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### Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial

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# Rodrigo's Fifth Chronicle: *Civitas*, Civil Wrongs, and the Politics of Denial

Richard Delgado\*

## I. RODRIGO AND I CATCH UP ON THE NEWS AND WHAT THE OTHER IS READING

I was staring glumly out my office window, awaiting the arrival of my secretary with a large stack of bluebooks, when I heard a polite cough at my door. I looked up and saw Rodrigo's familiar face.<sup>1</sup>

"Professor?"

"Rodrigo!" I exclaimed. "It's been a while. Come in. I've been thinking of you lately, and here you are. To what do I owe the pleasure of this visit?" Rodrigo, an African-American LL.M. student of international background, had begun graduate work at the well-known law school across town a few months before in preparation for a teaching career. He had turned to me for various kinds of advice in the past, and in return I had used him shamelessly as a foil for my own ideas.

"Are you finished for the term, Professor? I don't want to interrupt if you're busy."

"Not at all. They're administering my last exam even as we speak. Any minute now, they'll deliver 107 bluebooks. I'm in no hurry to start. What's on your mind? Did you finish that paper we talked about?"<sup>2</sup>

"I did. I'm still waiting to hear from the judges. The professor liked it and gave me a decent grade, but I'm afraid the conservative society that is

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1. I introduced my alter ego and interlocutor, Rodrigo, in *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) [hereinafter *Chronicle*]. *Chronicle* describes Rodrigo's history, family, and career plans. For further discussion of Rodrigo and his ideas, see *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. (forthcoming 1993) [hereinafter *Second Chronicle*] (discussing the economics of race and discrimination); *Rodrigo's Third Chronicle: Care, Competition and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993) [hereinafter *Third Chronicle*] (outlining a new civil rights strategy); *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) [hereinafter *Fourth Chronicle*] (arguing that neutral civil rights regimes are destined to fail). Further information about Rodrigo appears at notes 2-3, 5-6, 15-16, 24-27, and 75, *infra* and accompanying texts.

Like Rodrigo, the Professor is a fictional character, based loosely on an amalgamation of many persons I have known. The Professor is a man of color in the late stages of his career, teaching at a major law school in a large city.

2. In *Third Chronicle*, *supra* note 1, Rodrigo and the Professor discuss a paper Rodrigo plans to submit to a conservative writing competition. An earlier essay of his won first prize in a student writing competition. See *Third Chronicle*, *supra* note 1, at 389.

sponsoring the competition may not know what to make of it. I expect they'll like some aspects of it; others they're sure to find too radical."<sup>3</sup>

"If they're as smart as I think, they'll realize that neoconservative and Critical Race thought overlap in a surprising number of ways.<sup>4</sup> Now, how about you? Are you finished for the term?"

"I took my last exam on Friday. I'll stick around for most of the break, although Giannina and I may visit Dad in Florida for a few days.<sup>5</sup> In the meantime, I'm reading up on legal pedagogy for my study group and a committee report I'm writing for school."

"I didn't know you were in a study group," I remarked. "What kind is it?"

"Oh, some of the LL.M.s and a few of the regular students get together every few weeks at someone's apartment. Whoever hosts the next session gets to select the readings. Legal theory, mostly. We read a number of your articles before we stopped for exams."

Rodrigo peered at a book half-hidden under the papers on my desk. "I'm reading that one right now."

The book the observant Rodrigo referred to was *Anarchy and Elegance*,<sup>6</sup> which I was reading in anticipation of my appearance as a panelist at the law school where its author, Chris Goodrich, studied for a year in a special program for journalists and writers.<sup>7</sup> The conference at which I was to speak was entitled "The Making of a Lawyer", and was organized by the school's student association.

"What do you think of it?" I asked. "I'm speaking at Goodrich's school this spring and thought I'd read his book for background. My panel is on legal education, and my role is a small one—that of respondent."

"To whom?" Rodrigo asked.

"A well-known civic republican. I haven't seen his paper. He'll proba-

3. Rodrigo may be speculating that the redemption-oriented features of his proposal will provoke consternation, but that its endorsement of laissez-faire capitalism will appeal to conservatives. This proposal is detailed in *Third Chronicle*, *supra* note 1.

4. See, e.g., Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race*, 91 COLUM. L. REV. 1547 (1991).

5. Rodrigo's father, an African-American serviceman, served at a U.S. Army outpost in Italy, where Rodrigo attended base schools before earning a government scholarship to attend the University of Bologna. Rodrigo's late mother was an Italian citizen. His father recently retired to southern Florida. *Chronicle*, *supra* note 1, at 1359.

6. CHRIS GOODRICH, *ANARCHY AND ELEGANCE: CONFESSIONS OF A JOURNALIST AT YALE LAW SCHOOL* (1991). Goodrich traces the personal experiences of his section-mates and himself during their first year at Yale Law School. The book details, for example, the professors' approach to teaching, the students' responses to the case method, the anxieties over moot court, the challenge of legal memo-writing, and the excesses of the fall interview season. Goodrich, a professional writer, focuses upon the personality and cognitive changes that he and his classmates underwent their first year of law school. The title of his book foreshadows the book's central theme: the dichotomy created through imposition of an elegant structure on an unruly world.

In this essay, Rodrigo and the Professor explore the reasons for this dichotomy, which they believe is widening.

7. Several law schools offer one-year degrees for journalists, social scientists, and others who seek an overview of the American legal system.

bly argue that law school should do more training in social responsibility and civic virtue.<sup>8</sup> I'm not sure what I'll say. Who could disagree with the idea that we should strive to be more ethical, more community oriented, more concerned with each other than we are today? I suppose the sponsors want me to address whether dialog, love, and so on will cure racism. But several of us have written about that already."<sup>9</sup>

"I know," Rodrigo said. "But the more general point—about *civitas* and legal training—is intriguing, and in a way dovetails with issues of racial justice. Goodrich addresses that, did you notice?"

I searched my memory, but fortunately the irrepressible Rodrigo continued: "In the early pages, Goodrich writes that law school had an intensely normative, almost other-worldly quality, particularly in the opening day speeches.<sup>10</sup> All term long only one of his professors offered real-world training, and he did so in such a cold, mechanical manner that many of Goodrich's fellow students were put off.<sup>11</sup> The other professors emphasized social policy, theory, and so on, but neglected the realities of the legal profession."<sup>12</sup>

"I think students almost everywhere complain that legal training is not practical enough, that the faculty don't pay enough attention to the nitty-gritty details of lawyering. Is it the same at your school?"

"The regular students grumble all the time. My friend Ali told one of them it's a corporate-capitalist plot to render them unfit for anything but large-firm practice. He showed her an essay by Duncan Kennedy.<sup>13</sup> But most of us in the LL.M. program don't find the approach particularly disturbing. Most of us love theory. Maybe it's because we're foreign born or educated. Where we come from, the professors teach mainly by lecture. It's even more theoretical than here. They expect you to get practical experience later, in an apprenticeship or on the job."

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8. For discussion of the republican revival in U.S. jurisprudence, see, e.g., Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) [hereinafter *Self-Government*]; Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) [hereinafter *Law's Republic*]; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) [hereinafter *Republican Revival*]; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter *Interest Groups*]. The civic revival movement in law is not unique; similar revivals are taking place in a number of allied disciplines. See notes 20-23 *infra* and accompanying text.

9. See, e.g., Derrick A. Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988); Richard Delgado, *Zero-Based Racial Politics and an Infinity-Based Response: Will Endless Talking Cure America's Racial Ills?*, 80 GEO. L.J. 1879 (1992) [hereinafter *Zero-Based II*]; Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929 (1990) [hereinafter *Zero-Based I*]. For other approaches to achieving tolerance through communal effort, see, for example, Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989); Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1 (1988).

10. GOODRICH, *supra* note 6, at 18-19, 284.

11. *Id.* at 38-41, 62.

12. *Id.* at 18-19, 62, 284.

13. Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 40, 51-53 (David Kairys ed., 1982).

"What your U.S.-born colleagues may not realize is that clinical training is expensive. Many law schools can't afford it, so they teach by means of large lecture classes and the Socratic method."<sup>14</sup>

"Yes, but even so," Rodrigo frowned, "that doesn't explain the disjunction between real life and law school teaching that many students complain of."

"I assume you have a theory?" I asked. Rodrigo, a future teacher, was probably thinking about matters of pedagogy. As his sometime-mentor I thought it behooved me to listen and, perhaps, offer him advice.

"Well, some thoughts, anyway."

"I'd love to hear them."

"And I'd love *your* reactions. I'm interested in the way law is taught and its relationship to broader intellectual and cultural currents. As you know, I'm hitting the job market soon.<sup>15</sup> I'm sure the interviewers will ask me about my views on teaching. I'm hoping to have something coherent to say."

I made a mental note to urge Rodrigo not to range too far afield, to offer too controversial a theory, during his all-important job interviews. But my brash, talented young friend always had something interesting to say. Besides, I thought, if the "broader intellectual currents" he had just mentioned include civic republicanism, the discussion might well help me prepare for my upcoming conference.

"What connection do you see? But, before we start, can I offer you a cup of coffee?"

"Of course," replied Rodrigo eagerly. "The kind you made before was great."

"I have both regular and decaf. My doctor ordered me to cut down. I assume you want the high-octane kind?"

"Yes, please."

I adjusted the dials on my office coffee maker, added beans and water, then sat back expectantly. As I hoped, Rodrigo soon began.

## II. THE OWL OF MINERVA: IN WHICH RODRIGO EXPLAINS WHY LEGAL EDUCATION IS BECOMING MORE ASPIRATIONAL AND HIGH-FLOWN

"Have you heard of the Owl of Minerva, Professor?"

I ransacked my memory. Rodrigo, educated at the University of

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14. On the Socratic method, see LAW SCHOOL ADMISSION COUNCIL, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 33 (1991) [hereinafter OFFICIAL GUIDE]; LAW SCHOOL ADMISSION COUNCIL, THE RIGHT LAW SCHOOL FOR YOU 101-02 (1986); JOHN JAY OSBORN, THE PAPER CHASE (1971). For a classic argument that clinics are a better method of teaching legal skills, see Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947). On skills training generally, see note 19 *infra*.

15. Rodrigo and the Professor discuss the young man's plans to become a law professor in *Chronicle*, *supra* note 1, at 1359-62. For further discussion of Rodrigo's career plans, see *Second Chronicle*, *supra* note 1.

Bologna, seemed to have read everything.<sup>16</sup> At length I asked: "Is it a phrase by Hegel?"

"By his translator and editor, actually. It's from his preface to *Philosophy of Right*. The full phrase is, 'The Owl of Minerva spreads its wings only with the falling of the dusk.'"<sup>17</sup>

"Ah, yes," I said. "It refers to the way that philosophy always comes too late, when the world is already slipping into dusk. We achieve wisdom about something only when it is fading, is passing into history."

"The phrase has been coming into my mind a lot lately," Rodrigo said, "in connection with the critique of normativity, in which a group of young Crits maintain that the brand of highly prescriptive discourse you see in the law reviews these days serves many functions, not all of them particularly noble.<sup>18</sup> It occurred to me that one of these functions may be denial—postponing the realization that our situation has indeed deteriorated—that the Owl of Minerva has flown."

"And you think this has something to do with the students' complaints about the overly theoretical quality of law teaching?"

"Not so much with abstraction in general, but with the normative quality of it: all the talk of a lawyer's role, the profession's ideals, wise social policy, things of that sort, when what the students want to learn is the down-to-earth details of lawyering."<sup>19</sup>

"And you think this is connected with broader cultural conditions?"

"I do. There's a general pattern today in the West of trying to get beyond Self.<sup>20</sup> In law school that translates into abstract, vaguely aspirational

16. Rodrigo loves books. Each of his Chronicles begins with a discussion of recent works he and the Professor have been reading. *Chronicle, supra* note 1 (discussing DINESH D'SOUZA, *ILLIBERAL EDUCATION* (1991)); *Second Chronicle, supra* note 1 (discussing RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992)); *Third Chronicle, supra* note 1 (discussing ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992)); *Fourth Chronicle, supra* note 1 (discussing DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); DAVID S. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992); and GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* (1993)).

17. T.M. Knox, *Translator's Foreword*, in GEORG WILHELM FRIEDRICH HEGEL, *PHILOSOPHY OF RIGHT* 13 (T.M. Knox ed. & trans., 1957).

18. See Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991) (containing articles by Pierre Schlag, Frederick Schauer, Steven Winter, and this author). But see Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019 (1991) (questioning viability of categorical rejection of normativity); Mark V. Tushnet, *The Left Critique of Normativity: A Comment*, 90 MICH. L. REV. 2325 (1993) (examining the deficiencies of the left's critique of normativity and offering prescriptions for remedying those deficiencies).

19. On skills training, see David Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67 (1979); J. Alexander Tanford, *What We Don't Teach in Trial Advocacy: A Proposed Course in Trial Law*, 41 J. LEGAL EDUC. 251 (1991); Joseph P. Tomain & Michael E. Solimine, *Skills Skepticism in the Postclinic World*, 40 J. LEGAL EDUC. 307 (1990).

20. On the rise of religion and other normative systems, see ROBERT BELLAH, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1984). See also notes 21-23 *infra*

teaching. But you see it elsewhere, too."

"In legal theory, I think you said."

"Yes, especially in this new movement called civic republicanism." I pricked up my ears, remembering my date with the famous revivalist only six weeks hence. "It has parallels in philosophy,<sup>21</sup> social theory,<sup>22</sup> and political science.<sup>23</sup> Everyone is becoming more aspirational, just as Western society's troubles are becoming more and more plain.<sup>24</sup> Many writers are reviving Aristotle,<sup>25</sup> as clear-cut a case of Hegel's maxim as there ever has been."

"An interesting hypothesis. I hope you'll fill in the details."

"I'll try. But I must confess, the students' lament poses a problem for me that I've not yet resolved. I love legal theory, as you know. Yet, I agree that there is something wrong with the way law is taught. How to balance things is the trick, *and* how to explain all this succinctly to an appointments committee at a school where I would like to teach."

"You may not need to enter such treacherous waters, Rodrigo," I counseled. "Already you've won a national prize for student writing.<sup>26</sup> You're getting an LL.M. from a top school—not to mention having graduated second in your class at the oldest law school in the world." I was hoping Rodrigo would soft-pedal some of his more radical ideas in discussions with appointments committees. The critique of normativity I thought particularly likely to get him in trouble. Many found it corrosive, even nihilist,<sup>27</sup> although I could see why it appealed to this young *enfant terrible*.

"But that's not to say you shouldn't talk about these things with me or your friends. You also mentioned a committee at your school."

(noting rising interest in civic virtue and neorepublicanism). On the critique of normativity, see note 18 *supra*. On normativity in law school and legal pedagogy, see notes 10-11 *supra* and note 31 *infra* and accompanying texts; Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231 (1979); Michael I. Swygert, *Striving to Make Great Lawyers—Citizenship and Moral Responsibility: A Jurisprudence for Law Teaching*, 30 B.C. L. REV. 803 (1989).

21. See, e.g., PHILIPPA FOOT, *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* (1978); ALASDAIR C. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); MARTHA CRAVEN NUSSBAUM, *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* (1990); BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985); see also JOHN W. CHAPMAN & WILLIAM A. GALSTON, *VIRTUE* (1992) (collection of essays on politics and civic virtue).

22. See, e.g., BELLAH, *supra* note 20; PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* (1992).

23. See, e.g., MACINTYRE, *supra* note 21; Bruce A. Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013 (1984); J.G.A. Pocock, *Civic Humanism and Its Role in Anglo-American Thought*, in *POLITICS, LANGUAGE AND TIME* 80 (1973).

24. In *Chronicle*, *supra* note 1, at 1365-78, Rodrigo and the Professor explore the declining markets of the West, the increasing incidence of crime and social disorder, and the vacuum of political leadership. They also discuss the recent decline in workers' real income, increased infant mortality among Blacks, and high unemployment. See also *id.* at 1381-83 (app. A-B) (listing evidence of cultural and economic decline).

25. See note 21 *supra*; Pocock, *supra* note 23.

26. See *Second Chronicle*, *supra* note 1.

27. See Richard Delgado, *Moves*, 139 U. PA. L. REV. 1071 (1991) (discussing reactions to the critique of normativity); Tushnet, *supra* note 18 (discussing, *inter alia*, the critique's apparent contradiction with its proponents' leftist commitments).

"Oh, yes. I'm on a joint student-faculty committee to review the curriculum. It was established this year, in part because all the grumbling in the student body seems to be coming to a head. I'm the LL.M. representative. My friend Ali is the alternate."

The coffee machine had stopped gurgling. "Ready for a cup?" I asked. "You said regular, right?"

Rodrigo slurped his steaming hot coffee with gusto. "You make the best espresso I've had since leaving Italy, Professor. Where were we?"

"You were going to tell me how all the currents you mentioned are related. Aristotle, too, I think."

"Oh, yes. They all have to do with trying to get beyond Self. And this is happening in many disciplines more or less at the same time. Moreover, this is occurring as part of a historical cycle, just as our culture is starting to decline. The civic republicans are arguing that we need more virtue in law,<sup>28</sup> just as our society is fragmenting. They argue for deliberation and consensus,<sup>29</sup> just as those things are becoming impossible."<sup>30</sup>

"The author whose panel I'm on writes about all those things. Since the panel is on legal education, I'm pretty sure he'll urge law schools to teach more courses on ethics, examine the role of the lawyer, call for more discussions of social policy, and so on."

"All quite aspirational and elevating," Rodrigo added.

"And, if I understand you correctly, exactly the opposite of what the students want and society needs."

"True. The students want engagement, want to get beyond Self, just as the faculty do. But their approach is different. They want to learn technique, client counseling, black-letter law. The faculty want more theory, more ethics, more attention to the Good."

I was silent for a moment before deciding to play devil's advocate: "Well, Rodrigo, what's wrong with that? Shouldn't we teach students to be more than technicians and hired guns? Shouldn't we teach them to identify with professional ideals and the broader social good?<sup>31</sup> Isn't the rest just hack work, grinding out pleadings—sort of like automobile mechanics but with careful spelling?"

"I don't think so. The Aristotelian revival, civic republicanism in its various forms, and *civitas* in the law—you need to look at all of them in perspective to see the function they serve: namely, denial. Each is a mecha-

28. On the role of civic virtue in neorepublican thought, see, e.g., GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, *CONSTITUTIONAL LAW* 5-6 (1991). See also notes 8, 21 & 23 *supra*.

29. See, e.g., STONE, ET AL. *supra* note 28, at 5-6; Michelman, *Self-Government*, *supra* note 8, at 33.

30. On the fragmentation of U.S. society, see *Chronicle*, *supra* note 1, at 1365-76. On its effect on communication and language paradigms, see Kathleen M. Sullivan, *Rainbow Republicanism*, 97 *YALE L.J.* 1713, 1714 (1988); Steven L. Winter, *Contingency and Community in Normative Practice*, 139 *U. PA. L. REV.* 963 (1991).

31. See David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 83 (David Luban ed., 1984); Symposium, *Teaching Legal Ethics*, 41 *J. LEGAL EDUC.* 1 (1991).



nism for avoiding the painful reality of decline."<sup>32</sup>

"Not long ago, Rodrigo, you portrayed aspects of the rise of neoconservatism in terms of perseveration, of doing the same thing repeatedly when social conditions call for a new direction.<sup>33</sup> You said that when threatened, we often respond by doing what worked before, even though that conduct has ceased to bring us the desired results.<sup>34</sup> Is your Owl of Minerva mechanism an aspect of the same thing?"

"The two are related, but not the same. In perseveration, the culture digs in, pretends that bad things aren't happening.<sup>35</sup> It tries to hearken back to its own golden era.<sup>36</sup> Sometimes it looks for scapegoats—outsiders of some sort—to blame for its current troubles.<sup>37</sup> But this other mechanism is a little different. With denial, we avert our gaze from something known to exist. With normativity, we fix our gaze on a point in space—above the particular mess in the real world we wish to avoid because it's so distressing."<sup>38</sup>

"I could use an example."

"I'll give one in a minute. But first let me explain how neat the mechanism is. If you fix your attention on higher things, dwell in realms of abstraction and normativity, you can avoid taking practical action. It's much easier and more enjoyable to say that the West should not be slipping, that the legal profession should not be in such a mess, and so on. You get to discuss what ought to be, not what is and what to do about it.<sup>39</sup> You also get to blame someone, because if things are bad, there must be a cause."<sup>40</sup>

"So, the new normativity is different from perseveration."

"Yes. Perseveration, basically, is for conservatives. Normativity is for moderate leftists, including many of your and my friends."

"But they come down to the same thing—is that what you are saying?"

"Both disable us from appreciating our dilemma, from responding to it directly. Both shift blame. Both enable us to avoid coming to terms with a profession or society in disarray. It's another respect in which the left and the right converge, as you mentioned earlier, Professor.<sup>41</sup> But it's a convergence of the moderate left and moderate right, both using similar avoidance

32. For discussion of this decline, see *Chronicle*, *supra* note 1 & note 24 *supra*.

33. See *Chronicle*, *supra* note 1, for discussion of recent books in the neoconservative vein, including Dinesh D'Souza's *Illiberal Education*, and offering the view that the rise of neoconservative thought is a response to the West's declining fortunes. See also *id.* at 1381-83 (app. A-B) (containing Rodrigo's print-out, listing sources on the West's decline and the theory of cyclicity among nations).

34. *Id.* at 1372-76.

35. *Id.* at 1372-75.

36. *Id.* at 1374 (namely, the era of rapid development, which Rodrigo believes has played itself out).

37. *Id.* (arguing that the current scapegoats are minorities and the diversity movement).

38. On normative discourse as deflection and denial, see Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933 (1991). See generally Symposium, *supra* note 18 (detailing uses of normativity in legal scholarship and ordinary discourse).

39. Delgado, *supra* note 38, at 946-53.

40. *Id.* at 940-41, 954-57.

41. Delgado, *supra* note 4.

strategies, and with the same effect—things get worse, the poor get poorer, those excluded from society are further cast out.”

“The left will not like what you are saying, Rodrigo. Our liberal friends have a positive self-image.”

“So do conservatives.”

“But liberals think of themselves as the nice guys, the ones with a heart.<sup>42</sup> And they do, in fact, care about us. The civic republicans, for example, deplore the marginalization of minority groups.<sup>43</sup> Our exclusion from life's bounty, from full membership in the human community, is an affront to their ideal of *civitas*.”

“I realize that. And I'll be careful not to overstate my criticisms. One function of normativity, though, and all the talk of community, is to build consensus and solidarity.<sup>44</sup> Things are deteriorating. So, we respond by pulling together, by arranging to live with others in a kind of bubble. Someone who comes along and says the solidarity is pathological can easily expect trouble. History is replete with examples.”

I was silent for a moment. Then: “Rodrigo, fascinating as I find all this, you set a fast pace. I do want to hear about society as bubbles, civic republicanism as a response to social decline, and legal pedagogy. I'm beginning to get a glimpse of your theory, and to see how all these things fit together. But I haven't eaten in several hours and am beginning to wear down. Why don't we take a short break? Our own LL.M.s are having an end-of-the-term party downstairs. I just heard a couple of them heading down the stairway. We could go down, have a bite to eat, and maybe I'll introduce you to some of your opposite numbers here.”

At the mention of food, Rodrigo brightened up, then hesitated.

“We'll come right back. I really want to hear your ideas.”

“You're my best sounding board, Professor.”

“And you, mine. Don't worry. I'm not going to try to escape. I've got plenty of time, and although you may not realize it, I get at least as much out of our discussions as you do. In particular, I need to figure out something intelligent to say about legal education, *civitas*, and the republican revival for my talk in six weeks.”

“Then let's go.”

42. On the response of the moderate left to poverty and the problems of the Black underclass, see Delgado, *Zero-Based I*, *supra* note 9.

43. See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 60-70 (1990); Michelman, *Law's Republic*, *supra* note 8, at 1494-95, 1530; Michelman, *Self-Government*, *supra* note 8, at 74-77; Sunstein, *Republican Revival*, *supra* note 8, at 1549-55, 1564-66, 1588.

44. See Richard A. Epstein, *Modern Republicanism—Or the Flight From Substance*, 97 YALE L.J. 1633-35 (1988); Sunstein, *Republican Revival*, *supra* note 8, at 1564-66. For discussion of the concern that civic republicanism will usher in stifling conformity and group-think, see Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801 (1993).

III. IN WHICH RODRIGO EXPLAINS HOW LAW'S REACTION TO ITS OWN DISCONTENTS MIRRORS ARISTOTELIANISM, A CERTAIN OWL, AND THE MANY GOOD FOLKS WHO SUBSTITUTE DIALOG FOR SOCIAL ACTION

Thirty minutes later, as we rode the elevator back to my office balancing cheese, crackers, and little paper cups of white wine, I reflected on how I had once again misjudged Rodrigo. When he came to my door an hour earlier, I expected to have one of those nice, avuncular conversations a senior professor has two or three times a year with a favorite protégé. I would give Rodrigo tips on how to handle himself during his employment interviews, pointers on how to conduct his first class, and inquire politely into his first venture with student-faculty governance. Instead, we were discussing Hegel, legal theory, and cultural analysis.

My reverie didn't last long. As we rounded the corner and entered my office, I spied a familiar sight: a 14-inch high pile of bluebooks perched ominously on the center of my desk where my secretary must have deposited them while we were at the reception downstairs.

"Looks like you have work to do," Rodrigo commented.

"It's both the best and the worst part of teaching, Rodrigo. You get to see what your students have learned. Some answers amaze and astonish you. You'll wonder who the genius is behind the number on the cover. Other bluebooks are off the mark. You wonder how you could have mistaught someone so badly."

"That's another thing students complain about. Not only is law school too theoretical and abstract, but students feel they get little opportunity for feedback.<sup>45</sup> Few professors give mid-terms, so the single exam at the end of the course is the only feedback you get. And some professors—not you, Professor, I'm sure you're very good about this—take forever to hand in their grades."

"It is a *lot* of work," I added feebly, not wanting to excuse the conduct of some of my colleagues who routinely return their grades three months after final exams. "But this brings us back to law teaching. You're on the curriculum committee, Rodrigo, and have to write a report recommending changes in the way law is taught. And, in just a few months, you are going traveling. You're going to face appointments committees and faculties who will want to know your approach to teaching. Let's focus on that for a bit. What are you going to say in your report to the committee?"

"Ali is going to help me draft it. We know what we are going to recommend, but we need a theory, a way to crystallize our thoughts so the report has a structure out of which our suggestions flow naturally."

"Otherwise," I interjected, "the faculty will dismiss it as urging an anti-intellectual, know-nothing approach to law school."

"As I mentioned earlier, that's one of the seductive things about the cur-

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45. See, e.g., OFFICIAL GUIDE, *supra* note 14, at 33.

rent highly aspirational, super-normative approach. It enables you to think of yourself as taking the high road, as being an idealist.<sup>46</sup> In fact, we're the ones—the student grumblers, I mean—who are the idealists.”

“In wanting practical, skills-oriented training?”

“Yes. The other kind is a deflection, a way of seeing nothing while wrapping up one's nihilistic visions in an aura of seeming-goodness and social concern. In normal times, when things were stable, law was not taught this way. Legal training was less prescriptive, more experiential. A hundred years ago, apprenticeships were common. It's the same phenomenon at work in each of the areas we were talking about earlier. Law is a microcosm of society. If, as we discussed earlier, Western civilization is entering a period of decline, then the Owl of Minerva will spread its wings, right on schedule.<sup>47</sup> Our political leaders will talk to us about our collective greatness and rediscovering our American identity.<sup>48</sup> Philosophers will resurrect Aristotle and talk of civic virtue.<sup>49</sup> And law professors will focus their eyes on the mountain tops, preaching policy, ethics, and the role of the good lawyer exactly at a time when legal practice is cut-throat;<sup>50</sup> no one makes partner;<sup>51</sup> senior lawyers complain that law is not nearly as enjoyable as it once was and that law is now a business not a profession;<sup>52</sup> the bar is divided over the distribution of attorneys,<sup>53</sup> advertising,<sup>54</sup> and use of paralegals;<sup>55</sup> and the public's esteem for lawyers is at its lowest point ever.”<sup>56</sup>

“And so your cure is *concreteness*?”

46. See, e.g., Delgado, *supra* note 38, at 940-41, 943-44, 947-51, 958-59.

47. See notes 17-25 *supra* and accompanying text (discussing the origin and interpretation of this metaphor).

48. See, e.g., William A. Galston, *Clinton and the Promise of Communitarianism*, CHRON. HIGHER EDUC., Dec. 2, 1992, at A52 (discussing the influence of communitarian ideas on President Clinton and Vice President Gore); Karin J. Winkler, *Finding the Moral Center: A Scholar Seeks the Multicultural Middle Ground*, CHRON. HIGHER EDUC., Dec. 9, 1992, at A6 (same); see also *Chronicle, supra* note 1, at 1372-83 (discussing patriotism and revival of themes of early greatness). But see Michael Aaron Rockland, *Rediscovering America*, RESPONSIVE COMMUNITY, Winter 1991/1992, at 55 (decrying excesses of revivalism).

49. See notes 17-44 *supra* and accompanying text (linking revival movements with social stress); see also *The Responsive Communitarian Platform: Rights and Responsibilities*, RESPONSIVE COMMUNITY, Winter 1991/92, at 4, 5-9 (emphasizing need for moral voice and training among communities).

50. See, e.g., GOODRICH, *supra* note 6, at 17 (citing cut-throat behavior of some law students); Mark G. Sessions, *Restore Balance to the Lives of Young Lawyers*, BARRISTER, Fall, 1992, at 2.

51. See Jenny Hontz, *How the Recession is Affecting Law Firms*, BARRISTER, Fall, 1992, at 20; Steven Keeva, *Unequal Partners*, A.B.A. J., Feb. 1993, at 50; David Stevens, *Are You Partnership Material?*, BARRISTER, Fall, 1992, at 14.

52. See, e.g., Richard Delgado & Jean Stefancic, *Panthers and Pin-Stripes: The Case of Ezra Pound and Archibald MacLeish*, 63 S. CAL. L. REV. 907 (1990); Nancy D. Holt, *Are Longer Hours Here to Stay?*, A.B.A. J., Feb. 1993, at 62; *Stone-Age Policies Harm Morale*, YLD Concludes, BARRISTER, Fall, 1992, at 35.

53. See, e.g., Derek C. Bok, *The Bok Report: A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983).

54. See, e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (dismissing challenge to state bar rule prohibiting advertising by attorneys).

55. See, e.g., Bok, *supra* note 53, at 583.

56. See, e.g., David A. Kaplan, *What America Really Thinks About Lawyers and What Lawyers Can Do About It*, NAT'L L.J., Aug. 18, 1986, at S-2.

Rodrigo looked at me sharply, so I quickly rephrased: "I mean, if things are so bad, isn't there a case for ethics, for trying to find out how and where we went astray?"

"Of course," Rodrigo conceded. "But when I said the complainers in the student bodies are the idealists, I meant in a different sense. They have yet to learn the deflection strategy. They still want to fix things. Some of them entered law school imbued with the desire to help the unfortunate, to be public interest and legal services attorneys, to represent prisoners, battered women, the poor and hungry.<sup>57</sup> But law school teaches them that there is a 'grander' mission than this somewhere, and that the whole task is to find it."

"I have noticed that shift in my students. Many of them come to law school aiming to serve the poor. Over three years, they change.<sup>58</sup> Goodrich notes the same thing.<sup>59</sup> But I don't see the connection you are trying to make. Students surely don't lose their ideals because we lecture them constantly about law on a higher level?"

"They do," Rodrigo said firmly. "I know it sounds paradoxical. I couldn't even get Ali to see it at first, and as you know he's a Marxist. Normativity, the many platitudes and bromides of what passes as legal ethics, all the grand sonorous phrases with which your fellow professors fill the classroom air—no offense to you, Professor—have as their natural and intended effect the building of solidarity.<sup>60</sup> We call it professionalism. It's a certain mindset or way of seeing ourselves as lawyers in our society, with all its problems. And, that's the whole point of it. If you focus your gaze on the higher reaches, you avoid dealing with the pain below. If you can get everyone else to look and speak the same way, you build solidarity. You can almost persuade yourself that all is well, that we have not lost our former greatness. You can believe, a little longer, that law is still a gentleman's profession, with no serious blemishes. You can believe that there is nothing seriously wrong with the way law is taught and practiced, or the way legal services are delivered and distributed."<sup>61</sup>

"But the public doesn't see us that way.<sup>62</sup> I suppose you're going to say that this is because they are outside our bubble."

"Exactly," Rodrigo exclaimed, with an alacrity that led me to believe that, for once, I had managed to point out something implicit in his own thinking that enabled him to take it a step further. "And it's the same with

57. On this change in student attitudes over the course of law school, see ROBERT V. STOVER, *MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL* (1989); Terry Carter, *Why Students Lose Their Interest in Entering Public Interest Work*, NAT'L L.J., July 31, 1989, at 4.

58. See note 57 *supra*.

59. GOODRICH, *supra* note 6, at 140, 143-47.

60. On the solidarity-building function of normative discourse, see Delgado, *supra* note 38, at 951-54; Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 825-46 (1991).

61. On the troubles afflicting the legal profession, see notes 50-56 *supra* and accompanying text. On normative discourse as a form of denial, see notes 30-44 *supra* and accompanying text.

62. On the public image of lawyers, see Kaplan, *supra* note 56.

those other things. All the bubbles are slowly sinking, wafting down to the ground where they will meet their inevitable fate. But within each, there is a group that steadfastly believes its bubble is quite safe, that it is indeed the greatest bubble there is. It goes about preaching daily how virtuous, lofty, fair, and just it is. This postpones the day of reckoning a while longer."

"A special form of perseveration," I observed.

"More like procrastination," Rodrigo added. "An especially sweet, enjoyable kind, something we all do together that makes us feel good."

"For a little while."

"It may be a period of years. Aristotle, for example, wrote just as the Greek nation-states were falling apart.<sup>63</sup> If Hegel's observation is right—and I think it is—Aristotle was a classic case of the Owl of Minerva, of an intensely normative writer who preached wisdom, unity, and civic responsibility just when it was beginning to be too late."

I was astonished. Aristotle, the great author of the *Nicomachean Ethics* and *Politics*, engaged in the politics of denial? As though sensing my thought, Rodrigo continued:

"Sure. And don't worry. I won't tell this to everyone I meet. But Aristotle really *was* the wrong voice for his age. He spread his wings, but things had already changed, had already moved on."<sup>64</sup>

"I'm not sure I follow you. I'd like to hear more, especially if you plan to tie it to the current Aristotelian revival and subject of my upcoming panel."

"I'll try," Rodrigo said. "Aristotle's work did unite, maybe even inspire, Greek society; that is, at least its aristocratic, white-male elite. But it was exactly the wrong prescription for his times. It is even more wrong for ours."<sup>65</sup>

"Do you mean that our problem is that our society needs to find ways of incorporating immigrants and outsiders, of dealing with our problems with racism and sexism? The civic republicans are already conscious of that."<sup>66</sup>

"I know," Rodrigo replied. "But serious problems remain. Take, for example, Aristotle's famous doctrine of the Golden Mean.<sup>67</sup> Everyone re-

63. See, e.g., Richard McKeon, *General Introduction: (1) The Life and Times of Aristotle*, in *INTRODUCTION TO ARISTOTLE* ix-xii (Richard McKeon ed., 1947) ("The period of Aristotle's manhood coincided with the reduction of the Greek city-states to the hegemony of Macedonia and the twelve or thirteen years of his work in the Lyceum with the campaigns of Alexander the Great.").

64. See *id.* at xi-xiii (chronicling the loss of Greek liberties and decline of Greek ideals).

65. See, e.g., Michelman, *Law's Republic*, *supra* note 8, at 1494-95; Sunstein, *Republican Revival*, *supra* note 8, at 1564-65; cf. ARISTOTLE, *NICOMACHEAN ETHICS*, bk. I (generally implying that happiness requires that one be well-born, educated, wealthy, and politically connected). On the concern that civic republicanism's notion of dialog tends to be too narrow and exclusive, see Bell & Bansal, *supra* note 9; Gey, *supra* note 44, at 879-97; Sherry, *supra* note 8, at 553.

66. Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685, 726 (1991); Michelman, *Law's Republic*, *supra* note 8, at 1494-95.

67. The doctrine holds that for individuals, "right" action will consist of moderation; that is of avoiding the excess that tends to lie at either extreme of a particular type of behavior. See ARISTOTLE, *supra* note 65, at bk. II, ch. ii.

veres that, but a moment's reflection shows that it is completely wrong for our times. A hundred years ago, it would have served some useful purpose. Then, we were in an age of unchecked development, in which we mined the hillsides, dammed the rivers, laid the forests to waste, and killed or relocated the Indians. Moderation would have been a good philosophy to have had back then. But it came too late, just as it did for ancient Greece. Today, the challenge is not for the U.S. to go on doing what it has been doing all along, but moderately and judiciously. Our bubble is drifting downward. We need to arrest the fall, but we won't discover the solution through the discourse of moderation."

"What about the other elements civic republicanism has borrowed from Aristotle, such as deliberation by the citizenry?"<sup>68</sup>

"It's the same thing. Deliberation, solidarity, the search for consensus are reactions to cultural decline. They're another aspect of the Owl spreading its wings. And just like the Golden Mean, they lead us off in the wrong direction."

"Some of us in Critical Race Theory have been taking the republicans to task for their faith in dialog as a solution to all our social ills."<sup>69</sup>

"I've read that literature," Rodrigo said, "and agree with it. If one's bubble is sinking—one's society in trouble, one's profession in tatters—one needs to talk with someone other than oneself and one's friends. That talk will be circular, reassuring, empty, and 'inscribed,' as the critics of normativity put it.<sup>70</sup> It doesn't get you out of your bubble. And keeping you there is exactly its function. What's needed is not dialog with each other, but with 'Those Others.' We need to reach outside our bubble. From within it, we don't see the rate of descent. We don't see that the bubble closes in on itself. For those things, one needs to consult someone who lives and exists outside our bubble."<sup>71</sup>

"So, if the legal academy really wants to improve its pedagogy, its curriculum, it should confer with students, or with the bar?"

"That would be a start. And we should really listen to what they say. We should also talk with ordinary folks, with the consumers of legal services. We should talk with prisoners, the poor, and other underserved groups."

"Get outside our bubble, so to speak," I observed.

"The exact way we—I mean the law professoriate . . ."

68. See Gey, *supra* note 44, at 811-22; Michelman, *Self-Government*, *supra* note 8, at 33; Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 22 (1992); Sunstein, *Republican Revival*, *supra* note 8, at 1548-50. For examples of this emphasis in republican writing, see Michelman, *Law's Republic*, *supra* note 8; Sunstein, *Republican Revival*, *supra* note 8, at 1543-51.

69. See, e.g., Bell & Bansal, *supra* note 9; Delgado, *Zero-Based II*, *supra* note 9; cf. Gey, *supra* note 44.

70. See Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Schlag, *supra* note 60.

71. See *Chronicle*, *supra* note 1, at 1366-68 (developing a similar thesis and tracing it to W.E.B. DuBois' notion of double consciousness).

"It'll soon include you," I interjected.

"The exact way we will do that still remains to be filled in. Ali and I have a few common sense ideas. So did Chris Goodrich in his absorbing book.<sup>72</sup> But you're the one with years of experience, Professor. Do you have the time to go on a little further? I could run some of them past you. I like the way you push me. And I've got a few ideas on civic republicanism that might help you at your lecture."

"I'd love any help I can get. But before going on, would you like another cup of coffee? You're going strong, I can see. But at my age, I've learned I do better if I pace myself. Even though it's just the decaffeinated kind these days, a little pick-me-up helps keep me going."

"I'd love another cup." Rodrigo looked at his watch. "Oh, it's not too late. Make it regular."

#### IV. IN WHICH RODRIGO TALKS ABOUT BUBBLES, DEFLECTION, AND THE FUTILITY OF NORMATIVE DISCOURSE

While we waited for our coffee, I asked, "Would you like a sliced bagel to go with your brie? I have a new refrigerator."

"I wondered what that was. Did you have it last time?" Rodrigo asked, motioning toward the compact refrigerator in the corner of my office.

"No, I got it just the other day. I don't know if I told you, but I was lucky enough to get a permanent appointment here following my semester's visit. So, I'm moving in. One of the first things I got was this mini-fridge. It's perfect for snacks. My doctor told me to have a lot of small meals as I go through the day."

"Thanks," said Rodrigo, spreading a wedge of cheese on his bagel. "I get hungry from intellectual conversation myself. Giannina keeps remarking how much I eat for such a skinny guy."

"Speaking of hunger, is there a food drive going on at your school?"

"Yes, organized by the students. At your place, too?"

"Yes. There are a lot of homeless folks around here. The students collect cans and other nonperishables. It's interesting that in both schools, the drives are sponsored by students, not the faculty."

"Just as my thesis would predict," Rodrigo replied. "Those who talk normatively the most are least likely to take practical steps to better the plight of their fellow humans."<sup>73</sup>

"Touché," I said wryly, recalling with more than a trace of guilt that I

72. GOODRICH, *supra* note 6, at 4-5, 17, 38-39, 61, 11-13, 156, 204-06, 267 (arguing that the legal academy must cease teaching scoffing, "aggressive assurance," and other bad values, emphasizing competition for grades, teaching manipulation of facts, encouraging bullying rather than cooperation, teaching deflection, denial and flight from the anarchy of life to simplistic rules of law, and urging an "amoral" neutrality, in which a lawyer could equally argue either side of a case).

73. For a discussion of empirical studies showing no correlation, or even showing a negative one, between religiosity and "helping" behavior, see Delgado, *supra* note 38, at 944-45, 954. See generally Symposium, *supra* note 18, for a discussion of the role of normativity in social and legal thought, including its legitimating functions.



had meant to bring in a bag of surplus food from my apartment in response to a flyer from the student anti-hunger organization, but had never gotten around to doing so.

"I think it works like this," Rodrigo said. "Remember all the talk about subsistence rights during the mid-nineteen seventies and eighties?"<sup>74</sup>

"I do," I said, wondering how Rodrigo knew all this—he must have been a teenager completing high school at the air base in Italy where his father was serving at that time. "Charles Black and other progressive scholars and activists were hoping to establish a fundamental right to housing, food, medical care, education, and other basic needs.<sup>75</sup> They made a number of powerful arguments, but got nowhere."

"And you don't hear those arguments much any more, do you?" Rodrigo asked. I shook my head, and he continued: "I have a theory why. It has to do with normative discourse, and it explains why students and others who are only half 'professionalized,' as they say, tend to be the ones who organize food drives."

"Please go on," I urged. I was intrigued, not merely because I had just upbraided myself for neglecting the hungry during the Christmas season, but because I had been wondering recently about the connection between charity and political philosophies, both of the left and of the right.<sup>76</sup>

"As we were saying, I think one of the functions of normative discourse is to abstract problems, to translate them into something else. A subsistence claim—'I'm hungry'—is answered by: 'All right, I'll talk with you about your hunger.'"

"That's civic republicanism," I said.<sup>77</sup>

"But there are other variations," Rodrigo continued. "For example: 'Hunger is bad. Its persistence must mean there is something wrong with society.'"

That strikes close to home, I thought.

"That's the left. The moderate right has its version, too—'Well, let's talk about your responsibility to solve your own problem, to get a job, take care of your family, and so forth.' Or—'let's improve the economy generally, so there will be more jobs for all.'"

"So," I summarized. "We start with a simple human-needs claim: 'I'm

74. See, e.g., Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986). For Supreme Court decisions rejecting claims to various kinds of subsistence entitlements, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that school funding system that favors schools in affluent districts does not violate the Equal Protection Clause); *Lindsey v. Normet*, 405 U.S. 56 (1972) (arguing that responsibility to address scarcity of affordable housing rests with legislatures); *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding constitutionality of state ceilings on AFDC grants).

75. See, e.g., Black, *supra* note 74 at 1106-11 (arguing that constitutional rights are worthless without minimum subsistence).

76. See Delgado, *Zero-Based I*, *supra* note 9 (considering whether the agenda of the left or that of the right best serves the poor).

77. See notes 68-71 *supra* and accompanying text (explaining the role of social deliberation about the common good in civic republican thought).

hungry.' And this gets translated, swept up into various forms through standard normative dialog."

"Which we repeat over and over with our friends. We begin talking about you and your hunger. But five minutes later we're talking about me, my conscience, my favorite normative notions, my lack of responsibility, my prescriptions for social change, what the world would be like if my kind of lawyer was in charge. A neat shift, all facilitated by normative discourse."

"Now I see better what you mean by 'deflection,'" I said. "But I wonder if you're not being too harsh on the legal academy. Don't you think that rationalization and abstraction are universal human tendencies? Surely you're not saying that the great thinkers—you mentioned Aristotle earlier—were guilty of ducking hard issues, like hunger and the maldistribution of social resources?"

"I'm not the one who invented the 'Owl of Minerva' metaphor," Rodrigo replied, a little defensively.

"Maybe that's what the Crits mean when they say normative discourse is inscribed, circular, solipsistic,"<sup>78</sup> I offered.

"They're right about that. It shifts attention from the way the world is to my own situation. Now we can talk and discuss my virtue for having listened to you, or your frailty for having allowed yourself to become hungry, or society's shortcomings for being structured so as to have hungry, unemployed people, and so on. In ancient Greece, they began discussing civic virtue in earnest only when their society was on the verge of collapse. Our culture is doing that now.<sup>79</sup> All the great novelists—Tolstoy, Melville, Dostoyevski—have characters who increase their religiosity, their normativity, in times of trouble."<sup>80</sup>

"But, Rodrigo," I interjected, "maybe the whole thing is less sinister than you imply. Perhaps the mechanism is not perseveration but preservation. Just as the medieval monks labored to preserve wisdom in the dark ages, maybe the civic republicans are trying to preserve the best of western civilization for future times. Perhaps that accounts for the inscribed quality you and others note. Maybe wisdom comes with the Owl of Minerva not so much to save the current civilization, as to improve what comes next. Perhaps we are entering a new dark age, and the current *normativos* are our monks."

"I don't think preservation best captures what I see. I still think avoidance and denial are the most accurate terms. But even if all we are observing is an effort to preserve the past, one would have to question whether the patterns being preserved are worth preserving. And in my opinion, dealing

78. See, e.g., Schlag, *supra* note 60, at 804-06, 843-84, 925-26; Schlag, *Nowhere to Go*, *supra* note 70, at 183-91.

79. See notes 16-44 *supra* and accompanying text.

80. For an illustration of narrators or characters who increase their moral or spiritual focus in response to trouble or disorder, see FYODOR DOSTOYEVSKI, *THE BROTHERS KARAMAZOV* ch. X (Constance Garnett trans., 1948) (1880); HERMAN MELVILLE, *MOBY DICK* (Arion Press 1979) (1851); LEO TOLSTOY, *WAR AND PEACE* (Ann Dunnigan trans., 1968) (1869).

with hunger by abstraction, or with a legal profession in disarray by means of elegant classroom sermons, is unlikely to prove useful in any future society."

"If these patterns are near-universal, instinctive, and inscribed, Rodrigo, why are you able to see them? How are we able to identify and talk about them? Why are they not invisible, like the air?"

"You and I see these things because we are outsiders. You are a man of color. I was raised in Italy. In some sense we are both outside the bubble. As outsiders, we can see the curvature and the downward drift, as those inside cannot."

"But, Rodrigo, if as you say we are lost in the wilderness, shouldn't we do anything to find our way out?"

"Talking in circles will not do us much good. Nor will doing over and over again, with more and more energy, what in former times brought greatness."

"So, what should we do?"

"That's a normative question."

"But it's a question you'll have to face, Rodrigo, if only to write your report on how to fix legal education at your school. And, if you tell appointments committees that legal pedagogy is too normative, too ethereal, they'll want to know what you propose as its substitute. Law, like life, is concerned with action. That's why people get impatient with the Crits and think we are nihilists.<sup>81</sup> We don't offer answers. But in life, there must be answers. Every minute, we are concerned with some practical query or other: Should I have another cup of coffee? Should I tell Rodrigo to conceal his Critical brilliance in the interests of getting a job? One needs to answer such questions fifty times a day. I wonder if you're not being too hard on practitioners of normative discourse. Aren't they just trying to help us with guidelines for practical queries like these?"

"Yes, but their thinking is too conventional. Conventional answers—what sociologists of knowledge call 'normal science'—work only during normal times.<sup>82</sup> In each of the arenas we have been discussing, the difficulties are too serious, too basic for the sort of answers we get by talking with each other. That just takes you round and round in circles, does nothing about the bubble, about the discourse paradigm that is itself slowly sinking, slowly becoming obsolete."

"What do you propose to put in its place?"

"I'll tell you, but this part of my thesis is not fully worked out."

"That's my favorite kind. Like another cup of coffee?"

Rodrigo quickly glanced at his watch. "One more," he said.

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81. See note 18 *supra* and accompanying text.

82. On the connection between normative discourse and social homeostasis, see Schlag, *No-where to Go*, *supra* note 70; Schlag, *supra* note 60. The term "normal science" is attributed to Thomas S. Kuhn, who used it to indicate studies carried out within the prevailing paradigm or tradition. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 7 (2d ed. 1970).

V. IN WHICH RODRIGO EXPLAINS HOW TO GET OUTSIDE ONE'S  
BUBBLE AND WHY ARISTOTLE IS NOT THE RIGHT ROLE  
MODEL FOR OUR TIMES

As I returned from throwing out the old coffee and busied myself fixing a new batch, Rodrigo began:

"What I propose would build on civic republicanism's central insight, but go a step further."

"How do you mean?"

"Let me put it this way. I think we need more Socrates and less Aristotle. We need it in political thought, in law school teaching, and other areas as well. And I'm not referring to the rather tame practice you call the Socratic method, in which a professor asks simple scripted questions about distinguishing this case from that, about whether a particular question ought to be resolved by reference to this formulaic 'policy' principle or that.<sup>83</sup> When the students complain, it's not because the law school classroom asks questions, makes demands on them. Rather it's the sameness and predictability of those questions, which never seem to get anywhere."

"Civic republicanism does try to get somewhere. It grapples with things like racism and the unfair distribution of social resources."<sup>84</sup>

"But it only goes so far. I was talking about this with Ali and Giannina the other day. We agreed the civic republicans are right when they argue politics should consist of more than log rolling and balancing interests.<sup>85</sup> We should struggle to decide which preexisting desires are worthy, are most in keeping with our idea of *civitas*. That, I think, is a valid insight. It has real critical bite."

"I've heard it said that intellectuals love this vision of politics because it affords them a central role, rewards them for something they do well, namely, arguing.<sup>86</sup> Well-read, articulate people are just the ones whose ideas are likely to hold sway, whose notions of the best social arrangements are likely to win out in the end."

"Touché, Professor—although I'd note that, despite your radically Critical stance, your own ideas have not been without effect. But let me explain how civic republicanism's program needs refining. Cass Sunstein says we should not accept preexisting preferences as given, as exogenous to politics.<sup>87</sup> Instead they should be made the subject of it. We should all struggle to determine what we should want as a people."<sup>88</sup>

"A commendable insight, especially if the preferences that they propose to reexamine include ones like racism."

83. On the Socratic method of law teaching in general, see note 14 *supra*.

84. See note 66 *supra* and accompanying text.

85. See, e.g., Michelman, *Self-Government*, *supra* note 8, at 73-74; Sunstein, *Interest Groups*, *supra* note 8, at 31.

86. See, e.g., Epstein, *supra* note 44, at 1642.

87. See note 85 *supra* and accompanying text.

88. See note 85 *supra* and accompanying text; see also notes 8-9 *supra* and accompanying text.

"You've made that your life's work, Professor. But, as you know, one can't stop with merely condemning racism as unworthy of a nation founded on equality and equal respect. That's liberalism's program—declaring repeatedly that all men and women are equal, while proposing mostly ineffectual laws which reiterate that ideal."<sup>89</sup>

"And it's that approach which Critical Race Theory tries to go beyond," I said. "But I'm curious how you think even the talented Sunstein has fallen short. And do you think we in Critical Race Theory have some retooling to do as well?"

"Let's begin this way. Sunstein and the other civic republicans say we should reexamine preferences, that political life should not consist merely in treating them as givens, then mechanically adding and subtracting them to determine what to do.<sup>90</sup> But they accept dialog as it is, without subjecting it to the searching examination they afford preferences. Yet language and discourse—dialog of all sorts—prefigure the answers one reaches, at least unless one is very, very careful.<sup>91</sup> And to answer your question, yes, Professor, I have the sense that you and your fellow race-Crits are careful about language, at least sometimes. I'd cite Patricia Williams as an example.<sup>92</sup> And a number of you have been questioning the dialogic premise, the notion that merely talking to one another will increase empathy, reduce racism and other systemic social ills, and lead to a better world."<sup>93</sup>

"I think I know what you mean by prefiguring. But could you explain how the republicans ignore it? This may be something I can use next month, if you don't mind my borrowing your ideas."

"Not at all. You've helped me in innumerable ways. By prefiguring I mean that the terms, metaphors, pictures, and language one uses often determine the result of a discussion or inquiry.<sup>94</sup> Even when they don't, the cultural background against which words are used will. Statutory interpretation is a good example.<sup>95</sup> Or, to use an area in which we both are writing—race remedies—a perfectly neutral law such as: 'Treat Whites and

89. For a critique of liberalism as a failed program for enforcing and vindicating racial justice, see DERRICK A. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) [hereinafter *NOT SAVED*]; DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

90. Sunstein, *Interest Groups*, *supra* note 8, at 31.

91. See Richard Delgado, *Shadowboxing: An Essay on Power*, 77 *CORNELL L. REV.* 813 (1992); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 *CORNELL L. REV.* 1258 (1992); Pierre Schlag, *Pre-figuration and Evaluation*, 80 *CAL. L. REV.* 965 (1992).

92. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1989); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *HARV. C.R.-C.L. L. REV.* 401 (1987).

93. See, e.g., Bell & Bansal, *supra* note 9; Delgado, *Zero-Based II*, *supra* note 9; Delgado, *Zero-Based I*, *supra* note 9; Delgado & Stefancic, *supra* note 91.

94. In their previous conversation, Rodrigo and the Professor touched on a number of these themes. See *Fourth Chronicle*, *supra* note 1 (questioning efficacy of neutral legislation for redressing Black despair, because cultural interpretation skews laws and their application); see also note 92 *supra*.

95. *Fourth Chronicle*, *supra* note 1, at 1148-51 (illustrating this mechanism).

Blacks the same in such and such area,' will inexorably cause Whites to come out ahead."<sup>96</sup>

"So, you mean that the terms and conventions of discourse reflect cultural power, meanings, and understandings established long ago and that now seem natural, fair, neutral: the way things are."<sup>97</sup>

"Speech is paradigm-dependent. But racism is a part of the paradigm.<sup>98</sup> It's hard to get people to see that. They think we mean physical power, or money. If that were the problem, the solution would be simply to make sure that minorities and other disempowered groups have access to microphones, the media, PACs, and so on."

"So the problem isn't just the speaker's efficacy. It also includes the listener, who just won't listen to minorities. Is that what you're saying?"

"That's part of it. We have little credibility because terrible images have been disseminated about us for hundreds of years, about our lack of intelligence, immorality, ugliness, unscrupulousness, and so on.<sup>99</sup> So, when we talk or write about race, we are often written off as partial, as self-interested. Whereas when a white person says something about race or affirmative action, everyone snaps to attention.<sup>100</sup> Women complain of similar disregard for their views."<sup>101</sup>

"But you said that's only part of it."

"The conventions of discourse are another problem—all the unstated expectations about how the speaker is supposed to stand, how he should express himself, what intonation patterns he should use. All these conventions favor white folks, who are trained in such mannerisms until they come naturally. But the main difficulty is the one I mentioned before, about the meanings of terms and the way they favor preexisting power and prestige. Their meanings always render us one-down, yet seem neutral and fair to everyone."

Suddenly I sat upright. "I see what you're saying. Sunstein and the other civil republicans tell us we should not accept preferences as exogenous, as givens. Rather we should critique them—group critique, to be sure. But they do not ask the same questions about dialog, about critique itself. He ignores the inscribed, homeostatic, maintaining quality of much dialog. And so, we remain in our bubbles instead of breaking free of them."

96. *Id.*

97. Delgado, *supra* note 91; *Fourth Chronicle*, *supra* note 1. For an additional critique of the neutrality premise, see Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

98. For an argument that anything within the paradigm will be virtually invisible and thereby beyond critique, so that one who speaks out against it will be heard as saying something incoherent, see Delgado & Stefancic, *supra* note 91.

99. *Id.* at 1260-74; see also Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 384-86 (1991).

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

101. See JOANNA RUSS, *HOW TO SUPPRESS WOMEN'S WRITING* (1983); cf. Richard Delgado, *The Imperial Scholar Revisited: How To Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1364-65 (1992) (similar analysis of treatment accorded "outsider scholarship" in law).

From his expression, I could see that Rodrigo once again enjoyed my use of his metaphor. But he soon made clear that he had other matters than my flattery on his mind. "There seems to be a case, Professor, for disavowing dialog. Predictable normative discussion only deepens outgroups' predicament. The strong will win; the weak will lose, and not for any lack of effective advocacy, articulateness, or brilliance. And, because civic virtue, an honorific term, will attach to the resulting consensus, we will be much worse off. Racial disadvantage will harden; stereotypes strengthen. They will become harder to dispel because they will be more consensual, seem more like the truth. Uncritical discussion will increase the disadvantage of the most disadvantaged."

"A Rawlesian would disapprove," I said.

"I hope so," he continued. "But the odd thing is that it will also deepen the predicament of the powerful, at least in times like ours, even though they think they are winning all the arguments—for example, about affirmative action."

"I think I know what you are going to say," I interjected. "The familiar arguments, laden as they are with terms and meanings that favor the powerful, resulting time after time in the same predictable conclusions, seemingly reinforcing their position, nevertheless injure them deeply as well. For by maintaining the status quo, they prevent us from seeing when that status quo needs changing. They prevent us from seeing that we are encapsulated in small, self-limiting bubbles. We run round and round, like hamsters, within our bubbles: law school, social theory, political discourse. Normativity enables us to believe our bubble is the best, is principled, is just, has no serious defects. And all the while we are slipping further and further downward. I bet that's why you liked *Anarchy and Elegance*."

Rodrigo looked up, smiling. "The author, Goodrich, was an outsider.<sup>102</sup> He never allowed himself to be fully socialized, never gave in to the prevailing law school ethos and pedagogy.<sup>103</sup> He saw those things as an outsider, and it's that perspective that enabled him to be such a powerful critic."

"And do you think that's true in general—that social reform relies on the perspective of the outsider, the heretic who lives outside the culture and thus sees and is in a position to articulate its defects?"

"Yes. And that's why I think Socrates was in fact a greater historical figure than Aristotle, because he challenged orthodoxy and was, in that sense, more 'Critical.' Our time needs his type more than it needs neo-Aristotelians, classifiers, consolidators who take us round and round well-trod tracks, addressing yesterday's problems, reminding us of what we should have done a hundred years ago.<sup>104</sup> Systemic social evils require radical reform,<sup>105</sup> yet those inside the various bubbles cannot see the trouble they're

102. See notes 6-7 *supra* and accompanying text.

103. See GOODRICH, *supra* note 6, at 102-05, 116-17, 204-06, 234-36.

104. See notes 38-82 *supra* and accompanying text.

105. On the difficulty of effecting social reform through law, see Richard Delgado, *Derrick Bell*

in. Formalistic, vaguely inspiring discourse makes it that much harder—even though in less troubled times, conventional *civitas* can actually do some good.”

“I take it you are talking about orthodox prescriptions, like ‘a lawyer should avoid conflict of interest and not be an advocate in his or her own cause?’ ”

“Right. Or that ‘society should strive to maximize both social welfare and an economic system based on profits and individual initiative.’ Those were useful prescripts earlier, but are less so today.”

“And outsiders can help us attain the vision we need, acquire the reflexivity that can save us and our bubbles from their usual fates?”

“That’s the direction to look toward, at any rate,” Rodrigo replied firmly. “Multiple consciousness can see warpings, skewings in our own system before we, inside that system, have a glimmering of what’s wrong.<sup>106</sup> Excellence in micro-adjustments, in moderation around a central mean, will hardly help a system in real distress.”

“It’s like moving chairs around the deck of the sinking Titanic,” I said. “But to play devil’s advocate, how do I know your approach will help? Maybe the Titanic will sink no matter what.”

“It already has helped to some extent. Outsiders’ demands have spurred the system to refine and strengthen First Amendment law,<sup>107</sup> regularize due process in school disciplinary cases,<sup>108</sup> and make the workplace fairer for everyone, not just minorities.<sup>109</sup> Our pleas for attention to Black poverty have caused renewed attention to the plight of poor Whites.”<sup>110</sup>

“I agree with that. But the civic republicans will say, ‘We are ready to talk with you, ready to listen to your perspectives, absorb and reflect on your insights.’ ”

“I’m afraid that conventional dialog, at least without fundamental re-evaluation of its terms and rules, will just reinforce the status quo. It’s like trying to see the back of your head. If you take a look at the footnotes and citation patterns of the civic republicans, you will see that they are no better

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and the Ideology of Social Reform: Will We Ever Be Saved?, 97 YALE L.J. 923 (1988); Delgado & Stefancic, *supra* note 91.

106. See JACK BASS, UNLIKELY HEROES (1981); *Chronicle*, *supra* note 1, at 1366-75; Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7 (1989).

107. HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965) (describing the way abuses stand out in the glare of racial injustice, enabling correction, often to the betterment of all, and citing *New York Times v. Sullivan*, 376 U.S. 254 (1964), as one example).

108. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975) (holding that the Due Process Clause requires that a student facing disciplinary action be given oral or written notice of the charges and an explanation of the evidence against him, as well as an opportunity to present his version of the facts).

109. For instance, the affirmative action policy requirement that job openings be posted and advertised, rather than dispensed through “old-boy networks,” makes the hiring market more accessible to all job seekers, not just minorities.

110. See, e.g., BELL, NOT SAVED, *supra* note 89, at 239-58 (concluding that no single civil rights strategy will succeed in bringing justice for Blacks, and urging broad-based programs aimed at remedying class-based, as well as racial, inequalities); see also ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM (1990) (urging a similar course).



than other writers at incorporating the ideas of outsider scholars.<sup>111</sup> So, I'm afraid that increasing dialog will not deter conventional thinkers from embracing measures like immigration controls and English-only initiatives, while the more liberal ones embrace limited forms of affirmative action, which do little good, as you and your friends have argued."<sup>112</sup>

"Aristotle was quite candid, if I recall. He thought dialog should take place only with one's equals—with the white-male aristocracy of Athens.<sup>113</sup> Today's versions are much more egalitarian, but I gather you think they need to go much further."

"Dialog won't work for systemic social ills. We don't see—can't see—faults in the paradigm, the very structures by which we communicate, make ourselves understood, and explain, understand, and construct reality. We won't listen to Blacks, because we have assigned them low status, low credibility in the stigma-pictures we've made of them and still disseminate.<sup>114</sup> The master narrative includes conquest, disparagement, and subordination of the darker races, not loving inclusion, much less respectful attention to their ideas and world views.<sup>115</sup> Aristotle wrote that one should help one's friends,<sup>116</sup> a rule that would disadvantage Blacks. But the contrary rule—treat everyone alike—will also disadvantage outsiders.<sup>117</sup> Deliberation and moderation, indeed all the conventional virtues, are inadequate to deal with racism and other broad-scale social ills."

"So, Rodrigo, what do you advise? I know you realize it's a normative question, but one must do something."

"We need to confront the unfamiliar unmediated, take time to question our own presuppositions. We need to stand back and examine our own bubbles. For this, we need to seek out someone unlike us, someone who sees things with new eyes. If we do not do this, we will pay a price, namely the inability to see systemwide defects that cause our bubble, ever so imperceptibly, to drift downward."

"So, Rodrigo, your advice is . . ."

"For individuals, read books by unfamiliar writers. For civic republicans, stop talking with each other, seek out outsiders, the more strange and heretical the better, and get clear on the exogenous presuppositions that structure your own elegant dialogues and inquiries. For society, see what other societies have done by way of treating recurring problems more effectively than we have. For law professors, talk to your students—ask how they would like to be instructed, what they see wrong with the current sys-

111. Delgado, *supra* note 101.

112. For a critique of affirmative action, see BELL, NOT SAVED, *supra* note 89, at 140-61; Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222 (1991).

113. See note 65 *supra* and accompanying text.

114. See notes 99-101 *supra* and accompanying text.

115. See generally Delgado & Stefancic, *supra* note 91.

116. ARISTOTLE, *supra* note 65, at bk.VIII, bk. IX (discussing duties to one's friends and what makes a person a good friend).

117. See notes 96-101 *supra* and accompanying text.

tem. Bring in outsiders, like the journalist author of *Anarchy and Elegance*, and encourage your students to write about their impressions—and then listen and take them seriously.”

“And if you are a law school faculty concerned with curricular change and the students’ grumbling over pedagogy and the tenor of the law school classroom?”

“I know, Professor, I’ve got that report due,” Rodrigo said with a slight grimace. “And you’ve got your encounter with the famous civil libertarian. I hope you’ve found this conversation as useful as I have.”

“That and more,” I replied.

Rodrigo picked up his papers. Almost as an afterthought, I asked him: “But won’t we just be co-opted, you and I, I mean? We’ll take our ‘outsider perspective,’ as you call it, in your case to the law faculty committee, in mine to the audience at my conference. Won’t we just join the bubble, merge whatever meager insight we can offer into the general cultural mix, reinscribing ourselves in the current dysfunctional, hierarchical, and often racist culture of which we both complain? Won’t we just become part of that bubble?”

Rodrigo paused at my door a moment, then looked up with a smile. “At least it’ll be a larger bubble,” he said as he disappeared from my view.

## VI. CONCLUSION

As his footsteps echoed down the hall, I reflected on what we had said. I wondered whether he and Ali would meet with success in revamping their school’s curriculum. I wondered how my own audience next month would respond to the idea of normativity and *civitas* as denial. I wondered how Rodrigo would fare when he entered the job market. I remembered that bubbles had surface tension—would he be able to get inside one? Through my window, I watched as Rodrigo greeted a tall, slim young woman on the sidewalk—Giannina, I assumed. As they strode away, hand in hand, I wondered if my own bubble was drifting downward. I wondered whether, once the Owl of Minerva has flown, it ever returns, and whether the new place can indeed be larger and more humane than the old one, as Rodrigo had so cheerfully intimated. I wondered when I would get to meet the elusive Giannina.

I picked up the heavy pile of bluebooks and started home.

