rodrigo replied. "It's an idea that's just now emerging as a means of understanding American civil rights law and the place of nonblack groups in it. The idea is that the structure of antidiscrimination law is dichotomous. It assumes you are either black or

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16. See pp. 142-45.

17. See pp. 155-69.

18. See pp. 107-22.

19. See pp. 126-27, 131-32.

20. See pp. 24, 116-17, 167.

21. See pp. 5, 89.

22. See pp. 6, 88-89.

23. See pp. 138, 148, 199 n.47.

24. See Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 573 (1995) [hereinafter Perea, *Ethnicity*]; Juan Perea, *The Black-White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. (forthcoming 1997) [hereinafter Perea, *Binary Paradigm*].

white. If you're neither, you have trouble making claims or even having them understood in racial terms at all."<sup>25</sup>

"I think I follow you," I replied. "But could you fill it out a little more? Assuming that our system does incorporate such a dichotomy, how does that render nonblack minority groups one-down, as opposed to, say, one-up, compared to blacks?"

"That's the next step," Rodrigo replied. "At the conference, no one had worked that out yet. But it's an important question. America's racial future looks increasingly mixed up. Latinos will overtake blacks as the most numerous minority early next century.<sup>26</sup> The Asian population, too, is increasing rapidly. Multiracial people are demanding their own voice and census category.<sup>27</sup> A simplistic paradigm of racial relations, based on an either-or, *A-or-B* model, won't work much longer. I've been trying to figure out why this is so. Reading about Judge Garza helped me to crystallize my thoughts."

"Every time a new movement springs up in the law, it's stimulating," I said. "It almost always leads to changes in the way we think about society and justice. We talked about some of these things before."<sup>28</sup> Rodrigo nodded. "I remember the ferment when Critical Race Theory was born not too many years ago.<sup>29</sup> And, if you can believe it, I was actually around when Critical Legal Studies was born nearly thirty years ago."<sup>30</sup>

"You *have* been teaching a long time," Rodrigo replied, giving me a quick look. "And that's why I want to run past you some things I've been thinking about in the wake of the conference."

"Ask away," I said. "How long does the drive to your place take?"

"About forty-five minutes since they built the new airport." Rodrigo eased past a group of slow-moving trucks, accelerated the little sports car smoothly to sixty miles-per-hour, then said: "You remember, Professor,

25. See, e.g., Ruben J. García, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 128 (1995) (all pointing out the inadequacy of the current dualistic structure of American social thought on issues of race and ethnicity); Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 22-27 (1995); Elizabeth Martínez, *Beyond Black/White: The Racisms of Our Time*, 20 SOC. JUST. 22, 29-30 (1993); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 962-64 (1995).

26. See Ramirez, *supra* note 25, at 962.

27. See *id.* at 964-69.

28. See Delgado, *Sixth Chronicle*, *supra* note 1 *passim* (discussing the role of new groups in ushering in social change).

29. See CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 6, at xiii (introducing the concept of Critical Race Theory and explaining its origins among mid-1970s racial reformers).

30. On Critical Legal Studies, its themes, and its history, see generally THE POLITICS OF LAW (David Kairys ed., 1982) [hereinafter POLITICS OF LAW] and *Critical Legal Studies Symposium*, *supra* note 7. See also THE POLITICS OF LAW (David Kairys ed., rev. ed. 1990).

how Critical Legal Studies early on developed the notion of the fundamental contradiction?"<sup>31</sup>

"Of course," I replied. "At the time a breathtaking breakthrough, it explains many of the strains and tensions running through our system of law and politics. It led to powerful critiques of the public-private distinction, judicial indeterminacy, and rights.<sup>32</sup> Were the Latinos at your conference working on something similar?"

"I think we were," Rodrigo replied. "But without knowing it. And it's that very same black-white binary. People are just starting to talk about it. You may have seen an article or two.<sup>33</sup> If one's paradigm identifies only one group as deserving of protection, everyone else is likely to suffer. Not only that, even members of one's own group are apt to think of themselves as black or white. It's quite a disabling instrument. We may have to blast the dichotomy—embrace the full multifariousness of life—if we're ever going to get anywhere."

"You put it rather dramatically," I said, smiling at my young friend and protégé to let him know I appreciated his enthusiasm for ideas, even if it was sometimes a little superheated. "I suppose any rigid structure inhibits flexibility during times of change. But I think you started to say this had something to do with Judge Garza."

"I don't want to be too negative," Rodrigo said. "He was a genuine pioneer, for which we should all be grateful. But he never really developed much class consciousness—or, if he did, he kept it pretty secret. He went around the Mexican-American community extolling individualism and telling his countrymen and women that they could rise and accomplish the American dream through hard work, just as he had.<sup>34</sup> He detested discrimination and slurs aimed at Chicanos and Mexicans, but attributed them to individual failures on the part of particular Anglos, not to anything systemic. As a young man he worked for a Texas agency that ran the Texas Rangers,<sup>35</sup> despite their history of brutal mistreatment of his people.<sup>36</sup> He sold war bonds, backed America's role in wars, and

31. On the fundamental contradiction—the notion that we both fear and need others—see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 205, 211-13 (1979). See also Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?*, 23 *HARV. C.R.-C.L. L. REV.* 407 (1988) (discussing the Critical Legal Studies version of the fundamental contradiction and the possibility that a different version explains the predicament of persons of color under American law).

32. For an evaluation of the strengths and weaknesses of some of these critiques, see *POLITICS OF LAW*, *supra* note 30; *Critical Legal Studies Symposium*, *supra* note 7.

33. See *supra* notes 24-25.

34. See pp. 41-42, 68, 125, 170, 175.

35. See p. 34.

36. See pp. 37-38.



encouraged young Mexicans to enlist.<sup>37</sup> He praised all things American,<sup>38</sup> and even ruled against the plaintiffs in *Partida v. Castaneda*,<sup>39</sup> an early case presenting the issue of whether segregation and discrimination aimed against Mexican-Americans are redressable.<sup>40</sup>

"He was overruled by the Supreme Court, as I recall," I said.<sup>41</sup>

"Fortunately," Rodrigo agreed. "Garza began—and even ended—with good social instincts and a love of justice. But the black-white racial binary made it difficult for him to think of himself or his group in effective legal terms—as a people with a history of conquest and brutal treatment in need of redress. If you don't have a class analysis—and the binary assures that you don't—all you can do is urge your countrymen to work harder, and those who are oppressing them to back off—as individuals, that is. You'll rule against your people, Jehovah's Witnesses, and other minorities, and oppose federal welfare programs for the poor and intervention on behalf of prisoners and the institutionalized."<sup>42</sup>

"Didn't I read somewhere that early litigators arguing on behalf of Chicanos and other Latino groups embraced something called the 'other white' strategy?" I asked.

"They did," Rodrigo replied. "It's the logical extension of the kind of thinking that the black-white binary predisposes you to. The only way to get relief is to maintain that your client, a Mexican-American or Puerto Rican, is white and thus should not be the object of social discrimination."<sup>43</sup>

37. See p. 50.

38. See, e.g., p. 46 (supporting a compulsory salute to the American flag in public schools as a means of instilling patriotic values).

39. 384 F. Supp. 79 (S.D. Tex. 1974) (Garza, J.), *rev'd*, 524 F.2d 481 (5th Cir. 1975), *aff'd*, 430 U.S. 482 (1977).

40. See *id.* at 91 (holding that the plaintiff's "bare" prima facie case of intentional discrimination in the selection of jury members was rebutted by evidence of a majority of Mexican-American Jury Commissioners); see also p. 138.

41. See *Castaneda v. Partida*, 430 U.S. 482, 499-501 (1977) (holding that Judge Garza erred in finding that a state could rebut a presumption of discrimination by showing a "governing majority" of Hispanic jury commissioners and potential jurors).

42. See p. 46 (noting Judge Garza's opposition to a Jehovah Witness's challenge of a compulsory-salute school board policy); p. 119 (discussing Judge Garza's discomfort with "his extended judicial powers"); p. 130 (discussing *United States v. International Longshoremen's Assoc.*, 334 F. Supp 976, 982 (S.D. Tex. 1971) (Garza, J.) (finding that although segregated longshoremen's unions violated the Civil Rights Act, a merger may have been an inappropriate remedy), *rev'd*, 511 F.2d 273 (5th Cir. 1975) (requiring the merger of local unions)); pp. 147-48 (discussing *Hernandez v. Western Elec. Co.*, No. 75-B-58, 1978 WL 113, at \*8 (S.D. Tex. June 13, 1978) (Garza, J.) (holding that a Mexican-American plaintiff had failed to establish a prima facie case of employment discrimination)).

43. See Gary A. Greenfield & Don B. Kates, Jr., *Mexican-Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662 (1975); George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994) [hereinafter Martinez, *Legal Indeterminacy*].

"Not exactly empowering," I commented wryly. "But I believe you were going to tell me of some other ways the binary does its pernicious work."

"In addition to the way just mentioned—namely that it fetters our own minds," Rodrigo said, "preventing us from articulating, or even imagining, how our victimization is a serious, group-based form of oppression."

"You must do so, and in the most complete fashion possible," I said. "If the binary is to serve as Latinos' fundamental contradiction, you have to spell out exactly how this structure of thought renders your people one-down.<sup>44</sup> Otherwise, it's simply an observation, a descriptive statement no more useful than 'many Latinos speak Spanish,' or 'many have ancestors from Latin America or the Caribbean,' or 'a certain judge with good social instincts stopped just short of a civil rights breakthrough.'"

"I agree," Rodrigo replied. "Without such an explanation, the insight kind of runs out of gas." He sneaked a quick peek at his instrument panel, then—"Which reminds me, we'll need a quick stop for fuel before we get home."

"Let me buy," I suggested. "You were kind to come get me in the middle of your evening."

Rodrigo waved my offer aside. "Your listening to my thoughts will be payment enough. We're our best sounding boards, I think."

"That we are," I agreed. "So, what are your ideas on how the black-white paradigm injures Latinos and other nonwhite groups?"

## II. In Which Rodrigo Sets Out His Second Explanation: The Black-White Paradigm and the Social Reproduction of Inequality—Doctrine's Role

"As you know, Professor, the mainstay of American civil rights law is the Equal Protection Clause.<sup>45</sup> Rooted in Reconstruction-era activism and aimed at the wholly laudable purpose of redressing slavery,<sup>46</sup> that clause nevertheless produces and reproduces inequality for my people."<sup>47</sup>

"The Equal Protection Clause?" I replied, raising my eyebrows. "That crown jewel in our jurisprudence, centerpiece of justice, and source of civil rights breakthroughs like *Brown v. Board of Education*?<sup>48</sup> It's *this* that you think subordinates and injures Latinos? That's paradoxical, to put it mildly. I think I need to hear more."

44. Cf. Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories? Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989) (explaining how three features of legal research and classification systems constrain innovative legal thought).

45. U.S. CONST. amend. XIV.

46. See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 1-71 (2d ed. 1980) (discussing the Equal Protection Clause as a reaction to slavery and as a measure to complete emancipation).

47. See *infra* notes 54, 81-83 and accompanying text (discussing the limitations of American anti-discrimination law in redressing wrongs against Latinos).

48. 347 U.S. 483 (1954).

"Let me try," Rodrigo replied calmly. "An analogy occurred to me on the plane. Consider a different constitutional principle, namely, protection of the right of property.<sup>49</sup> How does that function in a society like ours?"

"I suppose you're going to say that it benefits the haves, while disadvantaging or leaving as they are the have-nots, thus increasing the gap between the propertied and those who have less of that commodity."<sup>50</sup>

"Exactly," Rodrigo replied. "And the same is true of other constitutional principles. The Free Speech Clause increases the influence of those who are articulate and can afford microphones, TV air time, and so on.<sup>51</sup> In the same way, the Equal Protection Clause produces a social good, namely equality, for those falling under its coverage—blacks and whites. These it genuinely helps—at least on occasion. But it leaves everyone else unprotected. The gap between blacks and other groups of color grows, all other things being equal. Even Judge Garza advocated on behalf of *maquiladoras*<sup>52</sup> and declined to find Mexican-Americans a minority group."<sup>53</sup>

"It sounds strange when you first explain it," I said. "The idea of the Equal Protection Clause producing inequality. But you may have a point. As with those other clauses, the black-white paradigm could marginalize Latinos because of the way the clause and the other Civil War amendments were aimed at redressing injustices to blacks, principally slavery."<sup>54</sup>

"I've thought of two other doctrinal sources of inequality," Rodrigo added. "Would you like to hear them?"

49. See U.S. CONST. amend. V (protecting against takings and assuring compensation); *id.* amend. XIV (providing due process of the law when economic and liberty interests are put in jeopardy by state action).

50. See, e.g., John Kenneth Galbraith, *A Message for the Socially Concerned*, TORONTO GLOBE & MAIL, Jan. 17, 1997, at A14 (noting that capitalism leads to great disparities in wealth if not accompanied by a safety net of welfare and social services).

51. See RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT 88 (1997) (noting that "'exceptions' to First Amendment protection favor the interests of the powerful").

52. See p. 112 (defining *maquiladoras* as American manufacturing plants located in Mexican towns bordering the United States).

53. See *Partida v. Castaneda*, 384 F. Supp. 79, 91 (S.D. Tex. 1974) (Garza, J.) (holding that the state rebutted a discrimination claim by showing a "governing majority" of Mexican-Americans in the jury pool and among jury commissions), *rev'd*, 524 F.2d 481 (5th Cir. 1975), *aff'd*, 430 U.S. 482 (1977).

54. See BELL, *supra* note 46, at 1-51 (discussing the history of the Civil War amendments and subsequent legislation); *supra* note 46 and accompanying text (describing the purpose of the Equal Protection Clause); *infra* notes 81-83 and accompanying text (discussing some of the technical and doctrinal difficulties of using antidiscrimination law, which was coined with blacks in mind, to redress wrongs to Latinos). For essays on the Anglo- and Afro-centric quality of current American law, especially in the areas of immigration and civil rights, see IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997).

"Of course," I said. "I assume they also have to do with the black-white paradigm?"

"They do. The first is the very notion of civil rights. In American law, this means rights bestowed by the civil polity.<sup>55</sup> But Latinos—many of them, at any rate—are not members of that polity. Rather, they want to immigrate here.<sup>56</sup> In this respect they stand on a different footing from blacks. I'm sure you know, Professor, that the plenary power doctrine in immigration law means that someone desiring to immigrate to the U.S. has no power, enforceable in court, to compel equal treatment.<sup>57</sup> U.S. immigration law can be as racist and discriminatory as Congress wants."

"Immigrants have due process rights, rights to a hearing, that sort of thing," I pointed out.<sup>58</sup>

"But only once they're here," Rodrigo replied. "Not to get here in the first place. Since virtually all Hispanics and Latinos, like Asians, come from somewhere else, this limitation affects them drastically. Yet it is inherent in our liberal notion of civil rights and implicit in the black-white binary. Blacks, and even Indians, were here originally or from very early days.<sup>59</sup> Once society decided to count them as citizens, their thoughts and preferences began to figure into the political equation. Even if they were often outvoted and oppressed, their voices at least counted. A Mexican peasant desiring to immigrate in search of a better life, or a Guatemalan village activist fearful that the government wants to kill him, or a Chinese boat person, does not count.<sup>60</sup> They can come here only at sufferance, only if Congress decides to let them in."

55. See THEODORE EISENBERG, *CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS* 3-9 (4th ed. 1996) (tracing the development of civil rights legislation).

56. On Latino immigration generally, see Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995).

57. On the plenary power doctrine and its function in immigration law, see generally T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989) and Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-600 (1990) (both tracing the development of the plenary power doctrine over the last 100 years).

58. See Aleinikoff, *supra* note 57, at 865-66 (outlining several constitutional protections afforded to aliens despite the co-existence of the plenary power doctrine); Motomura, *supra* note 57, at 564-80 (surveying the case law allocating procedural due process rights to immigrants).

59. See *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (referring to Indians as "the original inhabitants").

60. On the all-too-common need for political asylum for those fleeing Latin-American tyranny, see Michael A. Olivas, "Breaking the Law" on Principle: *An Essay on Lawyers' Dilemmas, Unpopular Causes, and Legal Regimes*, 52 U. PITT. L. REV. 815, 821, 820-35 (1991) (proposing "a series of due process guidelines . . . for adjudicating asylum claims for minors"). Cf. Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 695-707 (1981) (arguing that the government of the United States has a moral obligation to serve the needs of undocumented Mexicans).

"For example, through a Bracero program, a student visa, or some other category benefiting the U.S., such as that for investors," I added.<sup>61</sup>

"Judge Garza even cooperated with mass roundups and deportations of undocumented aliens," Rodrigo interjected. "He pioneered mass hearings, rather than individualized adjudication of their cases.<sup>62</sup> He was quite proud of this innovation, believing that it reduced the misery of the detainees, since it shortened the period of time they had to languish in jail, and that it freed space for other, more serious offenders."<sup>63</sup>

"Because the aliens had not been lawfully admitted, they had few rights, except to bare-bones procedural due process," I said. "Judge Garza's legal training did not equip him with a theory for understanding their predicament in any other terms. It would have taken a judicial genius to pioneer a new approach, especially back then."

"That's true even today," Rodrigo replied, eyeing his gas gauge nervously. "As a society, we seem to have taken a detour on the way to justice. And I'm afraid that you and I will have to take one ourselves if I don't see a gas station soon."

"I have towing insurance," I said half-facetiously. "But I'm sure we won't need it. What's your second doctrinal source of inequality?"

"It's related to the one I just mentioned," Rodrigo said, scrutinizing the approaching off-ramp. "No station there. We'll have to wait until the next one. I'm sure you've heard, Professor, of the self-definition theory of nationhood?"

"In immigration law, you mean?" I asked. Rodrigo nodded. "I have. Going back to an article and a book co-authored by Peter Schuck, the argument holds that nations have the inherent right to decide how to define themselves.<sup>64</sup> Otherwise, according to Schuck, any group could force a nation like ours to undergo radical transformation merely by moving here.<sup>65</sup> This no group has the right to do. Tapping neorepublican principles, the argument has proved influential in the immigration debate by

61. See, e.g., THOMAS A. ALEINIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY 229-50, 276-77 (3d ed. 1995) (cataloguing numerous grounds on which the United States admits aliens as non-immigrants for temporary stays of varying durations); Lopez, *supra* note 60, at 623-25 (discussing the long- and short-term motivations of undocumented workers entering the United States).

62. See pp. 94-95.

63. See pp. 94-95.

64. See PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 121, 9-41, 116-40 (1985) (noting that to insist upon "an automatic inclusiveness [of birthright citizenship] . . . is to betray a lack of confidence in the justice of consensual political self-definition that we believe is unwarranted today"); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1, 4-5, 49-65, 85-90 (1984) (citing early Supreme Court immigration cases to support the proposition that "a country's power to decide unilaterally who may enter its domain . . . [is] an essential precondition of its independence and sovereignty").

65. Schuck, *supra* note 64, at 85-90.

supplying an ostensibly neutral principle for limiting immigration.<sup>66</sup> And I suppose you think there's something wrong with it?"

"I do," Rodrigo replied. "The current contours of the U.S. citizenry are shaped by past immigration policies, which were overtly racist.<sup>67</sup> Recently, those policies have been eased somewhat, but only a little.<sup>68</sup> Thus, to ask a body of citizens like ours what sort of person they would like to let in is to invite the answer: as nonthreatening and as much like us as possible. And probably in small numbers, too. If we were a more diverse society, that would not be so bad. But the way things stand, the principle of national self-determination that Schuck and others tout merely reproduces more of the same. Oh, good, there's one and it's still open."

While Rodrigo pumped gas and I cleaned the windshield, we continued as follows: "So, Rodrigo, you think you have found the DNA, so to speak, that reproduces inequality for Chicanos and Hispanics.<sup>69</sup> A triple dynamic, inherent in Equal Protection doctrine and contractarian politics, that excludes and injures your people."

"Yes, but more than mere doctrine holds us back. If it were just that, we could make gains by working outside the legal arena, by mobilizing and educating, for example. Now, let's see, how do I get a receipt?"

"I think you push that button," I said.

"Oh, there it is," Rodrigo said. "They're all a little different."

"Like Latinos and blacks," I quipped.

Rodrigo smiled, and a few seconds later we were easing back onto the freeway with a full tank of gas. "Something happened at the conference that I think you'll find interesting.<sup>70</sup> It illustrates a third way binary thinking injures Latinos. Would you like to hear?"

### III. Rodrigo's Third Explanation: The Out-of-Mind Phenomenon

I nodded vigorously. "I love conference dynamics. Something zany happens at almost every one. I'd love to hear."

66. For a discussion of the connection between neorepublicanism and immigration restriction, see RICHARD DELGADO, *THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE* 158-61 (1996) [hereinafter DELGADO, *RACE WAR?*].

67. See Johnson, *supra* note 56, at 635-42 (discussing the historical roles of nativism and racism in United States immigration policy); Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425, 429-30 (1990) (summarizing how the historically racist immigration policies of the United States support Derrick Bell's bleak forecast in *Chronicle of the Slave Traders*).

68. Current law no longer rests on the old, racist national-origin quota system that gave preference to immigrants from Northern Europe. Family-unification preferences and occasional amnesties ease hardship for many.

69. Cf. Delgado & Stefancic, *supra* note 44 (providing a similar analysis for progressive law reform generally and showing how certain structural features of legal classification and research produce stasis and inhibit the legal imagination).

70. On the (only-partly-fictional) conference, see *supra* note 4 and accompanying text.

"It's not all that earthshaking," Rodrigo replied. "But I think it captures something. The conference, as I mentioned, featured a star-studded cast. Attendance was fairly good, even though the event was held in the law school, near the edge of campus. The curious thing is that only one law professor from the huge faculty of the host school showed up. The dean, who had been scheduled to introduce the keynote speaker, begged off at the last minute pleading important business, and sent the associate dean instead. He didn't even stay to hear the address itself."

"Maybe they were just busy," I said a little lamely, trying to excuse my colleagues at that other school, several of whom I knew personally.

"I'm sure that's true," Rodrigo conceded. "But suppose the eminent panel of conferees had been black, consisting of Derrick Bell, Cornel West, John Hope Franklin, Leon Higginbotham, and others of that stature.<sup>71</sup> In fact, the Latino speakers were just as stellar in terms of reputation and standing in their fields."

"Are you saying that attendance would have been better?" I asked.

"I'm not sure it would have been better," Rodrigo replied. "But I suspect the law faculty would have put in at least token appearances. They would have gushed over the speakers, shaken their hands warmly, and told them how glad they were that they were here, how much the students needed them, and so on.<sup>72</sup> They would have shown solidarity and engaged in at least a few minutes of chitchat before, of course, taking off for their offices and their next manuscripts."

"I hope you're not saying their failure to show up was a deliberate affront?" I asked.

"More likely just a matter of priorities. On any given day, dozens of major events take place at a large university. The professors probably saw the conference as just one of many possible demands on their time, like that reception for the married students or that lecture on Proust being held across campus. No conspiracy or conscious boycott operated, but the result was the same: they didn't show up. If we'd been blacks, they would have. It's as simple as that."

"I know that faculty pretty well," I said. "What you recount is surprising. They're all liberals and deep-dyed supporters of civil rights."

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71. Bell, Franklin, and Higginbotham are eminent black historians and activist-scholars of civil rights. See BELL, *supra* note 46; JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM* (5th ed. 1994); A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978). West is a philosopher of religion and politics. See CORNEL WEST, *RACE MATTERS* (1995) (urging a dynamic, aspirational role for a new generation of black leadership).

72. See TOM WOLFE, *RADICAL CHIC & MAU-MAUING THE FLAK CATCHERS* (1970) (describing the great attention many liberals shower on black-power and similar celebrities).

"I wouldn't doubt it," Rodrigo replied. "The faculty know, on some level, that Latinos have terrible troubles and need help.<sup>73</sup> But the classic, the *essential*<sup>74</sup> racial group is blacks. If you're a liberal law professor, you donate time to the NAACP Legal Defense Fund. When someone mentions 'civil rights,' you immediately think black."

"And so Latinos are simply out of mind because of the black-white binary," I added.

"We're not part of the mindset or discourse.<sup>75</sup> People don't think of us in connection with civil rights struggles. Another mechanism is geographical. Many Latinos, Chicanos for example, don't live in the cities. They're farmworkers or field hands.<sup>76</sup> But when you think of civil rights, you immediately think of city problems—like gangs, urban blight, segregated run-down schools, and unemployment—that afflict mainly blacks."<sup>77</sup>

"Puerto Ricans are by-and-large an urban group," I pointed out.

"True, and some urban programs do include them. But many Latinos are not included, especially in the West and Southwest. They fall almost entirely outside traditional civil rights consciousness, even though their struggles with pesticides, insecticides, field sanitation, and education for their kids are just as serious as those of inner-city dwellers."<sup>78</sup>

"I'm beginning to see the force of the black-white paradigm," I interjected. "It looks like it really does render your people one-down."

73. Cf. pp. 1-18 (describing the cultural and racial conditions in Judge Garza's home town of Brownsville, Texas). On the condition of the Latino community in general, see RODOLFO ACUNA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (3d ed. 1988) (recounting the history of Chicanos in the United States), RODOLFO O. DE LA GARZA ET AL., *LATINO VOICES: MEXICAN, PUERTO RICAN, & CUBAN PERSPECTIVES ON AMERICAN POLITICS* (1992) (containing statistics, histories, and surveys on the Latino condition).

74. On essentialism, see Delgado, *Sixth Chronicle*, *supra* note 1, at 109-11. Anti-essentialism holds that the error of speaking of a movement (for example, feminism) in terms only of a single representative (for example, white women) disempowers all the others in the movement. See Grillo, *supra* note 25, at 19.

75. See Perea, *Ethnicity*, *supra* note 24 ("For too long, the real ethnic complexity of American society has been submerged, hidden by a discussion that counts only race as important and only black or white as race"); Perea, *Binary Paradigm*, *supra* note 24 (noting that the black-white binary deflects attention from groups not falling within it).

76. See Regina Austin & Michael Shill, *Black, Brown, Poor, and Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69, 73-78 (1991) (discussing the development of minority grassroots environmental organizations in response to the disproportionate siting of toxic polluters in or near poor minority neighborhoods); see also Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179 (1995) (detailing Texan *colonia* settlements).

77. The Kerner Commission, for example, focused mainly on these problems. See Gene Schlickman, *The Kerner Commission and the Search for Answers*, CHI. TRIB., May 11, 1992, at 15; cf. Ronald J. Ostrow, *New Report Echoes 'Two Societies' Warning of 1968 Kerner Commission Poverty*, L.A. TIMES, Feb. 28, 1993, at A23 (examining the Eisenhower Foundation study made on the twenty-fifth anniversary of the Kerner Commission, which came to the same conclusion).

78. See *supra* note 76 (discussing the problems of the rural poor and farmworkers).



"And I hope you'll help me figure out more ways that it does. We've touched on three."

"I'm game. What are your thoughts?"

#### IV. Rodrigo's Fourth Connection: Practical Consequences of the Black-White Paradigm

"I think the paradigm not only has doctrinal and conceptual consequences, limiting the way we think of race and racism, but it also has highly concrete real-world ones as well."

"Do you have an example?"

"Let's say you're an employer or state bureaucrat. You are distributing assets—things of value, like benefits, contracts, or jobs.<sup>79</sup> You can give a job, say, to one of two equally qualified candidates. One's a black, the other a Hispanic. You probably give it to the black. The black can sue you. He or she has all those civil rights statutes written with him or her in mind.<sup>80</sup> To be sure, courts have held that Hispanics may also sue for discrimination.<sup>81</sup> But the employer may not know that. And the Equal Protection Clause does not protect brown litigants as unconditionally and amply as it does blacks.<sup>82</sup> The binary makes the black the prototypical civil rights plaintiff. Recall Judge Garza's ruling in the Texas

79. Cf. BELL, *supra* note 46, § 9.1 (describing the impact of employment discrimination on the economic status of blacks).

80. See *id.* §§ 7-9 (discussing statutory protections for blacks against discrimination in education, housing, and employment); EISENBERG, *supra* note 55, at 3-9 (providing a history of early and modern civil rights legislation).

81. See *Hernandez v. Texas*, 347 U.S. 475 (1954) (upholding class status for Hispanics in a juror-selection discrimination case); see also *infra* note 82 and accompanying text. Compare *Tijerina v. Henry*, 48 F.R.D. 274, 276-77 (D.N.M. 1969) (stating that a class composed of people (1) having Spanish surnames, (2) having Mexican, Indian, and Spanish ancestry, and (3) speaking Spanish as a primary language is too vague for class action purposes), with *Castaneda v. Partida*, 430 U.S. 482, 494-96 (1977) (finding Mexican-Americans to be a clearly identifiable class for determining whether an equal protection violation has occurred) and *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 197 (1973) (stating that Hispanics constitute an identifiable class in cases brought to challenge de jure school segregation of Latino children).

82. On some of the limitations, see Martinez, *Legal Indeterminacy*, *supra* note 43. See also Richard Delgado & Vicky Palacios, *Mexican Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME L. REV. 393 (1975) (analyzing the procedural difficulties of class-based relief for Chicanos or Mexican-Americans under antidiscrimination law). On a recent refusal to find anything wrong with excluding Spanish-speaking jurors, see Miguel A. Méndez, Hernandez: *The Wrong Message at the Wrong Time*, 4 STAN. L. & POL'Y REV. 193 (Winter 1992-1993). See also María L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607, 623-30 (1994) (analyzing statutory intersectionality under which undocumented workers fall between the cracks of workplace anti-harassment law); Perea, *Ethnicity*, *supra* note 24, at 595 (noting that there is little redress for discrimination based on ethnicity).

school discrimination case.<sup>83</sup> When people read of Latinos suing for school or job discrimination, they are always a little surprised.”

“Latinos ought to publicize this fact,” I said.

“That’s the problem. We have fewer leaders who could do so. Affirmative action produced a generation of college-trained black leaders and professionals beginning about thirty years ago.<sup>84</sup> Today, these people are mayors of cities and members of Congress. That body boasts a long-standing Black Caucus, but only a much smaller and more recently formed Hispanic one.<sup>85</sup> And, despite Judge Garza’s breakthrough, the entire federal bench includes fewer than thirty Latino judges today.<sup>86</sup> It contains many more black ones, even though the two groups’ numbers are almost the same in the general population. And the reason is simple: affirmative action started earlier with blacks. Even today, the average employer thinks of affirmative action in black, not Puerto Rican, Laotian, or Chicano terms. A Laotian or Chicano law teaching candidate shows up, and even liberal law faculty have to remind themselves, ‘Oh, yes, they qualify for affirmative action, too.’”

“That’s a problem of mindset and conception,” I said. “The way society thinks of a group—or fails to think about it—influences the way it behaves toward them. If you’re out of mind because everyone is thinking in dichotomous terms, how successful will you be in having your needs noticed and addressed?<sup>87</sup> Listeners may even decide you’re at fault for your own predicament, a whiner when you call attention to the way no one attended your conference,” I warned my young protégé.

83. See *supra* note 39 and accompanying text.

84. On the history and role of affirmative action, see BRYAN K. FAIR, *NOTES OF A RACIAL CASTE BABY: COLORBLINDNESS AND THE END OF AFFIRMATIVE ACTION* (1997) and David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921 (1996). For critiques of affirmative action, see, for example, Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222 (1991) (criticizing the role-model theory of affirmative action) and Delgado, *First Chronicle*, *supra* note 1, at 1364 (describing the “merit principle” as the equivalent of affirmative action for whites).

85. On the formation of the Black Caucus and its role, see ROBERT H. BRISBANE, *BLACK ACTIVISM: RACIAL REVOLUTION IN THE UNITED STATES 1954-1970*, at 262-64 (1974) (describing the formation of the Black Caucus and its early conflicts with the Nixon administration).

86. See p. 175 (lamenting that by the mid-1990s, Latinos occupied only 27 of over 800 federal judgeships).

87. See REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF RACIAL ANGLONOXONISM* (1981) (exploring the popular ideas of the racial destiny of American Anglo-Saxons and the resulting marginalization of other racial groups); Perea, *Binary Paradigm*, *supra* note 24 (asserting that the binary produces a discourse focusing on the racialization of only one group, when others, such as Latinos and Asians, have been constructed and racialized in different ways).

## V. Rodrigo's Fifth Connection: Symbol, Myth, and the Role of the Black-White Binary

"I'll be careful," Rodrigo agreed. "But it's interesting to notice why it's necessary. I think the black-white binary conveys to everyone that there's just one group worth worrying about. People conveniently forget that the early settlers exterminated ninety-five percent of the Indian population,<sup>88</sup> or that many Puerto Rican, Chicano, and Indochinese families are just as poor and desperate as black ones.<sup>89</sup> Recall how much poverty there was in Brownsville where Judge Garza grew up.<sup>90</sup> But only the one group, blacks, has moral standing to demand attention and solicitude. Those others don't. And to make absolutely sure they don't, we deploy appropriate myths and images. Asians are the model minority—smart, quiet, sure to rise in a generation or two,<sup>91</sup> Mexicans are happy-go-lucky cartoon characters or shady actors who sneak across the border, earn some money, and then send it to their families back home.<sup>92</sup> No one today could get away with speaking of blacks in comparably disparaging terms, at least in public. But as recently as the 1960s the national Frito-Lay corporation used the logo of a sleeping Mexican bandito, hat pulled over his eyes, dozing under a cactus. Even Judge Garza ran across some of that.<sup>93</sup> And the imagery deployed by the political right in the English-only and immigration reform campaigns is nearly as vicious: Latinos come across as criminals, welfare loafers, and drug dealers.<sup>94</sup> If we were part of the civil rights paradigm, no one would dare do this, at least so openly."

"And you think the black-white paradigm is the reason?" I asked.

88. On society's mistreatment of the Indians, see VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* (1969).

89. See Steven Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027 (1996) (exploring the deficiencies of common-law and statutory protections for non-English speakers and proposing reforms to expand inadequate existing remedies); *supra* note 73 and accompanying text.

90. See pp. 1-18.

91. See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1259, 1258-65 (1993) ("The portrayal of Asian Americans as successful permits the general public, government officials, and the judiciary to ignore or marginalize the contemporary needs of Asian Americans.").

92. See CHICANOS AND FILM: ESSAYS ON CHICANO REPRESENTATION AND RESISTANCE 3-155 (Chon A. Noriega ed., 1992) (containing essays describing the dominant stereotypes of Mexican-Americans in the cinema); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 33, 143-49 (1982) (describing the harms caused by racially demeaning discourse); 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, 1273-75 (1992) (describing the dominant stereotypes of Mexican-Americans).

93. See, e.g., pp. 14-16, 19-20, 24-29, 32-33, 45-48, 88-90.

94. See STEFANCIC & DELGADO, *supra* note 8, at 16-19, 31-32 (discussing the rhetoric and imagery deployed in the English-only and immigration reform campaigns).

"Not alone," Rodrigo replied. "But it supplies the conditions that allow it to happen. If one's prevailing cultural image is not that of a noble warrior, like Martin Luther King, but of someone who takes siestas or steals jobs from deserving Americans, why would anyone want to help you?"<sup>95</sup>

"In some ways, those images of Latinos are even more devastating than the ones society has disseminated about blacks, overtly until very recently, and covertly today.<sup>96</sup> They justify society not only in ignoring your misery but in making war against you."

"I'm sure you've heard of the militarized border that is just beginning," Rodrigo interjected.<sup>97</sup>

"I have, and of the imagery that is being deployed by the political right to justify it—the 'waves of immigrants,' the 'horde of welfare recipients,' the 'tide' of brown-skinned welfare mothers just waiting to have babies here so they can gain citizenship, the unassimilability of Latino people and their dubious loyalty."<sup>98</sup>

"Even though Latino servicemen and women have given their lives and won medals for heroism far out of proportion to their numbers and exceeding those of every other racial group," Rodrigo interjected.<sup>99</sup>

"Like Reynaldo Garza and his son, war heroes."<sup>100</sup>

"Right. And consider the issue of language. If an immigrant French

95. See Delgado & Stefancic, *supra* note 92, at 1273-75 (tracing society's stereotypical views of Mexican-Americans); José E. Limón, *Stereotyping and Chicano Resistance: An Historical Dimension (1973)*, in *CHICANOS AND FILM*, *supra* note 92, at 3 ("Like similar unflattering stereotypes of other subordinate groups, those of the Chicano depict him as dirty, violent, hypersexual, treacherous, and thieving, although he also often appears as cowardly, apathetic, and dormant.")

96. Delgado & Stefancic, *supra* note 92, at 1261-75 (discussing the images of various outsider groups in popular cultures).

97. On the new militarized border, see TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992: LOW-INTENSITY CONFLICT DOCTRINE COMES HOME 3* (1996) (arguing that "the implementation of a wide range of measures . . . to address the issues of undocumented immigration and illegal international drug trafficking resulted in the gradual militarization of the U.S.-Mexico border region").

98. See STEFANCIC & DELGADO, *supra* note 8, at 10-14, 32-44 (discussing right-wing catch phrases and images used to whip up public sentiment in these and other campaigns).

99. On decorated Latino heroes, see Gregg Barrios, *A 'Platoon' Without Latinos: Mexican-Americans Are Being Denied Their Place in History*, L.A. TIMES, Apr. 19, 1987, (Calendar) at 2, available in LEXIS, News Library, Lat File (chronicling the achievements of Mexican-Americans during World War I, World War II, Korea and Vietnam); *Hispanic Heritage Month: Moments in Hispanic History*, S.F. EXAMINER, Sept. 11, 1994, at A2, available in LEXIS, News Library, Sfxam File (noting that with "25 percent of World War II casualties from Southern California Chicanos[,] Mexican Americans bec[a]me the most highly decorated ethnic group of World War II"); and Anthony Millican, *Hispanic Vets Served Bravely Series: The Liberators Unsung Heroes*, ORLANDO SENTINEL, June 5, 1994, at 1, available in LEXIS, News Library, Orsel File ("Latinos in the U.S. military—ranging from Cuban- and Mexican-Americans to Puerto Ricans—have seen combat in every war involving this country in this century [and] are a highly decorated group.")

100. See pp. 49-52 (describing Garza's tenure in the military during World War II); pp. 115-16, 124-26 (describing Reynaldo, Jr.'s tenure in the military during the Vietnam War).

couple speak French to each other or English with a French accent, that's considered a sign of high status and culture. A Mexican worker speaks Spanish and he or she is considered stupid or disloyal."

"Here we are," Rodrigo announced, sliding the little car into a driveway. Glancing at a lighted window, he added, "Giannina's still up. You must have a bite with us before retiring."

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A little later I was comfortably ensconced in the hide-a-bed the two young people had graciously opened up for me, reviewing my papers for the Legal Services board meeting I was to attend the next day. As my eyes pored over columns of figures in the plastic-covered binder the chairperson had sent as background reading, my mind kept wandering back to the conversation in the car. I recalled how it had begun with Rodrigo's recounting of Judge Garza's life and career, then continued with his startling announcement that the Equal Protection Clause of the Constitution, with its implicit creation of a black-white binary, functioned as a subordinating instrument and replicator of inequality for Latinos.<sup>101</sup> I recalled how Rodrigo had showed that additional forces operate in concert with that paradigm, magnifying its effect—the out-of-mind phenomenon; geography, asset-hoarding, and political influence; and cultural imagery—some operating on a practical level, others on a level of myth and narrative.<sup>102</sup>

As I rather sleepily underlined facts and figures for the discussion the next day, I kept coming back to this and other conversations Rodrigo and I had had recently about the role of nonblack groups in America's future.<sup>103</sup> Would a country which I had served for more than forty years as a professor and civil rights advocate adjust peaceably to a century in which whites will begin to be outnumbered by blacks and browns?<sup>104</sup> And would those two groups be able to work together toward mutual goals—or would the current factionalism and distrust continue into the future, with the various minority groups competing for crumbs while majoritarian rule continued unabated?<sup>105</sup>

101. See *supra* notes 45-69 and accompanying text.

102. See *supra* notes 71-79 and accompanying text.

103. See generally DELGADO, *RACE WAR?*, *supra* note 66, at 4-165.

104. See Ramirez, *supra* note 25, at 960 (noting that from 1980-1990 the Latino population increased by 53% and the non-Latino, African-American population increased by 13.2%, while the white population increased only 6%).

105. See BLACKS, LATINOS, AND ASIANS IN URBAN AMERICA: STATUS AND PROSPECTS FOR POLITICS AND ACTIVISM (James Jennings ed., 1994) (examining the social and political tensions between blacks, Latinos, and Asians and evaluating the prospects for coalition); Jorge Klor de Alva et al., *Our Next Race Question: The Uneasiness Between Blacks and Latinos*, HARPER'S, Apr. 1, 1996, at 55, 62-63 (discussing how to form alliances between low-income blacks and browns who fight over immigration and jobs); Jack Miles, *Black vs. Brown: The Struggle for the Bottom Rung*, THE ATLANTIC, Oct. 1992, at 41, 51-54 (arguing that an economic struggle between low-income blacks and Latinos in Los Angeles is emerging).

Would the civil rights community prove flexible enough to modify the black-white binary to include other groups? Or would it decide petulantly that broadening vistas to include groups such as Latinos and Asians is too much trouble? For their part, would the young Lat-Crits be content with a new, richer paradigm, or would they aim at an anti-paradigm in which the very concept of race and different races dissolves? Old habits die hard, I thought, recalling the nearly all-white law faculty that had failed to show up for Rodrigo's meeting. The more nuanced understanding of race of which Rodrigo spoke would not come easily. I wondered if these issues would be replayed at tomorrow's board meeting and recalled, with a start, that a neighborhood group had written to our secretary recently questioning the lack of Spanish-speaking attorneys in two cities within our region.

I checked to see that the alarm clock was set early enough that Rodrigo, Giannina, and I could continue the conversation over breakfast tomorrow.

