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Richard Delgado

University of Alabama - School of Law, rdelgado@law.ua.edu

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# CHRONICLE

## Rodrigo's Twelfth Chronicle: The Problem of the Shanty

RICHARD DELGADO\*

INTRODUCTION: IN WHICH RODRIGO AND I TAKE A BREAK FROM OUR  
CHILD-CARE RESPONSIBILITIES AND DECIDE TO DISCUSS THE LARSON ARTICLE

"Professor?" The familiar voice in the telephone receiver gave me quite a start.

"Rodrigo! I'm delighted to hear from you, especially so soon!<sup>1</sup> What's up?"

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\* Charles Inglis Thomson Professor of Law, University of Colorado. J.D., University of California-Berkeley, 1974.

1. See Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) [hereinafter *First Chronicle*] (introducing "Rodrigo," the Professor's brilliant young fictional friend and alter ego). The half-brother of famed American civil rights lawyer and activist Geneva Crenshaw, see generally DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987), Rodrigo was born in the United States but moved to Italy when his father, an African American serviceman, was assigned to a U.S. outpost there. Rodrigo completed high school on the base, then attended an Italian university on government scholarships, graduating near the top of his law school class. In *First Chronicle*, *supra*, Rodrigo looks up the Professor while on a return trip to the United States to investigate graduate law study. After discussing various LL.M. programs, the two engage in a spirited discussion of race, affirmative action, the decline of the West, and other topics.

Despite their age difference, the two become good friends, discussing law and economics, see Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993) [hereinafter *Second Chronicle*]; love, see Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993); legal rules, see Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) [hereinafter *Fourth Chronicle*]; the critique of normativity, 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 *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); racial discrimination and 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); the role of merit, see Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995) [hereinafter *Tenth Chronicle*]; clinical practice, see Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996) [hereinafter *Eleventh Chronicle*]; the legal profession and its discontents, see Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism*, 94 MICH. L. REV. (forthcoming 1997) [hereinafter *Thirteenth Chronicle*]; and America's racial future, see Richard Delgado, *Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 HARV. C.R.-C.L. L. REV. (forthcoming 1997) [hereinafter *Fourteenth Chronicle*]. During this time, Rodrigo progresses from the status of law student to professor at a public law school in the Midwest. He and the Professor continue their relationship, seeing each other at meetings, conferences, and airports.

Like Rodrigo, the Professor is a fictional character and not to be identified with any person alive or dead. As I have created him, the Professor is a law professor of color and in the late stages of his career.

"I know you're probably busy with your daughter and new grandchild, but something came up the other evening that Giannina<sup>2</sup> and I thought might interest you."

"Actually, I'm taking a break. The baby is asleep. What's on your mind?"

"As you recall, the three of us were talking about the future of civil rights. Toward the end, we touched on the situation of Latinos."<sup>3</sup>

I recalled our conversation vividly. Indeed, I had done little but play it over in my mind since last parting company with my brilliant young colleague and protégé and his equally talented wife. "I remember well. We speculated about some of the complications likely to set in when the United States becomes a multiethnic society. Today, most civil rights scholars think in terms of black and white. But this will have to change as Latinos begin to outnumber blacks in twenty years or so. By mid-century, whites will be only a plurality."<sup>4</sup>

"Exactly. And Giannina and I want to talk with you about that very group—Latinos. But the matter also has a race-and-poverty or race-and-class aspect."

"What a coincidence," I said. "My old law school is thinking of changing its race-based affirmative action program to one based on class and socioeconomic disadvantage. The alumni magazine, which they still send me for some reason, featured the debate in the last issue."

"Giannina says they're talking about doing the same thing at her school. The students are up in arms. But that's not why I'm calling. When we got home from our dinner, we found a copy of a law review article in our mailbox. Laz, who is out of town at a Federalist Society meeting, sent it with a note saying he thought we'd find it interesting.<sup>5</sup> It's by Jane Larson, a law professor at Northwestern, and it deals with poor Mexicans living in border settlements in Texas.<sup>6</sup> It struck us both as dynamite."

"I know her work," I said, "but I don't think I know that piece. Do you have the cite?"

"Better than that, Professor. Giannina's at her writing group this evening. She

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2. See *Fourth Chronicle*, *supra* note 1, at 1137 (introducing Giannina, Rodrigo's soulmate and life companion). Giannina, who previously wrote plays and poetry for a living, has long held an interest in law, serving as an honorary member of the Women's Law Caucus at the school where Rodrigo earned his LL.M., see *Sixth Chronicle*, *supra* note 1, at 640, and writing the lyrics for a counterparody of a tasteless "Follies" presented at Rodrigo's school, see *Fourth Chronicle*, *supra* note 1, at 1137. Giannina's fans will be interested to learn that she has embarked on a career shift, metamorphosing into a first-year law student.

3. See *Apocalypse*, *supra* note 1; see also Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. (forthcoming 1997).

4. On these and similar demographic projections, together with what they may portend for civil rights law, see Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 962 (1995).

5. See *Tenth Chronicle*, *supra* note 1, at 1713 (introducing Laz, Rodrigo's young colleague and best friend). Only a year older than Rodrigo, Laz Kowalski befriended him when he joined the law faculty. The two friends—one radical, the other conservative—stand poles apart politically but nevertheless agree on certain things, including the usefulness of discussion of social problems by persons of different persuasions.

6. Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179 (1995).

can drop off a copy for you on her way home. Then, if you have any free time later this week—”

“I do. In fact, my daughter and son-in-law are taking the baby for her one-month checkup tomorrow. I have the afternoon off. How about if I take the two of you out to dinner?”

I. IN WHICH RODRIGO, GIANNINA, AND I DISCUSS THE LARSON ARTICLE  
AND THE PROBLEM OF THE SHANTY

Less than twenty-four hours later, the three of us were seated in a corner booth in a homey, Italian-style restaurant that Giannina pronounced “first rate.” “They don’t have a lot of glitz,” she noted, “but the food is good and the prices are right.”

We placed our orders—a broiled *pesce* for me, Neapolitan fettuccini for my two young friends—and Rodrigo began:

“Did you get a chance to look at the article, Professor?”

“I did. I can see why it interested your friend Laz. It’s full of law and economics.”

“Especially the part about zoning,”<sup>7</sup> Rodrigo said. “But Laz was also struck by the appalling conditions in the *colonias*. At the end of the first section, in which Larson describes how the poor Mexican families live,<sup>8</sup> Laz had attached a Post-It with a dozen question marks and a note that read, ‘Let’s discuss this soon.’”

“I had the same reaction,” I said. “I’ve never been to Texas—except when my wife and I would sometimes drive across the state on the way to see her family. Isn’t Laz an immigrant, too?”

“His folks were,” Rodrigo replied. “They came from an Eastern European country. When he was growing up, they were very poor. Maybe that’s why he identifies with the *colonia* residents.”<sup>9</sup>

“Any sensitive reader would!” I exclaimed. “The *colonistas* [*colonia* residents] live in conditions like those of a Third World country—as bad as any inner-city ghetto. Maybe worse.”<sup>10</sup>

“It’s hard to believe these unincorporated low-income settlements that have sprung up in Texas border counties are home to more than 340,000 people living in 1400 shantytowns, or *colonias*.”<sup>11</sup> Rodrigo looked down at some papers in his lap. “One large cluster is located in the southwest corner of the state, near El Paso, a second in the southeast corner, and a third near Laredo.<sup>12</sup> Larson focused on the ones in El Paso County, where she did her field work.”

“Which included conducting extensive interviews with the residents, most of

7. *Id.* at 179-83, 232-38.

8. *Id.* at 183-212.

9. On Laz’s background and social outlook, see *Tenth Chronicle*, *supra* note 1, at 1713-14, 1740-45.

10. See Larson, *supra* note 6, at 222.

11. *Id.*

12. *Id.* at 184.

whom are working poor people of Mexican descent—some legal, others not,”<sup>13</sup> I chimed in.

“Many of them are family units,”<sup>14</sup> Giannina added, “although I find it hard to believe how anyone can raise families under those conditions. It’s a testament to their courage and will to survive.”

“The *colonias* lack clean water,” Rodrigo continued, “because they are located outside the city and the county does not supply it.”<sup>15</sup> Grocery stores sell it, and a few businesses let their customers use their tap, if they have one, but many residents bring it in from elsewhere, storing it in abandoned industrial drums.<sup>16</sup> Other *colonistas* hand dig shallow wells, which often become contaminated by industrial or human waste.”<sup>17</sup>

“That’s because there are no sanitary sewers for disposing of human waste or carrying away storm drainage,”<sup>18</sup> I added, recalling a gruesome detail that had stuck in my mind even upon cursory reading. “Most families have outhouses, open-pit cesspools in the backyard, or septic tanks.”<sup>19</sup> Professor Larson cited one study that showed that ninety-eight out of one hundred wells contained water too contaminated to be safe for drinking.<sup>20</sup> Both adults and children are at risk for diarrhea, dysentery, and hepatitis from living in unclean conditions, and everyone lives in fear of cholera outbreaks.”<sup>21</sup>

“The buildings are equally poor,” Giannina added, leaning over to peer at Rodrigo’s papers, which he had placed next to his water glass. “Oh, here’s our dinner.”

We were silent a moment while the waiter put down our steaming plates.

While the waiter added grated cheese to my companions’ fettuccini, Giannina continued, scanning Rodrigo’s papers: “Some families live in dilapidated trailers, others in shacks made of wood slats, used tires, and pieces of tin or cardboard.”<sup>22</sup> Only half have indoor toilets.<sup>23</sup> Roofs are often constructed of garage doors or planks covered with plastic sheeting.<sup>24</sup> Many homes lack electricity;<sup>25</sup> even more lack running water, so that the people have to wash

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13. *Id.* at 259-60; *see also id.* at 205 (noting that in the *colonias*, “almost all adult household heads are . . . either U.S. citizens or legal residents” (citations omitted)).

14. *Id.* at 186-87, 192, 205.

15. *Id.* at 185-86, 197-205 (describing regulatory vacuum in which the *colonias* fall).

16. *Id.* at 186-87.

17. *Id.* at 186-88 (noting that some families “try . . . [to boil or treat water] but admit to drinking untreated well water when the need is great, the temperature is high, or their supply of potable water is low” (citation omitted)).

18. *Id.* at 187.

19. *Id.* at 188.

20. *Id.*

21. *Id.* at 189-90.

22. *Id.* at 191-92 (noting that other houses are “concrete-block bungalows, trailers, shacks, and an occasional conventional frame house,” some of which lack floors).

23. *Id.* at 192.

24. *Id.* Floors are sometimes made of old carpets or plastic sheets. *Id.*

25. *Id.* at 192-93.

dishes and do their laundry outside the house in metal or plastic tubs.<sup>26</sup> No building or housing codes apply, so that nonstandard and unsafe plumbing, wiring, and construction are rife.<sup>27</sup> Families often live in these conditions for years, sometimes adding rooms or making improvements as they acquire the money to buy materials.”<sup>28</sup>

“Deplorable,” Rodrigo said. “Unspeakable. And the strange thing is that Professor Larson writes with real passion and indignation.<sup>29</sup> She seems genuinely upset and angry that human beings should live in conditions like these, and disgusted both with the shady realtors and land developers—who defraud the *colonistas* with promises of running water and electricity ‘within a few years’<sup>30</sup>—and with the Texas legislature, which has so far refused to give the counties zoning and regulatory authority to impose minimum standards on housing in these areas.”<sup>31</sup>

“Why do you find it strange?” I asked. “Professor Larson is a liberal. She spent months talking with the *colonistas*. She wants things to be better for them.”

## II. IN WHICH RODRIGO CRITIQUES THE LARSON ARTICLE AND LIBERALISM IN GENERAL

### A. NORM THEORY AND THE TRAGEDY OF THE SHANTY

“I find it strange,” Rodrigo answered, “because a puzzling gap separates the first half of Professor Larson’s article from the second, in which she puts forward her solutions for the problems of the *colonias*. The first part is full of passion; the second, bloodless and full of mild remedies.”

“I noticed that too,” I said. “In the first part she writes with indignation. Then she starts talking about interest convergence. What the factories want.”

“Or will put up with,” Giannina interjected.

“Precisely,” I replied. “She urges regularization of land titles,<sup>32</sup> which strikes me as not a bad idea, and providing credit at market rates to low-income households so they won’t fall prey to loan sharks.<sup>33</sup> She also urges extending

26. *Id.* at 192 (also observing that some families use “gas-fired campstoves, improvised oil can stoves, or open . . . fires” to cook).

27. *Id.* at 184, 192-93, 198-201, 203. Most *colonias* also lack paved roads, streetlights, street addresses, and garbage pickups. *Id.* at 187.

28. *Id.* at 192.

29. *See, e.g., id.* at 182 (describing conditions as “deplorable”); *id.* at 183 (noting that “*colonias* lack the ‘basics’ that residents of other jurisdictions take for granted” and that “Main Street America” remains oblivious to these problems); *id.* at 191 (“If . . . statistics are dry and distancing, the human body has its own language.”); *id.* at 235 (noting “human degradation by dirt, danger, and disease”).

30. *Id.* at 193-94. On other shady practices of the lenders and developers, see *infra* text accompanying note 98.

31. *Id.* at 197-205 (explaining that this regulatory vacuum is due, in part, to statewide tradition of freedom and nonregulation of private property).

32. *Id.* at 238-40.

33. *Id.* at 241-44.

the franchise in local elections to permanent resident aliens.<sup>34</sup> All of these are fine. But then she suggests enacting what she calls 'minimal but appropriate land use regulations'<sup>35</sup> and encouraging the *colonistas* to build self-help housing under these relaxed standards."<sup>36</sup>

"That struck me as curious, too," Giannina agreed. "But I started out on her side. I gather that the idea is not to price the poor people out of the *colonias* by driving up the cost of housing there."<sup>37</sup>

"That's what I meant by bloodless," Rodrigo replied. "The author says that any measures aimed at abetting the dreadful conditions in the *colonias* must"—he leafed through the article—" 'strike the right balance between health, safety, welfare, and economics'<sup>38</sup> on the one hand, and affordability on the other. She seems stuck in a dilemma. Accepting the law and economics scholars' view of things, she sees only two options: regulation, which will increase the cost of housing so that the *colonistas* will have to move even though they have no place to go, or no—or very little—regulation, in which case they will continue to live in conditions unfit for human beings."

"So she hedges," I said, "and opts for a little regulation."

"Mainly of water and sewage," Giannina added. "Which I suppose is better than nothing."

"As one who spent the afternoon taking care of a baby—" I began.

"Small children or not, no one should have to live like that," Rodrigo said emphatically.

"True, but how *do* you escape her dilemma?" Giannina inquired. "The desperately poor have to live somewhere. If the *colonias* are the cheapest place, where will they go if the lawyers and regulators come in and make the developers clean things up? Isn't she right that increased vigilance can end up injuring the poor by causing landlords to allow housing to deteriorate, to walk away from it or not to build it in the first place?<sup>39</sup> My property professor mentioned that this had been the unintended effect of tenant advocacy in certain cities."<sup>40</sup>

"How do you address the gap between her descriptive first part and her second section on remedies?" I asked my young friend.

"As you'll see, they're connected," Rodrigo said. "What lies in the gap is history. Larson gives too little weight to the history of conquest, broken

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34. *Id.* at 254-57.

35. *Id.* at 245-51.

36. *Id.* at 244-47.

37. *Id.* at 180-82, 235, 238 (warning of this inexorable tie).

38. *Id.* at 250; see also *id.* at 249 (urging "optimally minimal construction standards").

39. *Id.* at 181-82, 230, 249.

40. Giannina's property professor may have drawn this information from articles such as Neil K. Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973); Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879 (1975); see also Symposium, *Redistribution of Income Through Regulation in Housing*, 32 EMORY L.J. 691 (1983).

promises, and outright discrimination that minorities—especially Mexicans—have suffered in the state of Texas.<sup>41</sup> To understand how to improve conditions in the *colonias*, one must look at how those problems came about.”

“Rodrigo, we’ve never discussed your Latin side,” I said. “Mostly we’ve talked about African Americans or people of color in general. I gather you’re taking a greater interest in your roots these days?”

“I am. My dad’s African American, as you know, and my mom is Italian.<sup>42</sup> But some of my ancestors lived in the Caribbean and my dad still speaks Spanish fluently. Did I tell you that Giannina and I are talking about applying for a Fulbright in Mexico sometime?”

“*You* keep talking about it,” Giannina said. “You sometimes forget that I’m in the middle of a certain educational program. I’m not as free to pick up and leave as you professors, although it’s something I’d love to do with you someday.”

Rodrigo blushed. “I sometimes get carried away. Sorry, Giannina. Maybe we’ll content ourselves with a quick trip down to see the Professor, at least until you graduate. Where were we?”

“The situation in Texas,” I reminded him.

“Oh, yes. I’ve been talking to two of my Latino students. Texas is notorious in the Chicano community. Early in the state’s history, Mexicans were considered inferior to whites and were treated virtually as slaves.<sup>43</sup> Places of business posted signs saying ‘No dogs or Mexicans.’<sup>44</sup> Cartoons and popular literature made fun of Mexican people, depicting them as slow, dimwitted, lazy, dirty, and unambitious.<sup>45</sup> Employers used a dual-wage system, paying Mexican workers less than Anglos.<sup>46</sup> The Border Patrol hassled Mexican-looking people even if they were U.S. citizens.<sup>47</sup> School authorities sent Mexican kids to schools that were different from—and inferior to—the ones attended by Anglo children.”<sup>48</sup>

“A sad, but familiar, litany,” I said. “And I gather you think that this has something to do with the gap in Professor Larson’s article?”

41. See RODOLFO ACUÑA, *OCCUPIED AMERICA* (3d ed. 1988); see also *infra* notes 43-48 and accompanying text. To be fair, Larson does take note of the historical experience of Mexicans and their mistreatment at the hands of the Texan citizenry. But she considers it mainly a matter of a negative attitude—a practice that has grown up, see Larson, *supra* note 6, at 222, and is only “part of the explanation for the longstanding neglect of the *colonias*’ problems,” *id.*, as though conquest and a culture of outright white supremacy played little part in the creation of the problems themselves. See *id.* at 228 (describing “human” as race-sensitive, so that society tolerates disparate living conditions for different groups as long as these divide along racial lines).

42. On Rodrigo’s family and origins, see *First Chronicle*, *supra* note 1, at 1359.

43. See ACUÑA, *supra* note 41, at 49.

44. J. Sebastian Sinisi, *Hispanic Vet Recalls Bias, Says Civil Rights Still Lag*, DENVER POST, June 1, 1996, at B4; Julian Samora, 75, *Mexican-American Sociologist*, CHI. TRIB., Feb. 11, 1996, at C9.

45. Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture*, 77 CORNELL L. REV. 1258, 1273-75 (1992).

46. Larson, *supra* note 6, at 227.

47. Michael A. Olivas, *The Chronicles, My Grandfather’s Stories, and Immigration Law: The Slave Trader’s Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425, 438 (1990).

48. Jorge C. Rangel & Carlos M. Alcalá, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307, 313-15 (1972).



“It does. It explains why all three of us had the same sense that her remedies section and the part detailing the abuses don’t match up. Do you recall our earlier discussion of norm theory, Professor?”<sup>49</sup>

“I do,” I said. Not knowing whether Giannina was versed in this new branch of social psychology, I elaborated: “It holds, basically, that our response to someone in need is a function of what we believe is normal for that person.<sup>50</sup> A white woman drops a bag of groceries and everyone stops to help; a black woman does the same, and fewer help out.<sup>51</sup> The same is true in experiments with stranded motorists.<sup>52</sup> If we believe that the person in need is usually wretched—and that such a condition is his or her ordinary one—then we are less likely to intervene. Starving Biafrans evoke little sympathy because we think that famines are common in that part of the world. But if our middle-class neighbor shows up at our door having lost his or her job and been evicted, we are much more solicitous. Hunger is abnormal for such a person. Everyone rushes in to help.”<sup>53</sup>

“I wasn’t familiar with the term,” Giannina remarked, “but it stands to reason. And this is why mild remedies won’t help the desperately poor of the *colonias*, Rodrigo? Because society does not see their need as requiring acute intervention?”

“More than that,” Rodrigo responded. “Mild remedies like Larson’s make matters worse. They virtually invite the rest of us to conclude that the dirt, poverty, hunger, and despair in the *colonias* are normal and ordinary. There are no *colonias* in Beverly Hills, no open sewers in Marin County. We make sure that land-use and health regulations are strictly enforced. We wouldn’t consider arguments like Larson’s about the price of regulation or the trade-off between cost and code enforcement in those fancy communities.”

“So in the end it comes back to who lives there—to race,” I said. “That’s your gap, Rodrigo, right?”

“Precisely. And norm theory predicts that liberals like Larson will reach for halfway measures in such a situation.”

“Perhaps with the consideration that society will stand for nothing more,” Giannina suggested.

“Yet it supplies a powerful argument against doing anything that reinforces someone’s wretchedness, and our general sense that they deserve nothing better,” Rodrigo added.

“Which Larson’s fatalistic approach does,” I seconded. “It symbolically tells the rest of the world, including Texas legislators, that the *colonistas* are second-class citizens who ought to be satisfied with a little electrical wiring and a

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49. See *Eleventh Chronicle*, *supra* note 1, at 76-80.

50. *Id.* at 76-77.

51. On this and other studies of helping behavior, see *id.* at 77 n.64.

52. *Id.* at 77.

53. *Id.* at 76-77.

running tap or two per block. Even though one's intentions are entirely laudable, as Larson's clearly are, this approach deepens the dilemma of those whom one is trying to help."

"Like *Brown's* 'all deliberate speed,'"<sup>54</sup> Giannina mused.

"We come to believe that the conditions in the *colonias* are acceptable because they are normal for *them*—for the people who live there. This creates a slave-like class that can be hired for less: a positive advantage for the factories.<sup>55</sup> Eventually, no white firm—not even a nonracist one—will hire a Mexican at full salary, even if he or she has a Ph.D. No school board will consider a pupil-assignment scheme that mixes Mexican and white kids. The idea simply won't come to mind," Rodrigo concluded.

"This agrees with something I've long thought," I added. "Low status tends to worsen over time, even as society becomes better educated. Stigma deepens, even as polls show Americans are less racist. The gap between the rich and the poor widens every decade. This may be part of the reason."

Giannina put her fork down and looked up. "Here's another reason why we should move decisively to aid the *colonistas*. The very existence of the *colonias* enhances racial and social segregation of the rapidly growing Mexican population<sup>56</sup> by encouraging border populations to remain outside the city, away from such things as public education and high-quality health care. I would bet children grow up in the *colonias* without knowing any Anglo, or at any rate non-Hispanic, kids and without first-rate teachers, books, or schools."

"Larson didn't deal with that," Rodrigo noted. "But norm theory gives it an added dimension. Do you remember those studies of teacher expectations?"<sup>57</sup>

"I do," Giannina replied. "Researchers told teachers that certain students had been identified as being likely to show a learning spurt during the coming year.<sup>58</sup> This was a sheer hoax—the idea was to see if the announcement by a respected authority would change the teachers' and the children's behavior."<sup>59</sup>

"And it did," I added. "The students announced as likely to be late bloomers earned higher grades and standardized test scores.<sup>60</sup> It stands to reason that the opposite effect may occur as well. If teachers look around them and see only dilapidated schools in run-down neighborhoods, they will assume that society expects little from the children who grow up there. And with lower expectations comes lower performance."

54. *Brown v. Board of Educ.*, 349 U.S. 294, 297 (1955) (*Brown II*).

55. See Larson, *supra* note 6, at 220 (noting that border economy relies on low-cost workers, who in turn require low-cost housing).

56. See *supra* note 4 and accompanying text.

57. See generally ROBERT ROSENTHAL & LENORE JACOBSON, *PYGMALION IN THE CLASSROOM* (1968).

58. *Id.* at 98-118.

59. *Id.* at 98-118, 149-72.

60. *Id.* at 121-45, 174-82.

## B. LAW AND ECONOMICS: THE OTHER LIBERAL SOLUTION

We fell silent as the waiter cleared the empty dishes. Then Giannina resumed: "Well, if Larson's first approach—half-hearted regulation—won't work, what about the other one? Her law faculty contains a strong and impressive law and economics element. This group would leave the *colonias* essentially alone. She discusses this approach briefly at the beginning of her article, but then more or less discards it."<sup>61</sup>

"Not entirely. Elements appear in her minimalist regulatory strategy," Rodrigo clarified. "Remember that she wants government to come in only to bring water and sewers.<sup>62</sup> It should go easy when it comes to housing construction standards and land use zoning.<sup>63</sup> A battery factory or filling station might go up right next to a family's residence."

Giannina grimaced. "But for the sake of argument, why not go the whole way?"

"Professor, do you remember when we discussed the limits of free-market economics in alleviating the suffering of poor communities of color?"<sup>64</sup> Rodrigo asked.

"I do. We concluded that only an activist program based on love could make a dent.<sup>65</sup> But there may be differences that cut against such an approach for the *colonias*. May I spell them out?"

My companions nodded, so I went on. "Deregulation ought to drive the cost of housing down—and it does. Larson reports that the *colonias* boast some of the cheapest housing in the state.<sup>66</sup> That's why the poorest people live there. They can't afford to live in the cities where the schooling, shopping, utilities, and cultural opportunities are better. So they go to live in the *colonias*, putting together a shanty of some sort on a shoestring—maybe a few thousand dollars—intending to add to it, to build new bedrooms when more babies come.<sup>67</sup> Therefore, they start out ahead compared to, say, newlyweds setting out in the suburbs or the city. With this extra money, the Mexicans should be able to bounce back. They start out poor, but the boost they get in housing—at a cost, to be sure, because the houses are substandard—enables them to enter other markets. They can educate their kids—maybe sending them to a parish school. They might be able to open a small business, like an auto repair shop. They can move right up the ladder, like those early immigrants from eastern or southern Europe who huddled together in tenement districts before learning English, getting jobs, and moving out."

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61. Larson, *supra* note 6, at 179-82, 228-35 (contrasting economic theory and empirical investigation).

62. *Id.* at 251-54.

63. *Id.* at 249 (arguing that "housing and land use regulation must be stripped to its core," with little or no attention to "orderly layout or aesthetics . . . (as is typical in suburban zoning)").

64. *Second Chronicle*, *supra* note 1, at 1190.

65. *See id.* at 1202.

66. Larson, *supra* note 6, at 184-85.

67. *Id.* at 192.

“And you want to know why that won’t work?” Rodrigo asked.

I nodded, so he went on: “For many of the reasons you and I discussed earlier. In theory, the Mexican family should be able to enter those other markets on an equal footing with Anglos. But the same forces that produce the *colonias* will plague them there as well. They’ll apply for a job, a mortgage, a better school for their kid—and be turned down. Racism is woven into the warp and the woof of society. They’ll confront it everywhere. Popular culture portrays them as lazy, siesta-loving, good-natured singers and dancers, or else as vicious shoot-you-in-the-back gunslingers and desperadoes. Countless tales, scripts, songs, and TV programs depict them this way.<sup>68</sup> How can a modest boost in housing begin to compensate for all this?”

“A thoroughgoing law and economics approach would have forced the nearby factories to internalize the costs of their own pollution,” Giannina pointed out. “It would have made them pay to filter the poison out of the water table and haul away their effluents and toxic wastes.<sup>69</sup> They’re the cheapest cost avoider. Classic law and economics theory would have dictated regulation of at least that aspect of these people’s lives.”

“Yet Larson missed that,” I said. “You can bet nobody would permit it if the chemicals were being pumped into Beverly Hills.”

“So, there’s no quick fix,” Rodrigo summarized. “Not regulation, of either the heavy- or the light-handed variety. Heavy regulation will drive up the cost of housing to levels the *colonistas* cannot afford, while light regulation merely reinforces the ‘otherness’ of the poor Mexicans living there. And not laissez-faire free-market economics, for the reason we just mentioned. Racism is endemic and inhibits the willingness of members of all those markets to deal with us.”

“Larson misses the tragic meaning of her own article,” declared Giannina gloomily. “She glanced at the abysmal conditions prevailing in the *colonias*, then backed away from the implications of her own research. She could not believe what she saw, but she was unwilling to believe that there is no conventional solution. Like many liberals, she overlooks that racism is the ordinary state of affairs in our society. It’s the norm, not the one-time-only, easily fixed aberration.<sup>70</sup> She *does* see the squalor, but her reaction to it is liberal, not ‘double’ enough.”<sup>71</sup>

“She overlooks that the wretched conditions in the *colonias* are becoming normal and ordinary in the eyes of Texans,” Rodrigo seconded. “In fact, all this

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68. Delgado & Stefancic, *supra* note 45, at 1273-75.

69. See Larson, *supra* note 6, at 187, 212-17 (describing nearby factories).

70. See Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1393-94 (1991) (noting that racism is a part of American culture).

71. See W.E.B. DU BOIS, *THE SOULS OF BLACK FOLKS* 3 (Herbert Aptheker ed., Kraus-Thomson Org. 1973) (1903) (describing double consciousness or sightedness, in which an African American becomes accustomed to seeing life and reality in two ways at once).

is functional, not dysfunctional, for the larger society that benefits from cheap labor in the factories and fields while avoiding the expense of providing utilities and zoning enforcement for the workers and their families.”<sup>72</sup>

“In other words, she doesn’t ask the ‘Who benefits?’ question,” I offered.

“Exactly,” Rodrigo continued. “She misses the ubiquity of the shanties, the way that they appear over and over in East Los Angeles, Watts, the Bronx, and dozens of other bombed-out slums and shantytowns scattered around this wealthy country. To her credit, she chooses the less popular remedy—self-help plus minimal regulation—realizing that something other than the ordinary quick fix must be done.”

“Would you folks like some dessert?” asked the waiter, who had been waiting patiently at the side of our table, notebook in hand. “Could we see the menu?” Rodrigo inquired, looking around at the rest of us. I mumbled my usual excuse about doctor’s orders but Giannina looked up with an interested expression. The waiter put down menus in front of my two young friends and said he would be back. He looked Latino; I wondered if he had heard part of our conversation.

As he walked away, I looked up. “He might be Mexican.” Turning back to Rodrigo, I asked, “Anyway, what’s the solution? If neither of the time-honored approaches will work, what will?”

### III. IN WHICH RODRIGO PUTS FORWARD HIS SOLUTION TO THE PROBLEM OF THE SHANTY

“Neither regulation nor the free market will work. Both approaches lack an adequate account of evil—specifically, racism—treating it as a case of market failure or ignorance. It’s neither of those, but is instead a ubiquitous, deeply entrenched system that confers class advantage. Like similar social problems, such as Garrett Hardin’s lifeboat ethics<sup>73</sup> or the tragedy of the commons,<sup>74</sup> it will yield only to a combined program that embraces both love and hardheaded political theory.”

“Your solution, Rodrigo,” Giannina urged impatiently. I sat back and listened.

#### A. IN WHICH RODRIGO SKETCHES THE FIRST PART OF HIS SOLUTION—GOVERNMENT’S ROLE

“There are no white *colonias*,” Rodrigo began.

I thought immediately of exceptions: Appalachia, white poverty in the South,

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72. On the functional view of race and racism, see, for example, DERRICK A. BELL, *RACE, RACISM, AND AMERICAN LAW* (3d ed. 1994) (taking economic determinist view of racial oppression as conferring systemic advantage on dominant group).

73. See generally Garrett Hardin, *Carrying Capacity as an Ethical Concept*, in *LIFEBOAT ETHICS: THE MORAL DILEMMAS OF WORLD HUNGER* 120 (George R. Lucas, Jr. & Thomas W. Ogletree eds., 1976).

74. See generally GARRETT HARDIN & JOHN BADEN, *MANAGING THE COMMONS* (1977); Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

homeless and hobo communities, and communities based on barter or voluntary simplicity. Still, I realized Rodrigo was right on a relative basis and decided not to interrupt him in order to see where his argument would lead.

"We wouldn't tolerate them," Rodrigo continued. "It would seem abnormal. We are accustomed to poverty's having a black or brown face. As you said earlier, Professor, seeing pictures of starving Biafrans on TV does not move us, because we believe that famines are common in that part of the world. But seeing a nice suburban family evicted or deported causes everyone to feel concerned, as we would if our neighbor showed up at our door, starving and asking for food."<sup>75</sup>

"That's norm theory," I commented.

"Blacks are not just white people who happen not to have any money right now. A black lawyer still is the object of discrimination on a bus or when he or she shows up at work early and confronts people who don't know him or her."<sup>76</sup>

"Are you folks ready for dessert?" the waiter asked.

"Oops—we haven't even looked at the menu," Giannina replied with a start. "Give us a second, please." My two young friends made their selections—a tiramisu for my lanky young colleague, a mango gelato for Giannina and me ("I've relented. That sounds good, and it won't ruin my diet too much.")—and the waiter departed.

"The answer breaks down into two parts," Rodrigo continued. "The first deals with what government must do, the second with the role of private citizens."

"What should government do?" I asked. "Surely you don't mean massive programs and giveaways. That will never go over in our budget-conscious times."

"No, I don't," Rodrigo replied firmly. "But government must be activist. There's no reason why the state should let counties get away with such lax treatment of such basic amenities as water and sanitation as we see in the *colonias*. If the state won't enforce a minimal level of these services, the federal government should. Services such as these are part of what it means to be a member of the human community."<sup>77</sup>

"Larson says we should be flexible about our demands. Surely you aren't saying that the *colonias* should have the same level of services as Beverly Hills, where everyone holds high-paying jobs, the average level of education is one of

75. *Eleventh Chronicle*, *supra* note 1, at 76-77.

76. *Cf.* ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* 34 (1993) (describing a senior law partner treated as poor and uneducated by whites while shopping).

77. Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1108 (1986) (urging consideration of recognition of a basic right to subsist); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 38-39 (1969) (government must provide most basic services under concept of minimum protection).

the highest in the world, and the residents' property taxes pay for a high level of services."<sup>78</sup>

"Not exactly the same," Rodrigo replied, frowning slightly. "But not as discrepant as now. There should be written standards for such things, applied uniformly across the board. Beverly Hills will choose to be far above those basic standards. But we should make sure every community has water that meets the minimum level of cleanliness and sufficiency. Sewers, too."

"No tradeoffs or exceptions, in other words," Giannina pondered, "of the kind Larson is willing to tolerate as a matter of pragmatic realism."

"No," Rodrigo answered. "Because we would inevitably see a ratcheting-down. Because of norm theory, we will come to tolerate more and more shanty conditions for those we see as different from ourselves, and these conditions in turn will simply confirm to us that the residents are indeed a different order of humanity, in a self-reinforcing spiral. Eventually, ghetto, *barrio*, or *colonia* conditions will seem natural and just—'the way things are.' "

"Like famines in Biafra," Giannina pointed out.

"That's why we need governmental enforcement, formally administered, under universal standards applicable to all," Rodrigo concluded.

"I'm sure you're familiar with the fairness-and-formality critique of alternative dispute resolution,"<sup>79</sup> I said. "It sounds like you're drawing on something similar."

"I am," Rodrigo replied. "And the same reasons that argue against relegating the poor and disempowered to mediation, arbitration, and other deformalized dispute resolution forums—instead of to court—argue against Larson's approach. In fact, I heard her speak at AALS on her paper. She expressly compared it to ADR in this way."<sup>80</sup>

"I was reading about that critique for my civil procedure class," Giannina interjected. "It holds that informality increases power differentials. If, for example, a woman who is a high-school graduate is divorcing her highly educated, professional husband, she is likely to do better in formal court than in a mediated divorce.<sup>81</sup> And the same is true for minorities, children, consumers, and others coming up against more powerful disputants, such as General Motors or a union."<sup>82</sup>

"And this is because . . ." I cajoled.

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78. On the general level of prosperity and amenity in this wealthy Los Angeles bedroom community, see BEVERLY HILLS CHAMBER OF COMMERCE, ECONOMIC PROFILE (1995). For a fictionalized treatment, see the TV show *Beverly Hills 90210*, depicting the lives of young people and their families in this community.

79. See generally Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

80. Remarks by Jane E. Larson, Section on Remedies and Intersectionality, Annual Meeting of the Association of American Law Schools (Jan. 1996).

81. Delgado et al., *supra* note 79, at 1387-91, 1402-04.

82. *Id.* at 1387-88, 1402.

"Oh, I should have explained myself better," said Giannina. "It's not simply because of the greater discretion the decisionmaker wields, although this does open the door for prejudice even wider than it is in court.<sup>83</sup> Rather, it's because all the hallmarks of formality you find in the courtroom—the flags, the robes, the judge sitting on high, the codes of evidence and procedure—all of these remind everyone present that the values that are to prevail are those of the American Creed: fairness, equal treatment, a day in court for everyone."<sup>84</sup>

"Americans subscribe to two sets of values: the noble ones we apply during occasions of state, on the Fourth of July, when everyone is watching. During these times, the same person who might at other times—say, in a bar or private club—tell an ethnic joke or do something hurtful to a woman or minority, will behave in truly egalitarian fashion.<sup>85</sup> Formality triggers the former values and tends to assure a better result, all other things being equal."

"I can think of lots of exceptions," I said. "But you may be right as a general proposition. Rodrigo and I were discussing something similar once before.<sup>86</sup> And so the two of you think this has something to do with Larson's thesis?"

"I do," Rodrigo said with conviction. "In relegating the people of the *colonias* to self-help and weakened regulation, she forfeits the powerful advantage of formality. Government, which could and should side with the underdogs, looks the other way."<sup>87</sup>

"The fairness-and-formality critique has a social science dimension," Giannina said. "I'm sure you remember how, in the sixties, institutional integration was a principal objective of the civil rights movement."<sup>88</sup>

"Of course," I replied. "It remains a mainstay of liberalism even today."

"Then, I'm sure you recall how it was premised on what social scientists call the 'social contact hypothesis.'"<sup>89</sup>

"I assume you mean the idea that racism and other forms of bigotry are simple mistakes," I ventured. "The bigot mistakenly believes that blacks, for example, are stupid and base. Arranging for a prejudiced worker or student to interact with a member of the other group in the workplace or school will correct this error. Over time, the prejudiced individual will learn that members of the other group are just like his own—some good and nice, others not. Prejudice will end."<sup>90</sup>

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83. *Id.* at 1387-91, 1402-04.

84. *Id.* at 1388.

85. *Id.* at 1383-91.

86. See *Tenth Chronicle*, *supra* note 1, at 1724.

87. A common theory holds that a principal purpose of judicial review is to correct the political processes when they stray due to prejudice or some other form of majoritarian oppression. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). See generally John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

88. See NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 224-25 (1968) ("Kerner Report").

89. Delgado et al., *supra* note 79, at 1385.

90. *Id.* at 1385-86.



"You don't hear that thesis as much today," Rodrigo noted.

"No," Giannina added, "because social scientists now realize that things are more complex than that. For social contact to alleviate prejudice, the contact must take place between equals and relate to a common objective or goal."<sup>91</sup>

"Like sports," I said.

"Or the military," Rodrigo added.

"Exactly," Giannina said. "And those conditions are found relatively rarely in our society. For that reason, social scientists today subscribe to a different approach to combating racism—the so-called confrontation theory."<sup>92</sup>

I nodded with recognition. Giving Rodrigo a quick look, Giannina continued: "It holds that the best way to combat discrimination is to arrange for its every outward manifestation to be noticed, remarked upon, and punished.<sup>93</sup> It rests on the premise that most people know that prejudice is wrong and violates the American Creed. They act that way because it brings advantage or satisfies a psychological need. If they realize that doing so not only is wrong but likely to bring swift censure, they'll refrain."<sup>94</sup>

Rodrigo shot his wife an admiring look. "You've stated my case better than I could have myself."

"All this ties into what we were mentioning earlier," Giannina remarked. "Larson underestimates the role of racism both in creating the conditions in the *colonias* and in limiting the strategies she puts forward for relieving them. She is shocked at the terrible conditions in the *colonias*, but her passion tapers off in her cool, pragmatic second part. She treats the residents' predicament as though it were due to a simple lack of money. She places little blame on the racism, conquest, and exploitation that produced the *colonias* in the first place and that make them profitable for the developers and factory owners today."

"Her remedies don't go far enough," I summarized. "They forfeit the advantages of formality. And they overlook the proper role of government in redressing historical wrongs."

"Would you folks like some coffee?" asked the waiter politely.

"Decaf for me. It's getting late," I said.

"The same," said Giannina.

"Do you have cappuccino?" my young colleague asked. When the waiter nodded, he said, "Make it a double."

"He sleeps like a baby," Giannina said, looking at me wonderingly. "If I did that, I'd be up all night."

As the waiter departed with our orders, I reminded Rodrigo, "You promised to tell us of a second strategy—one for private actors."

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91. *Id.* at 1386.

92. *Id.* at 1386-91.

93. *Id.* at 1386-87.

94. *Id.*

B. IN WHICH RODRIGO SKETCHES WHAT PRIVATE INDIVIDUALS SHOULD DO ABOUT THE PROBLEM OF THE SHANTY—A PROGRAM OF RESISTANCE

Moments later, the waiter returned with our beverages. Rodrigo took a deep sip of his high-octane brew, and continued: "Private individuals, both inside and outside the *colonias*, ought to devote themselves to a program of outright resistance."

"Do you mean like in the sixties—with civil disobedience, sit-ins, mass marches—that sort of thing?" I asked.<sup>95</sup>

"That and more. Are you two familiar with the tenants' union movement?"<sup>96</sup>

I nodded. Giannina did so as well, but added quickly, "How would rent strikes and enactment of repair-and-deduct laws, for example, help the people who live in the *colonias*? Most of them are owners, not renters."<sup>97</sup> Their problem is that they have been sold overpriced lots with shaky titles and no utilities. The developers skip town—or go limp—so there's no recourse."<sup>98</sup>

"True," Rodrigo acknowledged. "But resistance could take the form of demonstrations outside the offices of the county and the utility companies that are not supplying water, gas, and sewers. Some highly imaginative tactics come to mind."<sup>99</sup> Another possibility would be for the *colonistas* to stop paying on their land-deed contracts. The money could go into an escrow account held, for example, by a regional office of the Mexican American Legal Defense and Education Fund. The Fund would disburse the payments only as it saw the developers carrying through on their promises to put in electricity, water, and sewers."

"What about the pollution from the nearby factories?" Giannina asked. "It sounds worse than Love Canal, yet nothing is done."

"The *colonistas* should link up with the environmental justice movement," Rodrigo said. "That movement challenges the placement of toxic dumps, freeways, water treatment plants, and other undesirable things right in the middle of minority communities."<sup>100</sup>

"Of course, the *colonias* are so bad off they would probably welcome a water treatment plant right in the middle of town if need be," I added. "But I love the

95. On this chapter in history, see BELL, *supra* note 72, at 417-529.

96. See, e.g., AMERICAN BAR ASS'N, HOUSING FOR ALL UNDER LAW 599 (Richard P. Fishman ed., 1978).

97. Larson, *supra* note 6, at 185-93.

98. See *id.* at 193-94, 221-22, 237.

99. For one possibility, see *infra* notes 116-17 and accompanying text. For another, consider a phalanx of disgusted homeowners marching on city hall, bearing containers of polluted water, dead insects, and animal waste.

100. See generally Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523 (1994); Luke W. Cole, *Remedies for Environmental Racism: A View From the Field*, 90 MICH. L. REV. 1991 (1992); Luke W. Cole, *Empowerment as the Key to Environmental Protection*, 19 ECOLOGY L.Q. 619 (1992); see also LUKE W. COLE & SHEILA FOSTER, THE QUEST FOR ENVIRONMENTAL JUSTICE (forthcoming 1997).

idea of turning Luke Cole loose on them.”<sup>101</sup>

The waiter arrived to ask if we would like refills. “Not for me,” I said, placing my hand over my cup. “I’ll have another if it’s decaf,” Giannina said. Rodrigo motioned eagerly for another cappuccino.

“So that’s your program,” Giannina summarized. “Vigilance and formal equality from the public sector, resistance from the private. But what about the cost of all this? Won’t it just price the *colonistas* out of the only place they can afford to live?”

“No,” Rodrigo replied. “The idea is to force the developers to carry through on what they promised to deliver while simultaneously pressing government to supply what every human being needs. The relatively small cost would be borne by all of society. The Texas economy benefits from the low-cost labor of the *colonias*’ workers. It’s only fair that the state should bear the cost of better schools and sanitation for their families.”

“That which the developers cannot be made to bear,” I added.

“Right,” Rodrigo replied. “They should be made to pay for the basic hook-up, because that’s what developers are expected to do and what the people who bought the lots expect. After that, the state takes over.”

“What about housing and zoning ordinances?” Giannina asked. “You said you wanted formal fairness. Would you condemn two-thirds of the houses because they are made of pieces of tin and plywood and don’t meet the housing code? And what about land-use zoning? If you prohibited people from operating businesses out of their homes, you would have to close down all the auto repair shops, laundries, and clothing piecework that go on now in the homes and neighborhoods. Half the income of the *colonias* would dry up. You’d start out doing the people a favor but end up harming them.”

“I’d grandfather in existing businesses,” Rodrigo answered, “so that no one would be thrown out of work. As for newcomers, I’d make them toe the line but offer loans and job assistance programs to enable them to set up legitimate businesses.”

“What about Larson’s voting solution?”<sup>102</sup> I asked. “She would adopt measures to bolster voter registration and permit noncitizens to vote in local elections, as a number of communities outside Texas have done.<sup>103</sup> That way, adults who are permanent aliens could vote for local officials—sheriff, for example, or county tax board member.<sup>104</sup> Wouldn’t this make local government more accountable?”

Before Rodrigo could answer, Giannina opined: “I, for one, doubt it. The counties are very large. In most cases the *colonias* are satellites of large

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101. Luke Cole is an attorney with California Rural Legal Assistance. Cole also writes, teaches, and is considered a founding figure in the environmental justice movement.

102. Larson, *supra* note 6, at 254-57.

103. *Id.* at 254-55.

104. *Id.*

cities.<sup>105</sup> Her proposals are likely to end up simply as window-dressing. Although everyone will feel much better because the Mexican families will be able to vote, studies show that poor people *don't* vote, even when they can.<sup>106</sup> In most cases, they will be so outnumbered that it won't matter whether they vote anyway."

"Her solution—I hate to say it—is typically liberal," Rodrigo added. "The idea is that democracy can cure all ills. But racism is a classic failure of democracy.<sup>107</sup> Unless one deals with that, the majority will continue oppressing the minority."

"What about the possibility that Mexicans living in the *colonias* will form a bloc with ones living in the cities?" I asked.

"This could happen," Rodrigo conceded. "And the two groups might find issues in common. But it is essentialist to suppose that an urban Chicano family with a mother working as a library aide and a father driving a city bus will find common cause with the poverty-level Mexican families scratching out a living in the *colonias*.<sup>108</sup> Especially if it entails dipping into their pocketbook, through taxes, to remedy the situation."

"And do you think Larson commits that mistake?" Giannina asked.

I answered before Rodrigo could. "Her article contains overtones of essentialism." I reached over for Rodrigo's copy of the article. "Let me see . . . here's one. She says, for example, that she favors a self-help housing 'movement as a whole,' right here on page 246.<sup>109</sup> She urges that political pressure be brought to broaden self-help housing beyond the *colonias* to other areas where housing is scarce.<sup>110</sup> To be sure, she wants to do this while respecting cultural differences. But housing is an intensely personal matter that goes beyond the need for certain basic amenities. One community's or one person's approach to shelter might be completely unsatisfactory to another."

"Larson elsewhere commits the sin of treating the poor in lump fashion," I continued, "generalizing about them as though they were all the same. Look—here on page 220 she reasons that those in control of the 'local labor market' of the border economy have an interest in supporting minimal regulation in order to guarantee the availability of durable, affordable housing for the low-wage workers of the El Paso region.<sup>111</sup> And again—yes, here it is, on page 246—she

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105. *Cf. id.* at 184.

106. See Deborah Zabarenko, *90 Million U.S. Voters May Stay Home on Nov. 5*, Reuters N. Am., Nov. 2, 1996, available in LEXIS, News Library, Curnws File.

107. Ely, *supra* note 87, at 453.

108. On essentialism, the intellectual error of assuming that all members of a certain group are alike or share a unitary, core essence, see *Sixth Chronicle*, *supra* note 1, at 642-47. On the differences within the Latino community, see generally LINDA CHAVEZ, *OUT OF THE BARRIO* (1991); DAVID G. GUTIÉRREZ, *WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY* (1995).

109. Larson, *supra* note 6, at 246 n.343.

110. *Id.* at 246-47.

111. *Id.* at 220.

argues that the economic reality of 'falling wages and declining support for housing programs' implies that 'it can be predicted that working poor households in the United States increasingly will turn to self-help housing to survive'—not just *colonia* residents."<sup>112</sup>

"Hmm," mused Giannina. "I missed that part. But it does seem to me that her focus on the plight of the *colonias* foreshadows a larger sociopolitical agenda with essentialist aspirations."

"Not just essentialist," said Rodrigo, "but accommodationist as well. She seeks to impose a single 'story line' on people living in the *colonias*. It is commendable that she takes their plight seriously and wholly laudable that she attempts to incorporate, through empirical research, the practical realities of a disenfranchised people in coming up with policy recommendations. This is a valiant response to the criticism that too much legal research is empty, self-referential, normative, and otherworldly. But the use to which she puts her research is troublesome. She is trying to adjust the people to their situation rather than the other way around."

"The *pathos* of her article is entirely separate from the *logos*," added Giannina. "That is to say, the empirical portion elicits genuine sympathy for the plight of *colonia* residents. Yet, the theoretical portion is cold and calculated, containing little of the prior compassion. In this way, Larson's article makes it appear that her theoretical perspective is an outgrowth of the communal and emotional solidarity of *colonia* residents. But it ends up marginalizing them, essentializing their problems in the service of an unstated political agenda that I, for one, find frightening."

"I didn't find it frightening," I replied mildly. "But I agree with you about its essentializing thrust. It takes the multifaceted and probably often-conflicting feelings of *colonia* residents about their situation and merges them into a solution that just happens to be good for the nearby factories."

"It also gets government off the hook," Rodrigo added. "And, come to think of it, I have some nagging doubts about Larson's self-help program. Do either of you?"

"It does tend to foster a conservative property-owner ethic among *colonias* residents that could undermine potential bases of political activism," Giannina replied. "In encouraging people to look to themselves, she overlooks the possibility of solidarity and communal, cooperative group action. The *colonistas* are not a large enough bloc to accomplish much through voting. But if even a few dozen or hundred of them form a rent-strike union or march to City Hall to protest insects and fecal matter in the water, they may get government's attention in a way that a few hundred votes won't."

Rodrigo said, "You've put your finger on something that had been bothering me. Larson highlights the sense of pride which some *colonia* residents feel

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112. *Id.* at 246.

about having their own houses.<sup>113</sup> But this justifiable dignity should not count against the fundamental realization that these impoverished Latinos have been forced into the *colonias* and their on-the-edge lifestyle because of dire economic circumstances and racism."<sup>114</sup> Rodrigo looked down at his papers. "For example, Larson argues that 'homeownership represents something more than a shelter choice. Rather, it is a powerful symbol of self-reliance, personal dignity, and family advancement.'<sup>115</sup> All true. But her minimal regulation coupled with self-help housing merely treat the symptoms of a much larger problem: the historical and social reasons for poor Latino people being racially, economically, and *spatially* marginalized to the fringes of the greater El Paso area."

"Treating deep wounds with Band-Aids, in other words," Giannina commented.

"Not just that. Her approach has a blame-shifting aspect. Suppose the *colonistas* fail at self-help. They run out of money or become discouraged. Society can then write them off. 'See?' we can say, 'they had a chance to help themselves and didn't.' We can wash our hands of the whole thing, ignoring that their predicament is the product of conquest and centuries of racism and neglect."

"They are already living in dismal circumstances. In many respects, they are in the least advantageous position to shoulder any additional encumbrances," Giannina said solemnly. "What they need is help."

"Which my program promises," Rodrigo replied. "We stand shoulder to shoulder with them, offering help and resistance at the same time that we insist government do its duty."

"Will your program work?" I queried. "These are conservative times."

"It has a chance," Rodrigo explained. "Resistance, sit-ins, and various forms of civil disobedience will get the attention of the developers, factory owners, and lazy bureaucrats who benefit from the current arrangement. It would be hard to ignore one hundred mothers carrying babies in *rebozos*, sitting in on the ground floor of the water department building with signs reading '*Agua pura para los bebés*.'<sup>116</sup> And lawsuits and direct action aimed at shaming government have a chance as well. All these petitions can tap narratives such as 'All men are brothers,' and 'As ye do to the least of us'—ones that resonate with our religious and political traditions. At some point, government will come around."

I reached for the article again. "Larson says there is a—here it is—'direct tradeoff between higher standards and affordability.'<sup>117</sup> Your approach sounds idealistic, Rodrigo. But the greater your success, the more housing will cost. At some point, the people now living in the *barrios* and *colonias* will have to pick

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113. *Id.* at 206-07 (noting that residents name streets and neighborhoods with words suggesting pride and aspiration).

114. *See supra* text accompanying notes 43-48, 68.

115. Larson, *supra* note 6, at 206-07 (citation omitted).

116. "Pure water for the children."

117. Larson, *supra* note 6, at 249.

up and go. And where else can they settle? They live in the *colonias* because they can't afford a house in a city or suburb."

"It's not A or B," Rodrigo replied. "Let me see that quote. Here—Larson says there's a direct tradeoff between 'higher standards and affordability for lower-income households.'<sup>118</sup> I'm sure she didn't intend this, but her theory is explicitly predicated on a legal acceptance of otherness, difference, and perhaps inferiority. She justifies this pragmatically, but can it ever be justified as a matter of social principle?"

"Reminds me of *Plessy v. Ferguson*,"<sup>119</sup> Giannina commented quietly.

"Agreed," Rodrigo said. "It's too stinting an approach. We can enlarge the pie for the poor people of the *colonias* by standing with them in a program of resistance and activism."

"I'm not sure her program is even pragmatically justified," I said. "In a book I was just rereading, *American Apartheid: Segregation and the Making of the Underclass*,<sup>120</sup> Massey and Denton argue against a color line in housing.<sup>121</sup> Are you familiar with their thesis?"

My two interlocutors nodded a little uncertainly, so I went on: "Racialized spatial inequalities create and perpetuate an impoverished underclass that exists separate from the rest of the cities and society.<sup>122</sup> Larson's laissez-faire approach seeks tacitly to translate the already highly racialized spatial inequalities that exist into an official program. Such a policy, by seeking to integrate *colonias* into a broader scheme with the goal of giving them what Larson calls 'decent, affordable, and long-lasting housing'<sup>123</sup> will simply duplicate what we now see in cities—namely, all-black ghettos, except in reverse. In her plan, a spatial inversion will take place, similar to the inner-city black ghetto that Massey and Denton describe: an outer-city Latino ghetto."

"Just another form of residential color line," Giannina added.

"Exactly," Rodrigo said. "The result will be the translation of the *colonistas'* lifestyle—already a spatialized result of the culture and history of racism in southern Texas—into a legal codification of this dynamic of social hierarchy."

"What about her credit programs?"<sup>124</sup> I asked.

"Not a bad idea," Rodrigo replied. "But she notes that many of the residents work in the informal economy, at home, 'off the books.'<sup>125</sup> This implies that *colonia* residents already have little long-term financial stability. Credit pro-

118. *Id.* (emphasis added).

119. 163 U.S. 537 (1896).

120. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

121. *Id.* at 13-16.

122. That is to say, spatially but also culturally and economically—virtually as islands of their own.

123. Larson, *supra* note 6, at 249.

124. *Id.* at 241-44 (proposing that the federal government support loans for low-income people employing innovative approaches such as "borrowing circles," "sweat equity," and other unconventional forms of collateral).

125. *Id.* at 208.

grams might end up being merely another form of subordination in light of their preexisting economic inadequacies.”

“Speaking of credit programs,” I said, “I hope you two will let me put this on my bill. I’m on vacation, and you two are working. This is my treat.” I handed my credit card to the waiter a split second before Rodrigo, who had been fumbling in his pocket, could intercept it.

“But I’m on a payroll and you’re not,” Rodrigo protested, putting away his wallet. “Well, we’re hoping to visit you during spring break. You’ll have to let us take you out to one of your favorite restaurants.”

“It will be my pleasure,” I responded. “This conversation has proven as stimulating to me as to you. For a law student, Giannina, you certainly keep up a good reading program.”

“Don’t thank me. Thank our reading group. We try to read at least one background article or paper in connection with each new group of cases. That’s how I knew about repair-and-deduct tenant strategies. Now, when do we get to meet the baby?”

“Let me check with my daughter,” I said. “Maybe all of us can get together for a picnic this weekend, before I head back home. The new patio is nearly finished. It almost did in my back.”

“You’re not as old as you keep saying,” Rodrigo said. “You keep up a pretty good pace in conversation, and I bet at laying tiles, too.”

The waiter returned with the credit card bill, which I signed.

“Would you like to share a cab?” Rodrigo and Giannina shook their heads, indicating they wanted to walk. “Then I’ll call you if a picnic seems feasible.”

“Great,” said Rodrigo and Giannina. We waved goodbye to our waiter, who smiled and said “*Buenas noches.*”

“I *thought* he looked Latino,” Rodrigo remarked.

Seconds later, a cab pulled up and I was on my way. My parting sight of my two young friends was of them striding along the sidewalk, hand in hand, lost in conversation, too busy to wave. As the taxi drove down the dark streets to my daughter and son-in-law’s neat suburb, I reflected on what we had said. I agreed with Rodrigo that norm theory argued powerfully against Larson’s half-measures. I also agreed that deregulation and free market economics would fare little better. The market is unlikely to drive out racism because the incessant, but low visibility, demonization that society inflicts on people of color inhibits their chances everywhere.

But were his two proposals any more promising? As the taxi droned down the near-deserted streets, I wondered how many would join the Mexicans in resistance and civil disobedience. Society is different now, I pondered. Would Rodrigo’s suggestion work in today’s libertarian age? And what of his companion notion that we insist on equal enforcement of all housing, zoning, and sanitation codes? I saw the force of Giannina’s fairness-and-formality critique and agreed that confrontation theory called for strong, official responses to racism and neglect. But our age abhors governmental programs. Would the



*colonias* and their advocates really be able to call upon a host of state agents to remedy the dangerous and filthy conditions prevailing in these shanty towns?

My reverie was interrupted as the cabbie, who had just entered the street on which my daughter lived, turned around and spoke to me, I thought a little sharply. "You sure you have the right address, buddy?" he asked.

I assured him I did, once again reminded that despite my neat suit, briefcase, and gray hair, a minority-looking man like myself will always strike others as out of place in certain settings. As I got my wallet out I wondered, are we all, in some sense, *colonistas*? If so, resistance and remonstrance may be all we have left. As I fumbled for the key I resolved, rather sleepily, to write Professor Larson, whom I knew slightly, and ask what she thought.