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# Rodrigo's Tenth Chronicle: Merit and Affirmative Action

RICHARD DELGADO\*

## INTRODUCTION: IN WHICH RODRIGO AND I MEET BY CHANCE AT THE NEW PROFESSORS CONFERENCE AND I LEARN OF A RECENT EVENT AT HIS SCHOOL

I had just put down my papers from the talk that, as one of three graybeards, I had just given to a roomful of eager new professors when a familiar face materialized in front of me.

"Rodrigo! I didn't see you in the room. Where were you sitting?"

"Over there," my young friend and protégé<sup>1</sup> replied, "behind Henry Abercrombie. He's a giant—I'm not surprised you didn't see me. That was a great talk."

"Thanks," I said. "They called me up at the last minute. I didn't have much time to prepare. Have you been here for the entire conference?"

"I have. My dean is good about paying for this sort of thing. She sent both of us new professors—Barney, over there, and me."<sup>2</sup>

"It's a lot different than when I was starting out," I said. "We were sent straight into the classroom with the casebook and our notes. It was sink or swim—no teachers' manuals, no conferences like this one, and often no older hands to give us advice. Most of us were the only professors of color at our schools. Do you have any company in that respect at your school?"

"Barney is Asian," Rodrigo said. "We get along great, even though he

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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 Delgado, *First Chronicle*] (reviewing DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991)). This article introduced Rodrigo Crenshaw, my fictional interlocutor and alter ego. The half-brother of famed civil rights lawyer Geneva Crenshaw and the son of an African-American serviceman and Italian mother, Rodrigo was raised and educated in Italy, where his father was stationed. He graduated second in his class from the "oldest law school in the world" before coming to the United States to pursue a career in civil rights and the teaching of law. Like Rodrigo, "The Professor" is a fictional construct, a composite of many persons I have known and not to be identified with any one in particular. As I have constructed him, the professor is a man of color teaching at a major U.S. law school and is in the late stages of his career.

2. For a description of Rodrigo's graduate education leading to an LL.M. degree at a well-known U.S. institution and his successful search for a teaching position in the law, see *id.* at 1361-64; Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy and the State*, 41 UCLA L. REV. 721, 721-25 (1994) [hereinafter Delgado, *Seventh Chronicle*]; Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183, 1183-86 (1993) [hereinafter Delgado, *Second Chronicle*] (reviewing RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION* (1992)).

teaches tax. And there's Elaine, the assistant dean. She's black and teaches professional responsibility."

"Not bad," I replied. "This session looks like it's breaking up." I pointed to the crowd starting to straggle out of the auditorium. The conference staff was already busy changing the name tags on the speakers' table in preparation for the next session. "Do you want to go somewhere for a drink or a bite to eat?"

"I'd love to," Rodrigo replied with alacrity. "I got up early for the constitutional law session and missed breakfast. I was going to go to the session on networking, but I'd much rather talk with you."

As we filed out of the conference room, I asked Rodrigo how he liked his new job.

"It's great," he said. "I love the students. I'm teaching two new preps, but I have this terrific research assistant. It looks like we may actually get some writing done. Maybe you and I can talk about that later. But something curious happened just last week that I'd like your opinion on. Perhaps we could discuss it over dinner."

"I'm famished," I said. "Public speaking always does that to me. Have you discovered a good place to eat around here?"

"There's a decent sandwich shop up on the mezzanine. But yesterday Barney and a few of us went to this little Middle Eastern restaurant a couple of blocks away. The food is good and the prices are reasonable. I think they start serving dinner at five."

"Middle Eastern sounds good to me," I said. "So, what's this 'curious happening' at your school?"

Rodrigo fell silent for a moment as we rode down in the elevator in the company of a few strangers and one of my acquaintances. When we got out, he continued. "It concerns the way I got appointed. I'm not worried or upset. But I thought it was curious and made a note to ask you about it sometime. By the way, did you know you were not listed on the program?"

"I spoke last year," I explained, "but this year they had a last-minute cancellation. I agreed to help them out, and now I'm glad I did. I'll get to do two of my favorite things—eat Middle Eastern food and talk with you!"

We set out down the crowded city sidewalk. "I can vouch for the food," Rodrigo said, "but I don't know how much you'll get out of the conversation because it'll be mostly about me. The incident did get me thinking, though, about the whole issue of merit. We've talked about this a little before,<sup>3</sup> but my thoughts have gone further, thanks to the incident I'm about to recount."

"I'm sure you'll notice this, Rodrigo, if you haven't found it out already. We older hands get just as much from our younger colleagues as they do from us. Our conversations over this last year have stimulated many

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3. See Delgado, *First Chronicle*, *supra* note 1, at 1363-64.

thoughts in my mind, and not a few publications.<sup>4</sup> Sometimes I think *you're* the mentor and I'm the pupil."

Rodrigo waved aside the compliment. "What happened concerns a colleague of mine named Kowalski—an interesting guy from a poor background. He's got a brilliant law school record and terrific publications despite being in only his second year of teaching. Kowalski came to my office the other day. It's no secret that he's conservative—in fact he's the sponsor of the Federalist Society at my school. But he's a nice guy. When I started teaching, he offered me his teaching notes and tried to be really helpful."

"So, what did you learn from your conservative and presumably Polish friend?"

"That my appointment was part of the school's affirmative action policy. At my school they call it a special opportunity appointment. Nobody had bothered to mention this to me, not even the dean during the discussions leading up to my appointment. Kowalski dropped this bombshell in the course of a discussion we were having on affirmative action and then was taken aback and apologetic when he discovered that I hadn't known about it already. He had offered my appointment as an example of the way affirmative action works. He pointed out that he himself had not been eligible for a special opportunity appointment even though his own parents emigrated to this country when he was two, were poor, and lived in a rough neighborhood. Meanwhile, I, as an African-American, was eligible for preferential treatment."

"Sounds like the two of you must have had a—how shall I say?—tense conversation. I hope it came out that your own credentials are also quite impressive."

"He already knew that. And it *was* tense for a minute. Then I told him that I saw no problem with my being hired that way if the school used the

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4. Talking with Rodrigo is indeed one of the Professor's favorite activities, many of their earlier conversations having supplied the grist for publications. See generally Delgado, *First Chronicle*, *supra* note 1 (discussing legal education, affirmative action, and the decline of the West); Delgado, *Second Chronicle*, *supra* note 2 (discussing economic theory and race); Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993) [hereinafter Delgado, *Third Chronicle*] (reviewing ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992) and discussing laissez-faire economics, love, and redemption); Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) [hereinafter Delgado, *Fourth Chronicle*] (discussing the impossibility of neutral rules); Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993) [hereinafter Delgado, *Fifth Chronicle*] (discussing the neorepublican revival); Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993) [hereinafter Delgado, *Sixth Chronicle*] (discussing the relations among outsider groups); Delgado, *Seventh Chronicle*, *supra* note 2 (discussing racism and Enlightenment democracy); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears: On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994) (discussing black crime).

special funds the president's office was making available to hire an additional professor that they otherwise would not have been able to hire."

"In other words, you didn't displace anyone, not even the proverbial 'more highly qualified white,'" I said. "And did that get you off the hook with Kowalski?"

"More or less. At any rate, we went on to have a good talk about affirmative action and merit. He kept insisting that, present company excepted, affirmative action is unprincipled because it gives the edge to someone on the basis of a morally irrelevant factor, namely race. He also worried that it would end up stigmatizing even professors of color like myself because everyone would assume we had inferior credentials and did not really deserve our professorships.<sup>5</sup> It also could cause tensions between whites and blacks because the former would assume that whenever they lost out on an appointment, job, or other opportunity, it must have been because a black or other minority person won out."<sup>6</sup>

"These are the standard arguments," I observed. "And as you know, they all have answers.<sup>7</sup> Oh, here we are." We were both silent as we entered the small, homey restaurant. The maitre d' ushered us to a booth decorated with Persian bric-a-brac.

We seated ourselves, and Rodrigo continued as follows:

"I know, and I gave them. But then the conversation took a different turn. He cited an argument I had heard mentioned, in D'Souza and elsewhere, that the multiculturalism movement, not racism, is driving the recent wave of racist incidents, graffiti, and name-calling on campuses.<sup>8</sup>

5. On stigma, see generally Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222 (1991) [hereinafter Delgado, *Majoritarian Device*]; Deborah Waire Post, *Reflections on Identity, Diversity, and Morality*, 6 BERKELEY WOMEN'S L.J. 136 (1990).

6. For more on the "innocent white" concern, see, e.g., *Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 500 (1986) (Rehnquist, J., dissenting) (reasoning that the relief provided by § 706(g) of Title VII does not extend to victims that have not suffered discrimination because relief would come "at the expense of innocent white workers"); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (plurality opinion) (arguing that it is unfair to compel "innocent" people to remedy past discrimination that they did not cause). See also Linda S. Greene, *Twenty Years of Civil Rights: How Firm a Foundation?*, 37 RUTGERS L. REV. 707, 714-31 (1985) (tracing the development of "innocent white" and similar narratives in recent jurisprudence).

7. See Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (answering various objections to the use of affirmative action in law schools and putting forward a case for affirmative action based on institutional self-interest and political fairness); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) (critiquing the argument that affirmative action is unfair to innocent whites).

8. Works questioning academia's too-ready embrace of multiculturalism include ALAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 347-56 (1987); DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 13 (1991); E.D. HIRSCH, *CULTURAL LITERACY* 18 (1987). See also ROGER KIMBALL, *TENURED RADICALS* 63 (1990)

According to this view, minority groups who are calling for theme houses, special dormitories, and antihate-speech rules are misdiagnosing the situation. They have only themselves to blame—or, more precisely, affirmative action—and the cure is less, not more, of what they demand.<sup>9</sup> This, in turn, led to a discussion of the whole idea of merit, but we were cut off when we both had to go to a faculty meeting.”

I made a face. “Now *there's* an institution whose merit really ought to come under scrutiny. And I gather you've had some further thoughts on the whole question—merit, I mean?”

“I have. Do you have time to listen? Oh, here comes our waiter.”

We immersed ourselves in the menu while the waiter stood patiently. We gave our orders—kabob for Rodrigo, vegetarian couscous for me—and then continued as follows:

#### I. IN WHICH RODRIGO AND I EXPLORE THE CONNECTION BETWEEN MARKETS AND MERIT

“Professor, have you ever noticed how conservatives seem to love the First Amendment?”

“I have. But not only them. Lots of old-line constitutionalists, including some who consider themselves liberal, do too. You see this strange alliance form over hate-speech codes. Conservatives like Dinesh D'Souza hate them, of course.<sup>10</sup> But they have allies in moderately leftist, progressive organizations like the ACLU.<sup>11</sup> Every time a college thinks of enacting such a code to protect minorities and homosexuals against the tide of vicious insults and name calling that has been welling up these days, the conservatives say that Western civilization is ending, and the ACLU files suit. It's an odd alliance, somewhat like the way the religious right and radical feminists often find themselves on the same side fighting pornography, but, of course, in reverse.”<sup>12</sup>

“Politics makes strange bedfellows,” Rodrigo added. “Is that how the expression goes?”

Rodrigo, who had spent the last half of his life growing up in Italy,

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(arguing that support among university professors for multiculturalism is “anti-cultural” because it abandons traditional teaching methods in the humanities).

9. See D'SOUZA, *supra* note 8, at 231-42.

10. *Id.* at 132-56.

11. See, e.g., Marjorie Heins, *Banning Words: A Comment on “Words That Wound,”* 18 HARV. C.R.-C.L. L. REV. 585, 592 (1983) (prominent ACLU attorney arguing against hate speech codes); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 490 (presenting an argument by the current national president of the ACLU that restrictions on speech be narrowly drawn).

12. The first alliance, that is, opposes reform, the second favors it. On this latter alliance, see generally Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of “A Just Balance” Changes So Slowly*, 82 CAL. L. REV. (1994) (discussing the case for and against hate speech regulation).

sometimes misused an expression or idiom.<sup>13</sup> But this time I nodded. “Exactly right. And what moral do you draw from this, Rodrigo?”

After a moment of thought, Rodrigo replied, “I wonder if you saw the recent *New Republic* cover story that asked, ‘Is the First Amendment Racist?’”<sup>14</sup> I indicated that I had. “The author’s answer, of course, was no and that minorities and others clamoring for hate-speech regulations are deeply misguided.”

“And I gather that you think that it is—racist, I mean?”

“Not inherently,” Rodrigo responded. “But what I find intriguing is the way in which conservatives and traditionalists, people who basically don’t want blacks changing their position too rapidly (at least as a group), are enamored of the First Amendment. Consider that throughout history, top satirists and commentators have scrupulously reserved their sharpest slings and arrows for the high and mighty, for kings and other public officials who abused their power, and so on. Never, or rarely, did they use their wit to put down the halt, the lame, and the poor.”<sup>15</sup>

(Ah, he knows *that* idiom, I thought. He catches on fast.)

“A root word of humor is humus,” I interjected. “Like earth.<sup>16</sup> Humor brings the powerful down to earth. That’s a principal function of satire. The Roman emperors employed slaves to follow them during victory parades and celebrations, whispering, ‘Thou art but a man.’<sup>17</sup> Nobility of all ages employed jesters to mock their mannerisms and prevent them from becoming too enamored of themselves.<sup>18</sup> But I gather you think all of this has something to do with the First Amendment.”

“It does. The First Amendment is a marketplace mechanism, like many others. One of its functions is to assure that life’s victors continue winning—in this case, speaking more effectively than others and thereby convincing themselves that their positions are right, the best. The top satirists, Moliere, Swift, Twain, and in more modern times, columnists like Russell Baker, have carefully avoided making fun of the poor, minorities,

13. On Rodrigo’s period in Italy, see Delgado, *First Chronicle*, *supra* note 1, at 1359, 1367, 1375-76; Delgado, *Second Chronicle*, *supra* note 2, at 1184-86.

14. Henry Louis Gates, Jr., *Let Them Talk*, *NEW REPUBLIC*, Sept. 20, 1993, at 37 (cover story).

15. See Richard Delgado & Jean Stefancic, *Scorn*, 35 *WM. & MARY L. REV.* 1061, 1062-63, 1090-98 (1994) (arguing that powerful institutions such as the Supreme Court should reserve their use of sarcasm for the “high and mighty” and refrain from using such a tone with the weak).

16. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1102 (1986).

17. CLASSICAL AND FOREIGN QUOTATIONS 326 (W. Francis H. King ed. & trans., Unger 1965) (1889). The same entry goes on to note that at their coronations, the Russian Tzars were presented with (presumably along with their scepters) marble samples from which to select the material for their tombs.

18. See JOHN DORAN, *THE HISTORY OF COURT FOOLS* (1858) (describing the court jesters of England, France, Spain, Germany, and Italy); ENID WELSFORD, *THE FOOL: HIS SOCIAL AND LITERARY HISTORY* (1935) (discussing the role of the court jester in the Medieval, Renaissance, and Tudor eras of English history).

and those of lower station and power than themselves. These individuals are already lowly, like humus, down to earth.<sup>19</sup> But the First Amendment can't capture this simple moral intuition. Indeed, I believe one of its functions is to blind us to this asymmetry, to the way in which vituperative speech aimed at the poor, or gays, or minorities stands on a very different moral footing from criticism of government or the powerful."

"The First Amendment treats all speech alike. You have just as much right to criticize the Italian or U.S. government as a campus bully has to tell you to go back to Africa."<sup>20</sup>

"An example of decontextualized, neutrality-based jurisprudence, as we discussed before," I added. "And deeply mistaken."

"One could argue," Rodrigo added, "that this type of perverse application of First Amendment principles violates the equality principle.<sup>21</sup> It makes us dumb, deprives us of the ability to see differences that matter, like the one I just mentioned. Treating unequals as though they were equal is just as much a violation of equality as treating equals unequally. It also enables life's winners to think they won fair and square. When the campus bully notices that next year there are fewer blacks on campus because they have dropped out or transferred to a less racist institution . . ."

"Like Morehouse," I ventured.

"Exactly," Rodrigo continued. "Resegregation is a real problem. Black colleges are increasing enrollment just as the numbers of black students in large, white-dominated colleges are declining.<sup>22</sup> Parents of color are opting to send their sons and daughters to historically black colleges where the climate will be less racist. And one of the reasons is the reign of terror and catcalls that our First Amendment purist friends insist continue unabated."<sup>23</sup>

"A friend of mine is doing that very thing," I mused. "Sending his kid to Morehouse, that is. Yet our ACLU friends insist that hate speech remain unregulated. The First Amendment must be a seamless web.<sup>24</sup> But we were talking about merit. I assume you think there is a connection."

19. See Delgado & Stefancic, *supra* note 15, at 1062-63, 1090-98.

20. See Strossen, *supra* note 11, at 531 (arguing that content-based restrictions on speech are illegitimate).

21. On the various applications of this principle in American law, see LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1436-39 (2d ed. 1988) (discussing the principle of equal treatment as a method for analyzing constitutional issues).

22. See e.g., Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 387 n.354 (1991) (citing sources indicating blacks are dropping out of white-dominated schools or enrolling in all-black colleges).

23. See *id.* at 349-58 (describing wave of racial incidents); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321-34 (1989) (arguing that racist speech infringes the liberty of all citizens).

24. On the "seamless web" argument, see Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter, and The Tough-love Crowd*, 47 VAND. L. REV. 1807 (1995).



"Oh yes," Rodrigo resumed, frowning his brow slightly. "Let me bring myself back on track. I was going to make the point that all formalist devices, like merit, free speech, and the economic free market of trades and exchanges, serve a similar purpose. They decontextualize the transaction and so enable the powerful to exclude from consideration past actions, like slavery and female subjugation, that have effects even today which prevent some from entering the competition on equal terms.<sup>25</sup> In fact, the First Amendment is a special case of merit. The First Amendment is designed to winnow out meritorious from nonmeritorious speech and ideas. Supposedly, through a clash of ideas, the truth, the most robust idea of all, will emerge.<sup>26</sup> Thus, if one culture is dominant, it must deserve to be that way. Our ideas competed against those other, more easygoing, ones and won. It was a fair fight. Merit serves the same function in slightly different spheres."

"It does this by consolidating advantage. Any society's elite class will deem what they do well as constitutive of merit, thus assuring that their own positions become even more secure. Merit is a resource attractor. Those who have it make more money and gain more power. They use that money and power to purchase more increments of merit for themselves and their children."<sup>27</sup>

"The rich get richer."

"Not always," I interjected. "They send their children to the best schools, where some flunk out. But others go on to be rich. The gap between the haves and the have-nots gets greater every generation, and one reason is this host of seemingly neutral market-type mechanisms that assure that everyone has exactly the same chance—all the while ignoring that it takes a microphone to speak effectively, a college education to become a neurosurgeon, and so on."<sup>28</sup>

"Merit supplies a defense to an equal protection challenge," Rodrigo added. "If society decides to distribute a good to A and not to B, courts will sustain this decision if the government can show that A had more

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25. With the aid of decontextualization, pairs like the following can be made to seem like they stand on a similar footing: the right of a Southern legislature to fly a Confederate flag and the right of a Northern state to celebrate Martin Luther King Day; the right of a bigot to hurl a racial epithet and that of black friends to use the smiling greeting "Hi, nigger"; the right of black students to form a support organization and that of whites to form a whites-only club.

26. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.)).

27. On resource attractors in the theory of distributive justice, see Michael H. Shapiro, *Who Merits Merit? Problems in Distributive Justice and Utility Posed by the New Biology*, 48 S. CAL. L. REV. 318, 344-47 (1974).

28. On the increasing stratification of U.S. society, see generally JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* (2d ed. 1969); Richard Delgado, *Inequality "From the Top": Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100 (1984).

merit than B, that A was more deserving.<sup>29</sup> But what you are saying is that the pre-existing level of merit may be skewed, and that supposedly neutral mechanisms prevent us from seeing this.”

“Not only seeing, but even looking for it,” I replied. “There is no reason to. If A is more deserving of the job than B, why should we even inquire into how he or she came to deserve it? He may have had greater opportunities than B, may have had more solicitous parents or teachers. Better known people may have written him letters of recommendation. When he was a teenager, perhaps he got a summer job or internship through a family connection. A friendly teacher may have proposed an extra credit assignment with him that changed a B plus into an A minus, or helped him get into an honors section of a class that an equally talented black or working class kid might not have gotten into.”

“Yet white people do not see it that way,” Rodrigo replied. “Anytime a black gets into a special program or a law school by means of an affirmative action program, they are certain that *this* is an affront to principle, that it is unfair to innocent whites.<sup>30</sup> Even our liberal defenders consider affirmative action a perilous program, designed to work for a short time only. They regard affirmative action as a program fraught with many risks, such as the stigmatization of able blacks.”<sup>31</sup>

“So Rodrigo,” I summarized, “you think there are two kinds of racism. The old kind is overt and takes the form of laws and social practices that expressly treat blacks and others of color worse than whites. This type of racism might be typified by whites-only drinking fountains, or university admissions practices that excluded blacks entirely until about 1965. But there is another kind of racism evident in facially neutral laws and practices that require the decisionmaker to ignore history, context, and things that everybody knows are important. And you think that merit is a prominent example of such a mechanism, along with others that take the form of market-type, hands-off fairness.” I paused to see what Rodrigo would say. Rodrigo nodded, but quickly added: “I know what you’re going to say, Professor. I’ve made only a start. And you’re right. Kowalski pointed that out—my argument is merely formal. I must go on and give affirmative reasons why merit often serves dishonorable ends. He kept saying that merit *could* deflect us from seeing important things, including those that lie in the past. But he said that he didn’t think there were many such things today, and that, on balance, a merit-based scheme is apt to be fairer to minorities than one that relies on discretion, like affirmative action. He

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29. Cf. *Bakke*, 438 U.S. at 319-20 (discussing the role of merit in university admissions).

30. See Delgado, *First Chronicle*, *supra* note 1, at 1362-63 (discussing an earlier version of this argument).

31. See Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 603-22 (1977) (offering a general defense of affirmative action on social-utility grounds).

said my categories were not exclusive, and that he personally knew people without a racist bone in their bodies who nevertheless believed in merit. He also pointed out how his father and mother rose from abject poverty. He kept saying he meant no offense to me, but affirmative action could only produce lazy, unmotivated beneficiaries—and sullen, resentful whites convinced that minorities are responsible for every setback and defeat they suffer in life.<sup>32</sup> He also inquired whether I felt stigmatized on account of the way I was hired and seemed surprised when I said no.”<sup>33</sup>

“Of course, you did graduate near the top of your class at the oldest law school in the world, have an LL.M. degree from a top U.S. institution, and are the winner of two competitions for student writing.<sup>34</sup> Still, Kowalski sounds like a great foil.”

Rodrigo waved aside my attempt at praise. “Laz keeps me on my toes, makes me think—just as you do, Professor. Oh, and did I mention that he’s not opposed to speech codes? He says racist speech is disgusting and has nothing to do with the First Amendment—like many conservatives, he also supports regulating pornography. All this even though he opposes affirmative action and thinks it lies at the root of all our current troubles. If you’ve got the time, I could run past you some things I’ve been thinking about in the wake of our discussion.”

I nodded enthusiastically, reminding my brilliant young protégé, once again, how much I got out of our conversations. I sat back expectantly.

## II. RODRIGO’S THREE REASONS WHY MERIT OFTEN SERVES DISHONORABLE ENDS, ADVANCES RACISM, AND DEEPENS MINORITIES’ PREDICAMENT

“My thoughts mainly have to do with the connection that Kowalski persuaded me to make between merit and discrimination. Why don’t we take them up one by one. Oh, here’s our food!” We were silent while the waiter served our sumptuous-looking dinners.

“This looks great,” Rodrigo said. “Usually I like trying different restaurants, but this one was so good last time that I’m glad I came back.”

When I beamed my own approval, he continued: “As I mentioned, my

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32. See Thomas G. Gee, *Race-Conscious Remedies*, 9 HARV. J.L. & PUB. POL’Y 63 (1986) (arguing that quotas seat unqualified people, giving rise to inefficiency); Lino A. Graglia, *Race-Conscious Remedies*, 9 HARV. J.L. & PUB. POL’Y 83, 86 (1986) (rejecting race-conscious remedies and contending that they sometimes result in qualified whites being denied admission to elite colleges).

33. On stigma, see Delgado, *Majoritarian Device*, *supra* note 5, at 1224-25 (arguing that questioning the fairness of affirmative action perpetuates stigmatization); Post, *supra* note 5, at 148.

34. On my young friend’s undergraduate and law school history, see Delgado, *First Chronicle*, *supra* note 1, at 1359-62; Delgado, *Second Chronicle*, *supra* note 2, at 1183-86; Delgado, *Fifth Chronicle*, *supra* note 4, at 1581-84.

arguments fall into three groups. One set of considerations is analytical and has to do with the way merit operates, on a discursive and conceptual level, to strengthen the hand of the powerful at the expense of the disempowered. A second has to do with the after-the-fact quality of neutral, marketplace-type mechanisms, that is, the way they enable life's winners to justify the status quo. They are almost impossible to apply even-handedly. And a final critique is historical, consisting of showing connections between today's meritocrats and those of former, more racist times. How's your couscous?"

A. RODRIGO'S FIRST ARGUMENT: MERIT'S INVISIBLE NONFORMALITY AND THE WAY THIS GUARANTEES THE CONTINUED ASCENDANCY OF ELITE GROUPS

"Great, for vegetarian fare," I replied. "You probably know my doctor told me to cut down on meat. It's hard, especially when you're traveling. So I'm glad you brought me here. Even in my old meat-eating days I loved Middle Eastern food."

Rodrigo gave me a sympathetic look. "Giannina is mostly vegetarian, too.<sup>35</sup> So, I have some idea of what you're going through. Want to hear the first argument?"

"Whenever you're ready," I said, taking a forkful of steaming hot couscous.

"The first problem I have with the idea of merit has to do with its majoritarian quality. Writers contributing to the critique of normativity in legal thought, among others, have pointed this out.<sup>36</sup> Merit is what the victors impose.<sup>37</sup> No conquering people ever took a close look at the conquered, their culture, ways, and appearance and pronounced them superior to their own versions. Those in power always make that which they do best the standard of merit.<sup>38</sup> This is true at all times in history, including our own. The SAT, for example, has test items about toboggans, lacrosse, polo, and other activities prominent in white, middle- and upper-class culture.<sup>39</sup> Graduate programs often emphasize linear, rationalistic thought over other kinds, and so on."

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35. On Giannina, Rodrigo's friend and soulmate, see Delgado, *Third Chronicle*, *supra* note 4, at 402; Delgado, *Fourth Chronicle*, *supra* note 4, at 1137; Delgado, *Sixth Chronicle*, *supra* note 4, at 640-42, 673-74.

36. See Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991) (containing articles by Pierre Schlag, Frederick Schauer, Steven Winter, Frank Michelman, Margaret Jane Radin, and the present author).

37. Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 956 (1991) [hereinafter Delgado, *Normal Science*].

38. *Id.* at 956.

39. See Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121, 127-38 (1993) (arguing that the LSAT is biased because the reading passages evoke emotional responses from minorities and women).

“There’s the famous chitlins test,”<sup>40</sup> I mused, half-seriously, wondering if Rodrigo, who grew up in Italy but was half African-American, had heard of such a thing.<sup>41</sup>

He smiled appreciatively and went on. “Not only does this aspect of merit disadvantage the poor, minorities, and anyone else whose upbringing and experience differ from the norm, it also can disadvantage women, many of whom have strengths and approaches that differ from those of their equally talented and successful male counterparts.<sup>42</sup> A man might choose to sit down with a calculator and a legal pad while a woman might start by thinking and talking about a decision with others. The man might believe that the logic stemming from his own reasoning skills can solve the problem without consultation with others. He might also believe that he and the others around him will be similarly affected by the decision he makes. A woman, on the other hand, may tend to believe that a collective decision is the most likely to succeed and to be accepted by others, who may or may not be touched by the decision in the same way that she is. But because men tend to be in charge of most things in this world, including hiring and admissions decisions, they will look for the logical and analytical skills that have worked for them. Not surprisingly, they will find these skills predominantly in other men. When a woman has those skills that men deem important, she will, of course, be hired, but only because she has this male-defined set of skills. Frequently the woman’s skills will include the ability to read and understand the people she has to work with and to motivate coworkers and subordinates. These abilities are necessary for the smooth operation of the workplace and the campus, but it is often left to chance that they will reside in the same people who possess the level of logical and analytical skills demanded by the evaluative committees. Therefore, imposition of the male standard not only discriminates against women, it also robs the group or institution of the diversity that makes it effective.”<sup>43</sup>

“I think you and I discussed something similar before,” I said, straining to remember.<sup>44</sup> “Did we not agree that two candidates, one white and one

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40. The chitlins test examines the test-taker’s familiarity with matters that are common knowledge in black and inner-city culture.

41. On Rodrigo’s period in Italy and Dublin before immigrating to the United States, see Delgado, *First Chronicle*, *supra* note 1, at 1358-59; Delgado, *Second Chronicle*, *supra* note 2, at 1183-87.

42. See Post, *supra* note 5, at 140-46 (discussing gender bias in the legal profession); Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 333-50 (1984) (detailing discrimination against pregnant women).

43. For a classic exposition of this view, see generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982).

44. See Delgado, *First Chronicle*, *supra* note 1, at 1364; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2433 (1989) [hereinafter Delgado, *Oppositionists*].

black—or one male, one female, for that matter—will often compete for the same position. Both are equally capable of doing a stellar job. But the interview, or job test, rewards the candidate who has the greatest store of cultural capital, the one who soaked up cultural knowledge so easily at his father's or mother's knee. The household had the right kind of music and books. The dinner table conversation taught precisely the mannerisms, conversational patterns, and small talk skills that the employer finds comforting, familiar, and reassuring. The more conventional candidate gets the job, even though the other one could have done just as well, maybe better.<sup>45</sup> This is an aspect of your majoritarian critique, is it not?"

"It is," Rodrigo replied. "And it never ceases to amaze me how tenaciously elite groups resist a realignment of merit that you would think would benefit them as well. Racism—any form of irrationality, really—is economically inefficient and bad for a society. So is a merit scheme that excludes and discourages the contributions of a major sector. Which leads me to the second observation, that merit is, basically, white people's affirmative action, as we once put it.<sup>46</sup> Oh, but before I forget, I told Kowalski all this, and do you know what his answer was?"

"No, what?"

"He said that all this may be true, but that *formal* racism ended in 1964.<sup>47</sup> Now, the only kind lies in attitudes, unconscious predispositions, that sort of thing.<sup>48</sup> Formally the playing field is level, and if the merit criteria are biased, the solution is to change them, not advocate dangerously inequalitarian measures like affirmative action—which, by the way, he insisted on calling 'reverse discrimination.' "

I winced. "And how did you deal with this objection?"

#### B. RODRIGO'S SECOND ARGUMENT: MERIT'S AFTER-THE-FACT, APOLOGETIC FUNCTION

"Historically. I pointed out that the emphasis on merit began in earnest in 1964. He got the connection quickly. Formal racism was phased out,

45. Delgado, *Oppositionists*, *supra* note 44, at 2432-34. Small talk skills may of course be necessary in some jobs. But should their lack be a bar for the minority or blue collar candidate who lacks them? I was reminded of how quickly Rodrigo was picking up idiomatic English.

46. Delgado, *First Chronicle*, *supra* note 1, at 1362-64.

47. See 42 U.S.C. § 2000(a), (h) (1964) (Civil Rights Act of 1964, which barred discrimination in hiring, education, housing, and other areas).

48. See Delgado & Yun, *supra* note 24 (discussing latter-day or unconscious discrimination); Thomas F. Pettigrew, *New Patterns of Racism: Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 686 (1985) (arguing that current racism is more indirect and subconscious than the racism of 1964); see also Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (arguing that racism is unconscious and rooted in reinforcement of society's cultural stereotypes).

veiled or nonformal racism came in—racism under the guise of excellence, fairness, equal opportunity, all the things that make up the constellation of attitudes and standards we call ‘merit.’”

“That’s good,” I acknowledged. “And if memory serves me correctly (I was much older than Rodrigo), that is more or less what happened. Before 1964 white males benefited from old-fashioned laws that cut down on the competition by eliminating blacks and women. They also benefited from old-boy networks by which they helped each other. The events of 1964 changed just the first part<sup>49</sup>—the other remained intact. In fact, merit today is a principal means by which empowered people, ones who have been to the best colleges, taken the same tests together, know each other, and talk the same way, ensure that they and their class remain in charge. It’s especially important today because the population is changing. Whites are no longer going to be a numerical majority. In some parts of the country, they are already in the minority.<sup>50</sup> Thus, it’s even more important than before to have the mechanisms to ensure that their class replicates itself in circles of power.”

“Not only that,” Rodrigo added. “Today, conditions are different. The era of economic growth is over. There is a shrinking pie. Thus, merit, which is a principal measure of distributive justice, assumes even greater prominence.”

“I’m not sure I follow you,” I said. “With a shrinking pie, isn’t it even more important to have clear-cut rules and standards to determine how that pie is to be distributed? Perhaps your problem with merit is not with the concept itself, but with the way it is applied. Merit is a kind of formalization.<sup>51</sup> Many of us have written of the connection between fairness and formality, the way in which courtroom rules related to the presentation of evidence, allowing both sides a prescribed time to speak, and so on, promote fairness and reduce prejudice. They confine discretion, which could easily be used against the minority, the woman, or other disempowered litigant.”<sup>52</sup>

“Good point,” Rodrigo conceded. “The trouble is that merit illustrates the wrong kind of formality. Its standards exclude morally relevant data,

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49. See *supra* note 47 and accompanying text.

50. On these demographic changes and their consequences for American institutions, see, e.g., Juan F. Perea, *Demography and Distrust: An Essay on American Language, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 371 (1992) (arguing that laws requiring the use of English language are a response to the growing influx of immigrants with different languages and cultures).

51. On the thesis that formal rules and procedures often can serve to minimize prejudice, see Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1400. See also Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1586-88 (1991) (applying similar thesis to divorce mediation).

52. Delgado et al., *supra* note 51, at 1354-60, 1368-84.

particularly events that happened in the past.<sup>53</sup> They prevent us from considering another principle of distributive justice, namely reparations or making amends. Blacks, Chicanos, and Native Americans were formally oppressed throughout our history by the many mechanisms with which you and I are familiar. The merit advocate says, 'Let's ignore all that and start being perfectly fair right now. How high did you score on the SAT?'

"An examination that, as we said, tests only a narrow range of skills, mainly of linear-type thought. White folks are perfectly willing to look to the past if that is where their merit badges lie, but not to ours if those pasts show disadvantage and hurdles surmounted. Of course, if *their* past includes a grandfather who immigrated from Ireland or a poor Baltic nation, they'll remind us of that over and over, overlooking the business dynasty the family established in between."

"A dynasty that may have taken real energy and talent to set up," Rodrigo pointed out, "but that nevertheless was aided by the advantage white skin conferred."

"So you're saying we can't be concerned just with distributing the pie fairly. We have to ask who set the table, invited the guests and made the place cards."

"Exactly," Rodrigo exclaimed. "And the place card example is perfect. Conservatives would probably be irritated at the suggestion that merit is comparable to etiquette. But in some ways it is. All cultures have utensils for eating, but they vary and no one set is necessarily better than any other. (Rodrigo indicated a group of diners on the other side of the restaurant who were seated on cushions and using their fingers instead of the more usual chairs and silverware). All have ways of assigning places to guests. In some, tradition prescribes who sits where; in others, place cards are used. Much the same is true of merit. Each society is organized in a particular way and has rules—which they call merit—to ensure that their organizational system continues undisturbed. But the organization and the assignment of roles is, to a very large extent, arbitrary. Move the basketball hoop up or down six inches and you radically change the distribution of who has merit.<sup>54</sup> Add items related to love, compassion, or intercultural awareness and you have a completely different SAT."

"But Rodrigo, if two candidates have exactly equal merit for a job, and one is white and the other is black . . ."

"They're not equal," Rodrigo interjected. "The black probably has come further. They are equal only if you arbitrarily decide that overcoming

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53. For a discussion of how current approaches to racial justice are often guilty of this, see Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 562-66 (1984); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1024 (1988) (showing how criminal law's procedures fail to take account of the legacy of discrimination).

54. I am grateful to Duncan Kennedy for this example. For a general discussion of this subject, see Kennedy, *supra* note 7.



advantage is not a component of merit. Many whites get inheritances; most people of color do not. Whites often receive artfully crafted letters of recommendation. When a teacher proposes an extra credit assignment that allows them to receive an A-minus in an honors course, a neighbor gives them a summer job, or their father stakes their first home mortgage, they consider that normal, not a part of race and class advantage. Yet it is. You might even consider it a form of affirmative action—a system of rewards and resources awarded without regard to merit.”

“There are exceptions,” I pointed out. “The black middle class is growing. And the minority old-boy network looks after its own, as well.”

“I know there are exceptions,” Rodrigo replied. “But all too few. Ones of another kind—what I call ‘cultural exceptions’—come up much more often.”

“I’m not sure what you mean by the term.”

“I think we were speaking of this before. Take a case close to hand. Law school teaching candidates are supposed to be hired because of their teaching and scholarly potential. But merit, like most legal terms, gets applied against a background of cultural assumptions, presuppositions, understandings, and implied exceptions, most of which operate against our people.<sup>55</sup> Return to our two candidates for a faculty position, one white and one black. Let’s suppose both served on law review and dutifully wrote the same well-researched note, heavy on case analysis. Both made the finalist round in moot court, and so are likely to be good teachers as well—to whatever extent one can predict that.”

“But the white gets the job, right?”

“Usually, yes. It turns out that the white had a more pleasant demeanor, was deemed better at small talk, and went to a well-known private school. The black seemed tighter, a little intense. The white comes recommended by a more well-known professor. The white ends up getting the job.”

“But isn’t the solution, then, to assure that *true* meritocratic criteria are applied and not those other self-serving, counterfeit ones? Wouldn’t it be better to insist that appointment committees steadfastly refuse to look at these other race- and class-based traits—ones that do not bear at all on teaching fitness, but simply render the candidate more familiar, more comfortable, more like one’s own kind?”

“That *would* be a start,” Rodrigo conceded. “But the number of presumptions and implied exceptions is virtually infinite, including things like dress,

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55. See Delgado, *Fourth Chronicle*, *supra* note 4, at 1141-52; Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 823-24 (1992); see also CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 50-51 (1987) (discussing the cultural power men possess vis-a-vis women); Lisa Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, The Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205, 1284-85 (1992) (arguing that women are subordinated by current pregnancy regulations).

hair, intonation, demeanor, sports played, and so on. One's checklist would have to be very long indeed. And then, there are all those 'common-sense' and 'emergency' procedures."

"I'm not sure what you mean."

"Imagine a hiring committee that starts out the season entirely fair-minded and meritocratic. It draws up a picture of the ideal candidate—Supreme Court clerk, graduate of a top school, author of a superbly crafted student note. It reminds itself, over and over, that it will hire, or at least take seriously, any candidate that meets those specifications, white or black. It posts ads and sends letters to faculty and alumni around the nation telling them of its needs."<sup>56</sup>

"And you're going to say," I interjected, "that such a committee will hire very few folks of color."

"It will hire few candidates, period," Rodrigo replied. "There are only a handful of such candidates out there. A few come through and interview, but turn their offers down—even the black candidate, the superstar with Thurgood Marshall-type credentials who unexpectedly decided to go to work for the NAACP Legal Defense Fund. Now it is February, slots remain open, including the position teaching Corporate Tax and Securities that they are desperate to fill. By now there are few candidates on the market with the superstar, formal credentials, the written-down ones that the committee started with in September. But there are several with credentials slightly lower than that. They still haven't found jobs, but are quite able lawyers, intelligent people. And they are known to the school's faculty. One of them remembers Joe, the smart lawyer he practiced with at the big firm; another remembers Martha, with whom she clerked for Judge X. The school makes a phone call, an interview is arranged, and a month later Martha or Joe has a job."

"Despite lacking the school's formal criteria—the Paul Freund/Thurgood Marshall ones it started out with." I was silent for a minute, absorbing Rodrigo's point. Then I added: "And all the candidates hired the second way are white, right?"

"Exactly," Rodrigo replies. "Every blue moon, a law school will hire a Thurgood Marshall-type black under the superstar, formal criteria. Although even then, half the faculty and students will persist in believing he or she got a helping hand. But folks like us are never hired the second, informal way the school resorts to in February when it is under pressure and the dean is screaming that the hiring committee has not filled the Trusts and Estates or the Tax slot. That's the trouble with nonformal processes—they favor people we know, people who are like us.<sup>57</sup> And in the hiring committee's case, those people are white."

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56. Delgado, *First Chronicle*, *supra* note 1, at 1361-64 (discussing a similar example).

57. *Id.*; see also Delgado et al., *supra* note 51 (considering manner in which nonformal

"The net result is that white people have two chances of getting hired," I summarized, "by being superstars and satisfying the ostensible, on-the-books hiring criteria institutions start out with in September or by means of the informal route the school resorts to in February or March when the season is almost over, and the harvest is not yet in."

"Every now and then a school hires one of us with credentials just short of the Thurgood Marshall-type—say, somebody who graduated fifteenth in his or her class and had a gilded three years as the star trial attorney in the district attorney's office. When this happens, everyone—including my friend Kowalski, I'm afraid—will go around muttering about the iniquities of affirmative action and unfairness to innocent whites."

"I've seen this happen," I said. "Sometimes I try a second tack. I point out that many of their most esteemed colleagues, hired under either the meritocratic criteria or the second kind, fall woefully short on any standard of professional excellence. One hasn't written anything in fifteen years. Another is such a notoriously weak classroom teacher that his enrollments are close to zero."

"Hmmm," Rodrigo said. "I think we have a couple like that at my school. And what happens when you point this out?"

"They always say that there's a reason. The first professor wrote the definitive work on nonprofit corporations twenty-five years ago and is obviously germinating another, equally good article. The notorious classroom teacher is simply demanding, or else has other talents, perhaps delivering great annual lectures to the bar, which is good public relations for the school."

"So merit criteria end up being applied against a host of background forces—meanings, excuses, understandings, practices, notions of what any commonsense institution would do—that favor whites. Whites were in a position of power long ago, years before the merit criteria were written into the faculty code. That code naturally is interpreted against the backdrop of these forces. And so, even the most scrupulously fair-minded appointments committee ends up hiring whites and passing over blacks."

"I once served on the university-wide admissions review committee. It was fascinating. It turns out that my university, like most others, has a host of express quotas and a like number of preferences:<sup>58</sup> drop-kickers, quarter-backs, legacy candidates whose parents are apt to give money if Johnny or Sally gets in, musicians, ROTC scholarship holders. Many of these individuals have SATs lower than those of the straight admits.<sup>59</sup> Then there's the

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legal rules can promote racism); Grillo, *supra* note 51; Johnson, *supra* note 53.

58. See generally Chandler Davidson, *Affirmative Action in Undergraduate Admissions: The Experience at Rice*, 2 RECONSTRUCTION 45 (1994) (discussing the use of quotas and preferences in contemporary elite institutions of higher learning).

59. *Id.* at 47-50.

geographic preference.<sup>60</sup> Our school likes to have students from far away, even though they all watch the same TV programs, study from the same textbooks, and write the same biographical essays. Hardly anyone sees these quotas and preferences as immoral, unfair to innocent nondrop-kickers, or worries that they might stigmatize the poor quarterback who enters with credentials lower than those of the National Merit scholar. None is seen as a derogation of the mighty principle of merit, although that is what they are.”

We were both silent for a minute while the waiter picked up our empty plates and asked whether we would like to see the dessert menu. We looked at each other, Rodrigo nodded enthusiastically, and I said, “Let’s have a look.”

A minute later I said to Rodrigo, “You seem to have given quite a bit of thought to this matter. But you said you had a series of considerations concerning the way merit criteria are *applied*. The ones you have mentioned so far seem to me to be intrinsic to the concept itself or to the language game of which it is a part. I’d love to hear your thoughts regarding merit’s application. But before we move on, is there more you have to say about the first part, the discursive or logical aspect?”

“No, I’m just about ready to move on,” Rodrigo said, looking around to see if the waiter was nearby. I marveled at my rail-thin young friend’s appetite while wrestling with my conscience over whether to have dessert or not. “Just one more thing.”

“What is it?”

“We previously observed that conquering nations, like elite groups today, always impose their own merit criteria on the people they subjugate.”<sup>61</sup> I nodded. “Ideas about merit and notions of cultural superiority have always been used to justify conquest and colonialism. Recall, for example, the white man’s burden of Kipling, the Conquistadores who brought the blessing of Christianity to Native Americans, the wrath of Allah that fueled the invading Moorish armies, and, in our time, banana-boat diplomacy that installed puppet regimes in Latin America to bring the people the miracles of democracy.”

“Yes, go on.”

“What I wanted to mention is that less idealistic nations, those with less normative zeal, were much more reluctant to impose their own merit criteria, and, as a result, were less oppressive victors.<sup>62</sup> The early Romans,

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60. See generally Alan Grob, *Geography: The Invisible Preference*, 2 RECONSTRUCTION 55 (1994).

61. See *supra* notes 27-28, 36-46 and accompanying text.

62. On normativity as a tool for rationalizing outright cruelty, see Delgado, *Normal Science*, *supra* note 37, at 941-57; Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 186 (1990).

for example, did not demonize their slaves.<sup>63</sup> They did not have to. The Romans were not Christians, and so had no need to paint their slaves as base, unsaved heathens.<sup>64</sup> They did not, in other words, have to deem them normatively bad, lacking in merit. Our society, on the other hand, does need to do so, in order to justify our own bad acts. Thus, we demonize our enemies in war, and our own minority populations as well.<sup>65</sup> We employ backwards reasoning: the subjugated *must* be bad, we treated them so badly. And we are more prone to this rationalization than a more cheerfully secular group of conquerors, such as the Romans. Merit-based ideas help us live comfortably despite the discrepancy between our ideals of brotherhood and equality and the reality of the poverty and blighted lives that we see in minority and poor populations all around us.”

“Whites *hate* merit plans,” I mused, “when they are applied against them. School teachers’ unions oppose merit plans with a passion. And don’t even try to get a law faculty to take seriously the idea of doing away with tenure and evaluating every professor on a year-to-year basis.”

Rodrigo smiled in appreciation of my suggestion, then said: “That’s all I have under the first head. Ready for the application?”

“That *and* dessert,” I said, which made Rodrigo smile even more.

C. RODRIGO’S THIRD REASON: MERIT RULES DISADVANTAGE MINORITIES  
AND THE DISEMPOWERED EVEN WHEN APPLIED BY THE MOST  
FAIR-MINDED OF ADMINISTRATORS

“Those look great,” Rodrigo said, staring eagerly at the dessert tray. “What’s that one?” he asked the waiter.

The waiter explained and withdrew after taking our orders, a variegated flan for Rodrigo (“They have something similar in Italy”), and for me a banana pudding that the waiter promised was low in calories.

After the waiter disappeared from view, I said, “So, Rodrigo, you think that merit operates to harm and disadvantage minorities not only in its structure, but also practically, in the real world? I assume you mean something other than the ordinary disparate impact that the Supreme

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63. See JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM* 27-28 (6th ed. 1988). For classic works on slavery, including the early Roman variety, see generally EUGENE O. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1974); LEON LITWACK, *NORTH FROM SLAVERY* (1977); ORLANDO PATTERSON, *FREEDOM IN THE MAKING OF WESTERN CULTURE* (1991) [hereinafter PATTERSON, *FREEDOM*]; ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* (1982) [hereinafter PATTERSON, *SLAVERY*].

64. See PATTERSON, *FREEDOM*, *supra* note 63, at 227-57; PATTERSON, *SLAVERY*, *supra* note 63, at 7, 72.

65. On this seeming need and the mechanisms by which it is discharged, see generally 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) [hereinafter Delgado & Stefancic, *Images*]. On their application in wartime, see generally ROBERT JAY LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* (1986) (describing corruption of a profession through the alteration of its mindset).

Court finds insufficient in employment settings except when an extremely over-general exam is used to screen out, say, state plumbers or custodians.”<sup>66</sup>

“I am familiar with that line of cases. I was thinking of something even more pernicious. Earlier, you and I were talking about the canonical effect of certain words and social practices.<sup>67</sup> There is nothing more canonical than merit. A canonical practice or meaning resists change almost by definition, for it is one of the prime mechanisms we apply to determine when change is desirable.”<sup>68</sup>

“That means that our notion of merit is very slow to change,” I said. “I agree with that. Look how laggardly our acceptance of multiculturalism has been, and how campus curricular reform has sparked such resistance.”

“In part that’s because changes in courses required and books assigned come with the implied statement that these new authors and subjects are worth learning about. Persons who believe that only the Western ‘greats’ are properly on that list naturally protest.”<sup>69</sup>

“Take a case we discovered at my old school. My friend Ali and I were on a faculty-student committee charged with revising the first-year curriculum.<sup>70</sup> I was the LL.M. delegate, Ali the alternate. We were doing some fact checking in the placement office when we discovered something interesting. The minority students, many of whom had been admitted under affirmative action programs and with lower indices, were graduating at virtually the same rate as the rest of the class. Not only that, they were getting jobs and passing the bar at similar rates and even making more money—not a lot more, but still more. Moreover, a slightly *higher* percentage were going into prestigious jobs like teaching and clerking for federal judges. All the students, of course, were brilliant, and virtually all did quite well in later life. But the minorities were doing as well as the others and, in some cases, better. All this despite entering credentials that were, on average, considerably lower than those of the regularly admitted students.”<sup>71</sup>

“And what moral did you draw from this?” I asked.

“I thought immediately that the LSAT must be encoding some form of cultural preference for the whites, who had higher scores than the minorities, but ended up doing little, if any, better. But most of my classmates advanced a different theory.”

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66. See *Washington v. Davis*, 426 U.S. 229, 246, 250 (1976) (holding that some relationship between object of testing and goals of police training program satisfies Constitution, despite disparate impact on black applicants).

67. See Delgado, *Sixth Chronicle*, *supra* note 4, at 646, 657, 663.

68. See *id.* at 665-68.

69. See, e.g., BLOOM, *supra* note 8, at 336-47, D'SOUZA *supra* note 8, at 59-68, 94-122, 157-67.

70. See Delgado, *Sixth Chronicle*, *supra* note 4, at 661.

71. *Id.*

“What conclusion did they draw?”

“First, they were suspicious of my figures and wanted to know where I had gotten them. When I said the placement and alumni affairs offices, they were dumbfounded. Many of them insisted that the results must be the product of affirmative action in wider society—judges and employers applying the helping hand to the less qualified minority, and so on.”

“And that’s what you mean by the canonical function of merit, right?”

“Yes, Professor. The whole point of the canon is to defend itself, to insist that countervailing evidence justify itself in terms of the canonical idea. So, when the ostensibly less-meritorious minorities did well, it must be attributable to a further derogation of merit, namely favoritism in later life. Canonical ideas resist change, insist that new evidence be interpreted in light of them, a near-impossible task for the proponent of social change.”

“Merit goes along with what is canonical, placed at the center, with the ‘I.’ If those others are succeeding, it must be because they are getting unfair help. Canonical narratives of all kinds exist largely for that purpose: rationalizing and justifying the way things are.<sup>72</sup> That and making them seem right and true,” I concluded.

Rodrigo nodded. Resolving to play the devil’s advocate as long as possible, I added, “But Rodrigo, what about when you and I grade blue-books. Aren’t we applying merit criteria? Don’t we apply merit criteria every day in life? Say I go to the grocery store and buy a dozen Grade A potatoes. Am I guilty of buying into a canonical sin, of reinforcing the status quo? I have to eat, and I want to eat the best quality potatoes. What’s so wrong with that?”

“Nothing,” Rodrigo replied, taking a last bite of his flan and scrutinizing the bottom of his dish to see if there was any more. “But grading people, especially for something as long-term as a job or seat in law school, differs radically from the task of grading potatoes. When the grocer grades potatoes, the potato is static. It will be bought and eaten within a short time. The grocer properly applies a freeze-frame approach, looking only at the potato as it is now—its color, texture, shape. It is irrelevant how far the potato has come or how far it is likely to go in the future. People, however, are dynamic. Imagine a super-potato from another planet. Would you like to buy and eat one merely because right now it resembled all those other ordinary ones sitting in the grocer’s bin?”

I smiled at Rodrigo’s example, and he continued as follows: “I’m sure

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72. On the role of these and other mainstream narratives in confining and resisting change, see generally Delgado & Stefancic, *Images*, *supra* note 65; Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991) (exploring the particular situation of judges); Ikemoto, *supra* note 55 (presenting the narrative of the perfect mother); Matsuda, *supra* note 23 (describing the perpetrator versus victim narrative in hate-speech controversy); Ross, *supra* note 7 (presenting the “innocent white” narrative).

you've had the experience, Professor, of attending a reunion of the black or minority law students association ten years after graduation. I attended one the other day. It was impressive."

"Half the alums were commissioners or judges," I guessed.

"Exactly. Others were partners of major firms. One was a law professor at a law school even more highly ranked than my own."

"It happens every time. Yet the law school persists in treating affirmative action candidates as disadvantaged and likely to fail. It offers them special help and tutoring sessions."

"Which many are glad to have," Rodrigo said. "I went to a few myself in the early months of my LL.M. program. Even though I got decent grades in law school, I was struggling to get the hang of the American legal system. The sessions I attended were quite helpful."

"But then you transcended them," I said. "You caught up. You joined the other potatoes in the bin, and even went them a little better."

"Oh, I don't know if I did any better than they did," Rodrigo said, a little impatiently. "I may have a modest talent for writing and exploring unorthodox ideas. I'm not so sure I'm a better potato. Maybe I just work harder and am willing to take more chances."

"You're Rodrigo," I emphasized. "And I, for one, am glad you're around. And, I might add, very happy you entered the teaching profession. That way, at least we get to see each other on occasions like this rather than once every ten years at your class reunion dinner."

"Merit *recedes* for us, as I once put it in a conversation with Ali, while it *proceeds* for whites.<sup>73</sup> We have our accomplishments explained away while the others have their golden status continue long after their initial advantage, gained at Mom's and Dad's knee, has worn off and their accomplishments become quite ordinary. Like the hypothetical professors you mentioned earlier, Professor."<sup>74</sup>

"I wish they were hypotheticals," I said ruefully. "But they are based on actual cases. In a fair world, blacks would hold about ten percent of most of the desirable jobs. But they don't, and so-called merit criteria, operating as they do, are one of the principal tools by which those numbers are kept down."

"One thing troubles me, though," Rodrigo interjected. "Whites still allow us a token few—if not ten percent of faculty jobs, then two or three. Wouldn't a ruthless adversary, one who dominates all the councils, one who gets to draw up all the job descriptions, arrange matters so that we got none of the good things in life?"

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73. See Richard Delgado, Comment, *Beating Them at Their Own Game*, 1 RECONSTRUCTION 121, 121-22 (1992) (reviewing STEPHEN CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991)).

74. See *supra* text accompanying notes 55-58.



"They need tokens," I said, "so that things don't appear too inequitable, and so that they can tell themselves and each other that things are improving for blacks.<sup>75</sup> Theoretically, the numbers could become so suspicious as to call for an explanation. But courts don't like statistical proof of discrimination and lean over backwards to avoid finding prejudice in numbers that anyone would think bespeak it.<sup>76</sup> There could always be another explanation, such as lack of interest.<sup>77</sup> But, I think there is a deeper reason why courts don't intervene."

"I bet I know what you are going to say," Rodrigo interjected. "Courts don't review the criteria themselves. They police only the periphery, the application. They never consider whether merit criteria themselves are skewed, only whether merit is tested in a rational way, one related to the job at hand. Conventional merit that may be deeply biased against minorities goes unquestioned. It's like announcing you're going to hang someone, and then when he or she complains, pointing out that you're using a nice, sanitized rope. Any criteria could be job-related. And, of course, all the job descriptions are written by the majority, which happens to be white."

"I think I could use an example."

"I ran across a great one in a magazine I found on the plane that I took here. An ad by U.S. English, which opposes bilingual education for Hispanics and others, was entitled, 'Why a Hispanic Heads An Organization Called U.S. English.'<sup>78</sup> The ad explained the group's position by employing the rhetoric of equal opportunity. Even though it wishes to force everyone, including the foreign-born, to stop speaking their native languages and struggle along as best they can in English, the organization described itself as entirely egalitarian." Rodrigo fished out the ad and read: "'On the job and in the schools, we're supporting projects that will ensure that all Americans have the chance to learn the language of equal opportunity.'"<sup>79</sup>

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75. On optimism and the insistence that "things are improving," see Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 *YALE L.J.* 923, 928-47 (1988). See also Linda S. Greene, *Race in the 21st Century: Equality Through Law?*, 64 *TUL. L. REV.* 1515, 1539-41 (1990) (questioning the pace and direction of reform).

76. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-99 (1989) (finding no redressable discrimination evidenced in city's history of awarding construction contracts even though blacks received only 0.67% of prime construction contracts in a city approximately 50% black); *McCleskey v. Kemp*, 481 U.S. 279, 287, 297-99 (1987) (finding no discrimination in a state practice that resulted in a disparity of greater than four to one in racial sentencing patterns).

77. See generally Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 *U. CHI. L. REV.* 1073 (1992) (analyzing judicial responses to arguments that racial and sexual inequality in employment reflect a minority group's lack of interest in advancement rather than a pattern of discrimination).

78. *Why a Hispanic Heads an Organization Called U.S. English*, *HEMISPHERES*, Sept. 1994, at 42.

79. *Id.*

"Equal opportunity?" I asked. "That sounds like Orwellian doublespeak."

"Not really," Rodrigo replied. "If you adopt the organization's view of linguistic merit—namely, speaking English—their position is quite consistent. Once you accept that, everything else follows, including the part about equal opportunity."

"Of course, one might hold that it is better to be bilingual than monolingual," I said vehemently, recalling my own struggles to learn Italian early in life and then more recently in preparation for a trip to Italy. "One could hold that speaking more than one language is an advantage, a sign of a cultured person."

"In that case, the organization and its agenda would appear vulgar and xenophobic. But if your mission (Rodrigo looked again at the ad) is the preservation of our common bond through our common language," Rodrigo said as he took another look at the ad, "then speaking other languages, by definition, threatens that goal."<sup>80</sup>

"I'll take cosmopolitanism," I said. "But it *is* odd that the organization urges repression of linguistic minorities under the banner of equal opportunity."

"It's all in the definition," Rodrigo replied. "If your goal is forcing everyone to speak English, then your program will seem to you like equal opportunity. It treats native speakers of English and immigrants alike: everyone must speak the official language. And this is true in general. If you exclude from the definition of merit what another group values, likes to do, and does well, they will naturally turn out to be meritless. And your actions in coercing them to learn what you deem important will seem well-intentioned, fair, and just—a favor of sorts to the benighted."

"So, you believe that merit is not only biased, it's also undemocratic because it inexorably leads to tyranny of the majority. But surely we need *some* criteria. Otherwise you'd be calling for lazy, unqualified people to get desirable jobs—people who don't deserve and haven't earned them."

"Not at all," Rodrigo replied mildly. "Slackers get jobs right now. The economy of this country is sinking, its productivity and quality of life are at one of the lowest rates ever.<sup>81</sup> The workforces of many Asian countries are as productive as ours, and their children attend school for more hours and earn higher scores on standardized tests.<sup>82</sup> Our traditional merit criteria are ensuring mediocrity. It's quite alarming."

"And you think that our preoccupation with merit is the cause?"

"It's one," Rodrigo replied. "Unless constantly revised, modernized, and renegotiated, merit causes complacency, causes meritlessness, like the

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80. *Id.*

81. See Delgado, *First Chronicle*, *supra* note 1, at 1370-73, 1375.

82. *Id.*

British aristocracy, a millstone around Great Britain's neck. The more absorbed in 'merit' a system becomes, the worse it will fare in world competition."

"Perhaps we can get to solutions for our misguided emphasis on merit later. But I think you were hinting earlier that one cause of this complacency or sluggishness displayed by the meritorious victors, the phenomenon we now see in the West's slipping economic position and lost markets, is that merit has an apologetic effect of some kind.<sup>83</sup> Could you explain this a little further?"

"Sure. Merit rules reassure life's victors that their wealth and favored positions were deserved. Looking around them, upper class, suburban folks might feel guilt, might feel uncomfortable over the large numbers of poor and black people leading blighted lives as a result of slavery and racism, on the one hand, and economic dislocations and loss of jobs, on the other.<sup>84</sup> If they can persuade themselves that their comfortable positions were fairly won, then they need not feel responsible. They won because they were entitled to win; the others lost because they did not work hard, or lacked the brains or other meritorious qualities that were necessary to achieve success. All neutral, marketplace mechanisms have this function. And it's self-defeating because it reduces competition and enables those who are currently comfortable—if only because of Daddy's inheritance—to become lazy."

"It produces a slack people," I added.

"So it does. And so we have come full circle once again," Rodrigo replied. "Oh, here comes our waiter."

"Would you gentlemen like some coffee?" the waiter asked.

"A cappuccino for me—double, if you have it," Rodrigo said.

"Decaf," I said. "Doctor's orders." As the waiter retreated, I said, "I gather you think this is one reason for the West's current predicament."

"Yes," Rodrigo replied. "And as world conditions change, it is doubly ironic that we end up demonized and excluded from merit and life's bounty. For it is our skills and talents that the United States needs more desperately than ever if it is to solve its environmental crisis, learn new patterns of social responsibility, and acquire new approaches to family organization and caring for the aged.<sup>85</sup> All these tools and practices are within the repertoire of minority groups. We could teach them lessons of incalculable value, ones that might help arrest the country's decline. But

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83. See *supra* notes 36-43, 49-65 and accompanying text.

84. See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) (presenting statistics and descriptions of the predicament of the black underclass); HACKER, *supra* note 4, at 19-198 (same).

85. See Delgado, *First Chronicle*, *supra* note 1, at 1373-80; Delgado, *Third Chronicle*, *supra* note 4, at 391, 398-99, 409-14.

they deny and reject, demonizing the very thing that could save them.”<sup>86</sup>

“A sad irony that I’m afraid will become apparent only too late,” I said somberly.

“Oh, great! Here’s our coffee!” Rodrigo exclaimed.

After we had sipped our beverages briefly, Rodrigo continued. “Are you ready for another paradox, Professor? I was thinking about this the other day.”

“I have all the time in the world,” I said. “They wanted me to be on a second panel tomorrow, but I demurred. I’m too old for double duty, I said. So I’m limiting myself to just the one speech. You’ve got me as long as I’m vertical and responding to stimuli—which in my case,” I estimated as I looked at my watch, “is probably ten o’clock.”

“It’s a little after nine. Let me know if I’m wearing you out. I find these conferences stimulating and could probably go on all night. But you’ve been traveling today, plus you just gave a great twenty-minute speech. Let me know if we’re overdoing it.”

“I will,” I said. “Please go on. I love paradoxes. What’s your new one?”

“I call it the paradox of disbursed merit. Michael Shapiro coined a similar term in connection with biomedical technologies.<sup>87</sup> Disbursed merit is the idea that society is capable, in many ways, of distributing qualities and skills that are constitutive of the very idea of merit. For example, law school itself probably boosts a student’s LSAT. That is, if most of our students retook it after two or three years of training in case analysis, they would probably score higher than they did when they took it the first time. The old adage, learning to think like a lawyer, probably has at least a grain of truth in it. The same is true of many other highly selective callings. The best athletes make training squads and Olympic teams. They thus get more practice time, access to coaches, trainers and physicians, diet help, and so on, and so rapidly increase the gap between themselves and their less-favored competitors. Movie stars, already beautiful, earn the money to buy cosmetic surgery and become even more attractive. The haves increase their lead over the have-nots, and not just because skill, intelligence, and beauty are at a premium in our society. It is also because the resources that they enable you to command permit you to buy further increments of skill, intelligence, and beauty. This enables the haves to become more meritorious, richer, and better able to buy merit-enhancers, in an endless chain.”

“I agree that’s how things work. But I’m not sure I see the paradox. Isn’t that the inevitable result of any competitive, marketplace-oriented society?”<sup>88</sup> The rich get richer. It’s always been that way.”

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86. See Delgado, *First Chronicle*, *supra* note 1, at 1374, 1376-77.

87. Shapiro, *supra* note 27, at 319-23.

88. On the relation of economic marketplaces and discrimination, see Delgado, *Second*

“The paradox lies in the moral irrationality of rigorously applying merit criteria to distribute regimens, programs, or medicines that can give the beneficiary a boost in an attribute that forms a part of, or is a pre-existing element of, those very same merit criteria.<sup>89</sup> It would be like a paint store that only sold yellow paint to houses that were already yellow. If law school can boost anyone’s LSAT and can make practically any intelligent person into a competent lawyer, then it becomes irrational to insist on a high LSAT as a condition of entrance.”

“To resolve that paradox, then, we would need to turn to other distributive principles, such as equity, utility, reparations, and the like to make the entrance determination. Once society develops the means radically to increase a person’s merit in a particular regard—whether it be intelligence, strength, beauty, analytical ability, or health—it becomes pointless to continue to distribute the benefit based on pre-existing possession of that very same attribute. I gather that’s what you mean by your paradox. And I think I agree with it,” I said. “You may be onto something.”

“It’s not only a paradox, Professor. It’s a potent argument against over-reliance on merit, particularly in educational settings. It seems to me to set an important limit upon the meritocratic ideal, one that should give even conservatives pause.”

“Did you mention it to Kowalski?”

“I did. He resisted less than I expected. On his own he pointed out that distributing increments of merit based on merit criteria could create dynasties. Merit is a resource-attractor in our society.<sup>90</sup> If we limit distribution of merit-conferring attributes and skills to the brilliant and talented then we guarantee that they will corner the market, so to speak. Kowalski loves market theory.”

“To some extent this is happening now,” I pointed out. “The wealthy set their children up in business, provide them with trust funds. The well-educated see to it that their kids get the best possible educations, sometimes with an assist from legacy programs instituted by the educational institutions.<sup>91</sup> In America, a small percentage controls an overwhelming portion of the net wealth;<sup>92</sup> this may be part of the reason.”

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*Chronicle*, *supra* note 2, at 1189-93. See also Regina Austin & Michael Schill, *Black, Brown, Poor, & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL’Y 69, 70-71 (1991) (examining the correlation between profits and health in the poor minority community).

89. Shapiro, *supra* note 27, at 322-23.

90. See generally *id.* (describing the role of resource-attractors in economic and distributive theory).

91. On legacy programs that aid the children of alumni in obtaining admission to elite schools, see generally John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491 (1993).

92. See sources cited *supra* note 28 (detailing stratification in U.S. economic and social life).

"Professor, do you recall our earlier discussion about how merit is context-dependent—how it all depends on what society values?"

"Yes. You gave the example of the hoop in a basketball game.<sup>93</sup> You also mentioned women's roles in group situations."<sup>94</sup>

"Well, it just occurred to me that many of the qualms you, I, and other progressive people have with the idea of merit, aside from its disreputable history, relate to its interdependency."

"Do you mean the contextual quality we were talking about before or some other kind?"

"I mean that which arises by virtue of the social construction of the notion of a person. Most people can be made to agree that persons do not exist in a vacuum; rather, we are coterminous with our social surroundings. Someone who lived his or her entire life on a desert island would scarcely grow up to be anything we would recognize as a person. We all derive our identity, in large part, from the social practices, roles, and expectations of the culture into which we are born. These include the premiums that we place on certain things as constitutive elements of merit."

"And I assume you mean the same is true of demerit, merit's opposite?"

"I do. That's part of the reason why I think society's toleration of the ubiquitous imagery in popular media and the press of minorities as criminal, stupid, vicious, and sexually licentious<sup>95</sup> is worth addressing."

"I assume you would include hate speech. That runs your argument directly counter to the First Amendment. Our friends in the ACLU would not like that."<sup>96</sup>

"All I am saying is that the social construction of demerit, like that of merit, raises serious problems and needs to be addressed. I have a feeling there are the same irrationalities and inequities built in on that side, as well. But that's a subject for another time."

"I agree," I said, looking at my watch. "I'm afraid I need to be getting back to the hotel soon. Much as I love this place and have enjoyed our conversation, Rodrigo, an old man like me needs his sleep. And I do have that early plane to catch tomorrow morning."

Both of us were silent for a moment. The waiter materialized, coffee pot in hand. "Would you gentlemen like refills?" he asked. We each looked at the other. "I believe there was one final point about history that we were going to explore," Rodrigo said, noncommittally. "I'm going strong, but you've had a long day."

I hesitated. The coffee looked good. Just then Rodrigo looked past my

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93. See *supra* note 54 and accompanying text.

94. See *supra* notes 42-43 and accompanying text.

95. See generally Delgado & Stefancic, *Images*, *supra* note 65.

96. See, e.g., sources cited *supra* note 11.

shoulder and with a shock of recognition said, "Kowalski! What are you doing here?"

I turned to see a strikingly pale young man, about Rodrigo's age, with a neat suit, short hair, and an alert, sparkling expression. I half-stood, Rodrigo introduced us, and I invited Kowalski to sit down. It turned out that he had just arrived for a morning panel the next day on tenure. "We were just discussing merit," Rodrigo said. "Would you care to join us?"

"I'd be pleased to," Kowalski said. "Although I'm just here for a snack. Looks like the two of you are nearly finished."

"Please stay," I said. "Rodrigo was going to give me the last chapter of a conversation he says was inspired by you. He was going to review the history of merit and meritocracy in the United States and draw some lessons." I turned to Rodrigo. "I hope I'm not putting you on the spot."

"Oh, no," Rodrigo replied. "Laz and I tell each other everything. Nothing scandalizes him, even my most wild-eyed radical ideas. He loves debate and, as you will see, is capable of holding his own on anything. Right, Laz?"

The pale young man smiled and said, "We'll see. I get as much out of Rodrigo's challenges as he gets out of mine. I'd love to hear what you have to say." He gestured toward the waiter, ordered a spicy dish—I complimented him on his choice—and Rodrigo began:

### III. IN WHICH RODRIGO AND HIS FRIEND DEBATE MERIT'S HISTORY AND WHAT IT MEANS FOR TODAY

"I'm really happy you showed up, Laz," Rodrigo said. "I didn't know you were coming. The Professor and I were talking about some of the same things you and I discussed the other day."

"Still resisting merit, eh?" Kowalski said. "Ironic—the most brilliant member of our faculty, and you're still at it, deconstructing your own talent and distinction. I think you liberals are just uncomfortable with your own smarts, your own status. Such levelers. Too bad." Kowalski smiled warmly to let us know he meant nothing personal.

"Touché," Rodrigo replied good-naturedly. "But even if you are right about liberals on a personal level, there still remain a host of irrationalities and problems with merit, even more than the ones you and I were talking about before. The Professor and I developed them further just now. If you like, I can bring you up to date when we get home. Actually, what flight are you on? Are you flying home tomorrow?"

It turned out that the two young scholars were indeed on the same flight. They quickly made plans to phone the airline and change their seat assignments to sit together. "I've got the 800-number somewhere," Rodrigo said. "Maybe I'll do it as soon as we get back to the hotel." He caught the waiter's eye, indicated we would indeed like coffee, and resumed his colloquy.

"I'm sure both of you know how the early anthropologists, up to the period of Franz Boas, were fascinated by the idea of proving racial differences, particularly ones involving intelligence and cranial capacity."<sup>97</sup>

"Most of these have been discredited," Kowalski said quietly. "No one of my acquaintance or political persuasion would give them any credit today. That was a disgraceful chapter in our history. I hope you are not going to tar the entire idea of merit with the brush of the early extreme pseudoscientific meritocrats."

"No one subscribes to the crude versions of those early race-IQ theories," Rodrigo said. "But the history of the idea is still relevant today, as I hope I will get you to see. In many respects today's most strident meritocrats are the straight-line descendants of the late nineteenth and early twentieth century ones. And in some respects, their agenda and arguments are exactly the same. Consider the current SAT, administered by the Educational Testing Service for the College Board. Until recently, the test had items about oarsmen and regattas. It contained questions about polo and mallets.<sup>98</sup> It is eminently coachable. The director of one of the prominent test-coaching companies, which charges between five hundred and one thousand dollars for its services, recently admitted—boasted, really—that his organization was able to boost the score of the average test-taker by 185 points.<sup>99</sup> Thirty percent improved by 250 or more.<sup>100</sup> Because of the high price charged, the children of the wealthy are more likely to be able to take the course."<sup>101</sup>

"I must admit I took such a course myself," Kowalski said. "Twice, in fact. Whether it helped my score or not, I don't know. But my parents were not at all rich, as you know. I saved up the money because I wanted to do well. If poor kids are disadvantaged by the test, is not the solution to eliminate those test items that are unfair and to make sure that the cram courses offer scholarships for poor kids who can't afford them?"

"That would be a start," Rodrigo said a little dubiously. "But I think the whole enterprise ought to come under scrutiny. The test's principal originator, Carl Brigham Campbell, was an out and out white supremacist who published a book in 1923 entitled *A Study of American Intelligence*. In the book, Campbell cautioned that inferior immigrants and minorities were swamping the country at the expense of those with superior European genes. He warned against interbreeding and urged that we close our borders. Two years later, he became director of the College Board's testing program. He based the first test on Madison Grant's *The Passing of the*

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97. See generally STEPHEN JAY GOULD, *THE Mismeasure of Man* (1981).

98. STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH (AND IT'S A GOOD THING, TOO)* 63 (1994).

99. *Id.* at 63-64.

100. *Id.* at 63.

101. *Id.* at 62-64.



*Great Race*. Its purpose was to confirm the superiority of white test-takers pure and simple. It is no different today: Merit is up-to-date bigotry.<sup>102</sup>

"I had not heard about the SAT's history. That's appalling," Kowalski said. "But I'm not sure what it has to do with today. No one advocates those distasteful notions any more. And isn't merit the best protector blacks have against intolerance? How else can you dispel negative stereotypes, except by succeeding, being successful, demonstrating your merit?"

"That's just what we are prevented from doing," Rodrigo replied. "Remember those test items about regattas. They actually had an item like that on the version of the LSAT I took. I knew what the word meant because it's similar to one in Italian. However, if I'd been a smart but poor ghetto kid, I might have failed that item. Fairness, including fairness in testing, is always a contested concept, always relative to someone's interests, perspectives, and purposes. It does not stand outside experience in some external realm. It's a matter of what we deem important. And the 'we' is generally those who are in a position to assure that their own merits, values, standing, and excellence remain untouched."<sup>103</sup>

"I still think you are putting too much emphasis on early history," Kowalski said. "The test may have been biased back then, and maybe a regatta or two creeps in even now. But ETS has professional test validators, experts who comb the items for bias. And surely you cannot say there are no differences in legal aptitude or ability. You're a teacher! Rodrigo, you see those differences every day, every time you teach a class or grade a bluebook. What's wrong with trying to see that legal education is not wasted on those who simply can't get it, on whom it won't take hold? You do no favor by admitting someone who has so little talent for analysis that every law school class is a torment, every exam a humiliation. And if they don't pass the bar, they've wasted three years."

"We were talking—the Professor and I—about bar results, jobs, and so on, before you came in.<sup>104</sup> I can bring you up to date on those things on the plane back, if you want. But I'd like to return to history, if the two of you don't mind. And no, Laz, I don't think that the history of an idea is irrelevant to its current function and understanding. Some of the modern conservative and neoconservative writers sound themes remarkably similar to the now-discredited ones from that rougher, more overtly racist era. (Rodrigo pointed out the book his friend had been carrying that now lay on the booth seat next to him). Jared Taylor is an example,<sup>105</sup> but some of the more moderate conservatives and neoliberals are saying the same things."

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102. *Id.* at 64, 81, 85-86.

103. *See id.* at 4, 8-10, 85.

104. *See supra* notes 70-73 and accompanying text.

105. JARED TAYLOR, *PAVED WITH GOOD INTENTIONS: THE FAILURE OF RACE RELATIONS IN CONTEMPORARY AMERICA* (1994).

"Patrick Moynihan says that blacks in the urban underclass are evolving into a new and different species, cut off from the rest of civilized society and developing mores and a culture of their own, passed down from mother to son. Speciation, he calls it," I remarked.<sup>106</sup>

"And he's a Democrat!" Rodrigo exclaimed. "Then there's Arthur Schlesinger, who is from the same party. His recent book, *The Disuniting of America*,<sup>107</sup> tells how the recent ethnic upsurge is tearing the country apart. He sets forth the argument that multiculturalism and identity politics are weakening the Anglocentric culture that formerly constituted a common bond, making us a single nation. He deplores that we as a nation are getting away from the old ideal of assimilation that encouraged immigrants and minorities to shed their ethnicities in favor of WASP culture and tradition. He says this is not only bad for the country, but also for minorities. For the American tradition is 'the unique sauce of individual liberty, political democracy, the rule of law, human rights, and cultural freedom.' Collectivist cultures, by contrast—and by those he means us, I'm afraid—'have stamped with utmost brutality on human rights.' He considers them tribalistic, despotic, superstitious, and fanatical. It is absurd that society is asked to give those cultures equal respect. White guilt, he says, can be pushed too far."<sup>108</sup>

"I've read that book," Kowalski said. "And it is possible that the author goes a little too far. Other cultures, including my own, have given America much of what it has to be proud of, ranging from some of its best music to its top scientists, and even," he noted as he gestured toward his plate full of steaming dolma-type delicacies, "its finest food. Yet, I think he has a point when he says that the American synthesis has an inevitable Anglo-Saxon coloration.<sup>109</sup> If so, then he is not amiss in portraying racial separatism and separate dorms for blacks as forms of balkanization."

"I'm not so sure why it has to be that way," Rodrigo replied mildly. "*The Passing of the Great Race*<sup>110</sup> echoed some of the same themes, warning of chaos and disorder. Immigration continued, yet the evils the author warned of did not come to pass. Some of the 'English-Only' people sound some of the same alarms. Their theory of language is that English ought to reign supreme, that its sacred texts, including the Bible and Shakespeare, are the only guarantors against barbarism.<sup>111</sup> The problem I have is that there

106. Charles V. Zehren, *Changing of the Species?*, NEWSDAY, July 14, 1994, at A4.

107. ARTHUR SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (1991).

108. *Id.* at 10-12, 71, 126-29.

109. *Id.* at 13-14.

110. MADISON GRANT, *THE PASSING OF THE GREAT RACE OR THE RACIAL BASIS OF EUROPEAN HISTORY* (1920); see FISH, *supra* note 98, at 81-86 (discussing this book and other early books sounding the nativist theme).

111. See *supra* notes 78-80 and accompanying text; FISH, *supra* note 98, at 12-13, 81, 83-86 (analogizing current assertion that multiculturalism introduces barbarism into the educa-

is a match, virtually a one-to-one correspondence, between the new writers and the old ones who wrote tracts about white supremacy. Lawrence Auster's 1990 book<sup>112</sup> warns that we are seeing the end of Western civilization in recent immigration reform acts,<sup>113</sup> which modestly relax the previous restrictions against immigration from the Third World. Richard Brookhiser, senior editor at National Review, has written in his book, *The Way of the Wasp*,<sup>114</sup> that Anglo traits such as conscience, antisensitivity, industry, and success must be preserved over the opposite cultural traits that minorities and foreigners bring, namely self, creativity, gratification, and group-mindedness. If we allow the former traits to be submerged by the latter, America is sure to lose the way.<sup>115</sup> These ideas resemble nothing so much as those of Henry Pratt Fairchild in *The Melting Pot Mistake*,<sup>116</sup> a 1920s-era tract against immigration. So, you see that today's meritocrats and test advocates have much to live down. Both their current and their old champions base their arguments, implicitly and explicitly, on racial superiority and xenophobia. Carl Campbell Brigham, in *A Study of American Intelligence*,<sup>117</sup> studied racial differences in mental traits. Based on a survey of Army test results, he concluded that Negroes were 'very inferior' and warned against integrated education because Negroes were incapable of taking advantage of it. He became director of the SAT, which failed to repudiate his teachings and, indeed, the ETS library bears his name!"<sup>118</sup>

"So, Rodrigo," I said. "You are saying that an appeal to a unity based on Anglo-Saxon values is inherently racist."<sup>119</sup>

"Yes, and so is pandering to fears of balkanization. As a recent author put it, ideas are only intelligible within the particular circumstances that gave rise to them and in which they are circulated. Thus, an appeal in

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tional curriculum to similar claims by those like Madison Grant); Perea, *supra* note 50, at 343 (arguing that the official English movement is a nativistic policy intended to contain the effects of the cultural influx that new immigrants bring); Abigail M. Thermstron, *Bilingual Miseducation*, COMMENTARY, Feb. 1990, at 44 (discussing increased emphasis by states on bilingual education).

112. LAWRENCE AUSTER, *THE PATH TO NATIONAL SUICIDE: AN ESSAY ON IMMIGRATION AND MULTICULTURALISM* (1990).

113. Some of these statutes include the Immigration Reform and Control Act of 1986, P.L. 99-603, 100 Stat. 3359, Nov. 6, 1986 (offering legalized immigrant status to undocumented aliens who had arrived before January 1, 1982), and the Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978, Nov. 29, 1990 (permitting an overall increase in immigration from all countries).

114. RICHARD BROOKHISER, *THE WAY OF THE WASP* (1991).

115. *Id.* at 29-39; see also RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) (warning of split in American society along IQ-based class lines).

116. HENRY PRATT FAIRCHILD, *THE MELTING POT MISTAKE* (1926); see also HENRY PRATT FAIRCHILD, *RACE AND NATIONALITY AS FACTORS IN AMERICAN LIFE* (1947).

117. CARL CAMPBELL BRIGHAM, *A STUDY OF AMERICAN INTELLIGENCE* (1923).

118. FISH, *supra* note 98, at 85-86.

119. See *id.* at 87 (making similar point).

today's climate to national unity, assimilation, or against balkanization is deeply racist."

"So is one to merit," I added, "for the same reasons."

"Rodrigo, you two have me half convinced," Kowalski conceded. "But only half. The history you recounted is certainly distasteful—although no more so than other chapters we could name, including express quotas against Jews at top universities, and 'No Irish Need Apply' rules that were in effect in certain Northeastern cities for at least as long as the repulsive testing and IQ theories you mentioned. And I'll remind you that one still hears Polish jokes even today. But I still think that merit, properly applied, can serve as the best guarantor against racism and bias. Look at sports. As you yourself pointed out, blacks dominate, simply because they're faster and have more drive.<sup>120</sup> Other spheres could yield in similar fashion. Look at you, for example. You and Barney are two of our most recent hires and among our best by any measure. *Global* standards of merit, like the SAT, may be unfair, overbroad, and prone to the kinds of abuses you detailed. But I don't see how you can deny *local*, or contextualized merit—speed, in a hundred-yard dash, teaching ability in a law school, spelling ability in an editor. You liberals believe in contextualizing everything. Isn't that the solution to your problems with merit?"

Rodrigo replied: "That may help somewhat. But merit still excludes, and in an especially pernicious way. The Professor and I were discussing some of these things before."

At the mention of my name, I shook my head, recognizing with a start that the relaxed reverie into which I had lapsed was drifting perilously close to dozing.

"The Professor is looking tired," Rodrigo said. "He's had a long day. Maybe we'd better call it quits for now."

"I'm going strong," I protested. "I just need another cup of coffee."

"We'll walk you back," Laz said, taking my elbow as I stood up. "I've finished my food, and my young colleague and I both have early sessions tomorrow morning."

#### CONCLUSION: EXIT RODRIGO ON A NOTE OF RACE-AND-CLASS RECONCILIATION

Our meeting soon broke up. We walked in near silence back to the hotel. Rodrigo spoke only once, to remind his friend to ask him about something later. Within ten minutes I was in my hotel bed, sleeping the sleep of the dead. I saw Laz and Rodrigo only briefly, at a distance, the following morning in the hotel lobby. They were engaged in an animated

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120. Delgado, *First Chronicle*, *supra* note 1, at 1372-73; see also Linda S. Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U. L.J. 101 (1984) (discussing black athletes in college sports).

discussion. But I had a feeling I would hear from the two young scholars, one conservative, one radical—yet seemingly best friends. My hunch turned out to be true. Only two days after I got back, I received a lengthy letter from Rodrigo in my law school mailbox. Written on long computer paper (his trademark), it contained a torrent of words, concluding with the following:

“... And so, Professor, after our long talk on the plane back home, we each realized that the other was both right and wrong. After hearing more of Laz’s story, I’ve concluded that European ethnics can experience headwinds just as great as those our people suffer, the element of skin color excepted. (Did I tell you that Laz, despite his obvious brilliance, went to a community college?) Much cruelty and unfairness are perpetrated under the banner of class, which is often as great a disadvantaging factor as race, and nearly always a cross-cutting one.<sup>121</sup> Moreover, affirmative action merely shifts the cost of racial remedies onto those least able to protest—blue-collar whites like Alan Bakke or Laz’s siblings—neatly exempting the high-achieving son or daughter of a blueblood family.”

“For his part, Kowalski finally came around to my and your position that we cannot accept merit standards as they are, pressing only for the occasional, limited affirmative action exception—rather, we must fundamentally re-evaluate merit standards and the way they are used. He also agrees with our conclusion that affirmative action generates its own pool problem through a sort of self-fulfilling prophecy. He added that the West’s slipping economic position is especially troubling, as it is likely to close off opportunities not just for blacks, but also for upwardly-mobile white ethnics. He said his people have a kind of ‘second sight’ or double consciousness, like ours. They are outsiders to some extent. But they also have seen the way entire cultures can sink, as in Eastern Europe, with their superstructure, leadership, and cultures essentially intact.”

“For my part, I agreed—somewhat reluctantly to be sure, but Laz’s logic is unassailable—that minorities ought never, except in the narrowest circumstances, accept affirmative action. Doing so splits the poor community along color lines and reinscribes the current merit standards just that much deeper. It also reinforces the belief that people of color are unworthy and need affirmative action, when the reality is that society needs *them* and their contributions, at least as much as we need society.”

“So, Laz and I declared a pact, a sort of truce, which we plan to publicize to our groups and to everyone who will listen. We’ll start by

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121. See generally Frances Lee Ansley, *Stirring the Ashes: Race, Class, and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1989) (arguing that issues of race and class are largely intertwined and must be considered together when addressing affirmative action policies); John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201 (1982) (suggesting that plight of black poor is consequence of both race and class).

holding a conference. The general idea would be that minorities will forswear affirmative action unless it also includes poor whites. White ethnics and people of color—those who join the new coalition, at any rate—would agree to work together to subvert and replace the array of standards, social practices, and old-boy networks that now hold back the progress of both. We believe the critique of merit, far from being a sour-grapes venture, leads inexorably to a bold, hopeful coalition in which two numerically large groups—minorities and ethnic (that is non-WASP) whites—work together to lift the yokes of racism and classism that oppress each, and that end up, as we've seen, linked. Until now this linkage between racism and classism, had not been demonstrated. Now that it has been, will you and your friends join us in the last, the final, and the most important, subversion of all? Here are a range of dates we are thinking of for the conference. We're getting the money for your speaker's fee. Will you come?"

#### APPENDIX: RODRIGO'S PRINT-OUT

Rodrigo's letter was accompanied by a neatly-typed sheet of computer paper, entitled "Tentative Conference Program," which included the following events:

First Day: Reconstructing Affirmative Action. Convenor—Laz.

Morning. Keynote address. On the need for a new race/class coalition. Ask the Professor or someone of his generation.

The Critique of Affirmative Action. Panel and respondents. Discuss the history and current status of affirmative action. Supreme Court jurisprudence. Critical perspectives. What is wrong with the doctrine, and where do we go from here?

Break-out sessions: Pair lefties and righties. Assign a reporter to report back to the group.

Lunch. Address by Laz.

Afternoon. Working groups. Tentative assignments: How to persuade minorities to forswear affirmative action based solely on race. Devising new social programs and objectives that will include poor ethnic whites and immigrants. Legislative reform. New judicial standards of review.

Late PM. Plenary session: Round-table—Laz plus the reporters: Contours of "The New Pluralism—Race and Class in the Nineties and Beyond."

Second Day: Reconstructing Merit. Convenor—Rodrigo.

Morning. Keynote address. On the need for new approaches to merit. Ask

the Professor if he wants this one? If not, get someone of his generation. Duncan Kennedy or Derrick Bell?

The Critique of Merit. Panel, respondents. Discuss history and role of merit, including IQ test; Equal Protection challenges, case law. Critical perspectives: what is wrong with conventionally defined merit—paradoxes, inequities, the need for reform. How merit standards burden both minorities and ethnic whites.

Break-out sessions: Pair people of opposite persuasions, backgrounds, races. Each group designates a reporter, who reports back to the group.

Lunch. Address by Rodrigo.

Afternoon. Working groups: The social construction and reconstruction of merit. Mechanisms by which conventional merit standards oppress both blacks and poor whites. Programmatic considerations—a writing competition; sponsor test cases?

Late PM. Plenary session: Rodrigo plus the reporters. Who really has merit? Why current standards flunk, and where we should go from here?

Press conference on the new black/white coalition and program.