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RODRIGO'S THIRTEENTH CHRONICLE: LEGAL FORMALISM AND LAW'S DISCONTENTS

*Richard Delgado**

INTRODUCTION: IN WHICH THE PROFESSOR RETURNS TO THE U.S. AND GETS CAUGHT UP ON WHAT HIS TWO YOUNG FRIENDS HAVE BEEN DOING

"Professor! You're back!" Rodrigo leaped to his feet and shook my hand fervently.¹ "I heard a rumor you might be coming. What good news! Sit down. Did the authorities give you any trouble?"

* Charles Inglis Thomson Professor of Law, University of Colorado. J.D. 1974, Berkeley. — Ed.

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

Despite their age difference, they became good friends, discussing law and economics (*Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993)); love (*Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993) [hereinafter *Rodrigo's Third Chronicle*]); legal rules (*Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) [hereinafter *Rodrigo's Fourth Chronicle*]); the critique of normativity (*Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993)); relations between men and women (*Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993) [hereinafter *Rodrigo's Sixth Chronicle*]); enlightenment political theory (*Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994)); black crime (*Rodrigo's Eighth Chronicle: Black Crime, White Fears — On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994) [hereinafter *Rodrigo's Eighth Chronicle*]); racial discrimination and the rule of law (*Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994)); the role of merit (*Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995) [hereinafter *Rodrigo's Tenth Chronicle*]); clinical practice (*Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996) [hereinafter *Rodrigo's Eleventh Chronicle*]); and problems of desperately poor squatter settlements (*Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, GEO. L.J. (forthcoming 1997)) over the course of the next two years. During this time, Rodrigo progressed from the status of law student to professor at a public law school "in the Midwest." He and the Professor continued their relationship, seeing each other at meetings, conferences, and airports.

"Not at all," I replied, choosing one of the few uncluttered spots on my young friend's couch. "I breezed right across. They didn't even make me open my suitcase.² I gather you didn't get my letter."

"No, but Laz got a card and mentioned it to Giannina.³ So we were hoping against hope that we'd hear from you."

"You'll probably get my letter next month. The mail is glacially slow. It's one of the few things that takes a little getting used to about my new home. I'm glad you're both in town."

"It's been a while," Rodrigo said. "How's the grandchild?"

"She and her mother are fine. They named her Gianna, after your Giannina, I suspect."

"We hoped the lure of grandchildren would bring you back. How long can you stay?"

"My visa's good for six months. But I'm thinking of heading back the week after next. I'm helping my son-in-law lay tile for their new patio, so that my daughter and the baby can go outside when the weather's good." I looked at a pile of papers and reports on Rodrigo's desk with yellow slips of paper sticking out. "What are you working on?"

"Oh, that stuff," Rodrigo said, looking down. "I'm on the curriculum committee. Laz is the chair. The dean asked us to decide what, if anything, the law school should do in response to these reports. Are you familiar with this one, Professor?" Rodrigo asked, holding up one of the volumes.

I half stood up and peered at the thick paperbound volume Rodrigo was holding up for my benefit. "That must be the MacCrate Report.⁴ It came out just as I was leaving. It caused quite a stir. As I recall, it argued that legal education should be more practical.

2. See RICHARD DELGADO, *THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER WELFARE AND AFFIRMATIVE ACTION* (1996), at the end of which the Professor is deported. Like Rodrigo, the Professor is a fictional person and is not to be identified with any individual, alive or not. A man of color in the late stages of his law teaching career, the Professor is a composite of many persons I have known.

3. For an introduction to Laz, Rodrigo's colleague and best friend at the law school, see *Rodrigo's Tenth Chronicle*, *supra* note 1. A conservative who serves as the faculty advisor to the local Federalist Society, Laz engages Rodrigo in spirited and freewheeling discussions about faculty politics, race, and affirmative action. For an introduction to Giannina, Rodrigo's life companion and soulmate, see *Rodrigo's Sixth Chronicle*, *supra* note 1. A published poet and playwright, Giannina is also adept at social and legal analysis. See, e.g., *Rodrigo's Fourth Chronicle*, *supra* note 1, at 1137; *Rodrigo's Third Chronicle*, *supra* note 1, at 402.

4. Drafted by a prestigious committee of lawyers, judges, and academicians, the MacCrate Report recommends a series of changes aimed at making legal education more practical by emphasizing the teaching of skills and values. See *Legal Education and Professional Development — An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. AND ADMIS-

A number of my friends applauded it. Others damned it because they thought it threatened transformative scholarship and teaching."

"And had you seen this other one?" Rodrigo asked.

I leaned forward again. "Oh, that's Judge Harry Edwards' article.⁵ He sent me a reprint, which got forwarded to my new place. Boy, has he changed. Did you know that we knew each other?"

"No, I didn't. But it stands to reason," Rodrigo replied. "You're of the same generation. So you know he leveled quite a blast at law review scholarship, charging that a high proportion of it has little to do with law and judging."

"I don't know what got into him. He was quite a scholar before he was on the bench. Maybe I'll write him sometime. But you mentioned that there was something else?"

"Yes. The Carrington article.⁶ We discussed it one time before. It accuses CLS scholars — and, by implication, others, such as critical race theorists, feminists, and interdisciplinary writers — of nihilism and invites them to leave the academy."

"I remember. He said their message was counteraspirational and went against the central ethos of the law. People who write in that vein, he said, have no business teaching law students. They should either move over to other departments or leave the academy entirely.⁷ And so your dean asked you to look at all three?"

"She did. We're supposed to report on the implications they bode for the way we teach and write. Her memo came with a sheaf of news clippings about the public's discontent with law and lawyers."⁸

"Some of that was building when I left. The major news magazines have been covering it, even in their international editions, which are the only ones we get down there. But it's not just the public. Lawyers seem disenchanted with law practice as well. Some are leaving. Others are thinking of doing so."⁹

SIONS TO THE BAR (containing findings made by the A.B.A. Task Force on Law Schools and the Profession: Narrowing the Gap, chaired by Robert MacCrate).

5. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

6. See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

7. See *id.* at 227 ("If this risk is correctly appraised, the nihilist . . . has an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy.").

8. Rodrigo, Giannina, and the Professor discuss some of these matters in Part I. See *infra* text accompanying notes 14-34.

9. See *id.* (discussing these and other laments of lawyers).

"She asked us to look into all that. Can I offer you a cup of coffee? Giannina will be here soon. Can you join us for dinner?"

"I'd love to," I said. "If it wouldn't be too much trouble."

"Not at all," Rodrigo replied. "Did I tell you that Giannina is in law school now?"¹⁰

"I had no idea! How does she like it? Where is she going? I hope she hasn't given up her writing," I said.

"By no means. She says the first year is so weird she writes for relief. She's finished half a book of poems and most of a play that she refuses to let me see. I think it's about law school, and I'm probably a character in it."

"Uh-oh," I said. "Reminds me of the time my daughter wrote a crime mystery for a high school English class. It was so realistic the teacher called home. My late wife and I had to do a lot of talking to persuade the teacher we weren't running some sort of crime ring out of our home!"

Rodrigo laughed. "She's going to the school across town. She got high test scores and could have gone anywhere. But we've had it with living apart."

"I'm glad you decided to stay together. I remember how hard commuting was on the two of you that first year of teaching.¹¹ But tell me your thoughts on these three critiques. I assume you have a theory."

"I do. Oh, the coffee's ready." Rodrigo busied himself for a moment at his office espresso machine, then handed me a steaming mug. "It's Italian blend. Your favorite, if I recall. And I have cream and sugar right here."

"Just like the old days," I said.

10. Previously a successful (but impecunious) writer, Giannina had nevertheless exhibited an interest in law, even becoming an honorary member of the Women's Caucus at the law school at which Rodrigo earned his LL.M. See *Rodrigo's Sixth Chronicle*, *supra* note 1, at 640-41. She also composed the lyrics for a counter-musical that spoofed a racist and sexist one that had been sponsored by the students of Rodrigo's school; the counter-performance was played by the LL.M. students, including Rodrigo. See *Rodrigo's Fourth Chronicle*, *supra* note 1, at 1136-37. Thus, the Professor is not entirely surprised to learn that the multi-talented young woman has decided to pursue a career in law.

11. See *Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545, 547 (1995) (final chronicle in first cycle (chronicles 1-8) and concluding chapter of RICHARD DELGADO, *THE RODRIGO CHRONICLES* (1995)). Rodrigo graduated from his LL.M. program and took a law teaching position in the Midwest. Giannina remained in the metropolis to pursue her own career, and the two commuted on weekends to be with each other.

I. IN WHICH RODRIGO AND THE PROFESSOR REVIEW LAW'S LAMENTS

As I mixed the condiments into my coffee, Rodrigo began:

"You asked if I had a theory, Professor. I do. As you know, the two dominant currents in legal education today are, first, the MacCrate-Edwards critique of legal education and scholarship as not being practical enough,¹² and second, deep discontent with law and lawyers, both on the part of the public and of lawyers themselves. My thesis is that these two are related, although not at all in the way or in the direction most people think. And the connecting link is legal formalism."¹³

"Legal formalism?" I said. "You mean teaching and scholarship that emphasize cases and doctrine over policy, critique, and interdisciplinary approaches? The Langdellian idea that law is a science with only one right answer?"

Rodrigo nodded animatedly, whether in response to my answer or to his own double-size mug of coffee, which he was rapidly draining, I could not tell. In any event, I went on: "So are you saying we need more formalistic classroom teaching and more boring, doctrinal scholarship? I certainly hope that is not where you are going."

"Quite the contrary, Professor. Those things are precisely what are causing all the trouble."

"That's a relief," I replied. "But I hope you can spell out the connection, for you are definitely swimming against the tide. In fact, you are saying the opposite of what the ABA report and my old friend Harry Edwards are saying."

"I'll be happy to," Rodrigo replied. "But first consider what the public is saying about lawyers, and also what lawyers are saying about themselves and their profession."

"I'm all ears," I said. "I haven't practiced in quite a while, as you know. But I've always done a little consulting, mostly in school

12. See *supra* notes 4-5 and accompanying text.

13. Associated with Christopher Columbus Langdell and the early Harvard school, legal formalism holds that law is a science; that the principles of this science are to be found through the study of case decisions; that these principles form a vast, comprehensive set; that each legal problem has one right answer; and that the purpose of legal education is to instill the principles of inductive and deductive science through a case-centered, Socratic dialogue. For a succinct discussion of formalism and the transition to legal realism, see Elizabeth Mensch, *The History of Mainstream Legal Thought, in THE POLITICS OF LAW* (David Kairys ed., 2d ed. 1990); see also *infra* note 81. Formalism went into decline with the advent of realism in the 1920s, but it has been making a comeback. See Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 180 (1990).

desegregation cases. So I'm vitally interested in what you're going to say."

A. *In Which Rodrigo and the Professor Analyze the Public's Disenchantment with Law and Lawyers*

"Let's take the public's attitudes first," Rodrigo began. "If you'll just give me a minute." Rodrigo, who I knew from past experience was well versed in the new technology,¹⁴ pushed a few buttons on his computer keyboard. "Where did I find that poll file? Oh, here it is. Where were we?"

"Public attitudes toward lawyers."

"Right," Rodrigo said, looking down at his desk. "These clippings from the dean turned out to be only the tip of the iceberg. I bet you've seen this one, at least."

I peered at what he was holding up for my benefit. "Yes, it's the ABA president saying that the profession isn't as bad as it's made out to be."¹⁵

"The public doesn't trust us. Many think we are ambulance chasers who feast off the misfortunes of others. We are more interested in money than justice, prolonging suits in order to drive up our fees. A Gallup Poll — if I can find it, oh, here it is — rated lawyers below druggists, clergypersons, doctors, dentists, and college teachers for honesty and ethical standards. We ended up toward the bottom, not much above professional admen and used car salespersons.¹⁶ In another survey of confidence in institutions, law firms rated dead last, behind every branch of government, the military, major companies, Wall Street, the press, colleges and universities, the medical profession, and TV news.¹⁷ Yet another poll found that fifty-six percent of the public believed lawyers tend to recommend more legal work than necessary because it increases their fees.¹⁸ Seventy-three percent said there are too many lawyers and

14. For example, see the computer-generated printouts contained as appendices to *Rodrigo's First Chronicle*, *supra* note 1, and *Rodrigo's Eighth Chronicle*, *supra* note 1. The Professor, who is much older than Rodrigo, envies his young protégé's electronic proficiency.

15. See Roberta Cooper Ramo, *Let's Not Take It Anymore*, A.B.A. J., Mar. 1996, at 6.

16. See John Dart, *Public's Esteem of Clergy Slipping, Gallup Poll*, L.A. TIMES, Oct. 2, 1993, at B11; see also Marilyn Kalfus, *Public Perception of Lawyers Declines in Two Opinion Polls*, ORANGE COUNTY REG., Dec. 12, 1988, at A1.

17. See Louis Harris, *Changing Trends in American Politics*, 510 VITAL SPEECHES OF THE DAY 663, 663 (1994) (discussing a Harris poll on confidence in institutions).

18. See Gordon Black, *USA Today Poll*, USA TODAY, Feb. 20, 1984.

that the glut causes disputes to be taken to court when they shouldn't be."¹⁹

"Sounds dismal," I said. "But, of course, you can prove almost anything with statistics. The very way a polltaker frames a question largely shapes the answer.²⁰ Maybe the public associates lawyers with trouble — with divorces, drunk driving tickets, and other hassles. Maybe it's a case of shooting the messenger."

"If so, they certainly think ill of the messenger," Rodrigo replied. "Another survey — this one by the ABA — showed that the public views lawyers as being of uneven character and quality.²¹ And a second reflects the perception that lawyers are deficient in compassion, caring, ethics, and honesty.²² We are motivated by money and engaged in undignified advertising.²³ Lawyer-bashing jokes are legion."²⁴

I winced. "Even I've heard those from time to time. I'm a law professor, but a certain type of person makes it their business to let me know at parties what they think of lawyers, as though I were some sort of media-hungry, ambulance-chasing personal injury shark."

"The same happens to me. I tell them I'm an Italian lawyer, which I am. That usually shuts them up, because they have no idea of whether or not their stock criticisms hold true elsewhere. Oh, look here. Here's one on parents: Professor, would you want your new grandchild to be a lawyer someday?"

"I'd be honored," I said.

"Most parents wouldn't. This poll," Rodrigo indicated his screen, "shows that when parents were asked which of eight professions they would encourage their son or daughter to go into, only five percent said law.²⁵ Ten years ago, the figure was twelve.²⁶ Among the top six lawyers people today said they admire most, two are fictional and two are dead."²⁷

19. See *id.*

20. See Brad Edmondson, *How To Spot a Bogus Poll*, AM. DEMOGRAPHICS, Oct. 1996, at 10, available in LEXIS, News Library, Amdem File.

21. See ABA COMM. ON PROFESSIONALISM, "IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 3 (1986).

22. See Barbara Sheehan, *Lawyers Urged to Address Criticisms of Profession*, N.J. LAW., Dec. 26, 1994, at 9.

23. See *id.*

24. See Randall Samborn, *Anti-Lawyer Attitude Up*, NATL. L.J., Aug. 9, 1993, at 1.

25. See *id.* at 20.

26. See *id.*

27. See *id.* (citing Randall Samborn, *Who's Most Admired Lawyer?*, NATL. L.J., Aug. 9, 1993, at 24).

"I love fictional lawyers," I quipped. "Some of my best friends . . ."

Rodrigo rolled his eyes. "The dead lawyers are Thurgood Marshall and Abraham Lincoln. The fictional ones are Perry Mason and Matlock.²⁸ Miller Brewing Company aired a commercial featuring a "Big Lawyer Roundup," in which cowboys are shown lasoing a hotshot divorce lawyer and an overweight tax attorney.²⁹ Oh, here's another poll of honesty and integrity. In this one we rank only slightly ahead of prostitutes and politicians."³⁰

"And used car salesmen, I think I read," I added.³¹

"Them too, but barely. And finally," Rodrigo said while pressing more buttons on his computer and peering intently, "a recent *National Law Journal* poll found that seventy-three percent of Americans think there are too many lawyers.³² Thirty-one percent considered lawyers less honest than most people.³³ Three-fourths said that the large amount of litigation is hindering the country's economy."³⁴

"A stunning indictment," I replied. "Especially when you hear it all at once. We obviously have some work to do." I pointed toward the other folder that lay on Rodrigo's desk. "But I think you mentioned another side to the story."

B. *In Which Rodrigo and the Professor Discuss Lawyers' Discontents*

"More like another count to the indictment," Rodrigo continued. "Not only is the public fed up with law and lawyers, our colleagues are as well."

"Everyone pines for the good old days," I interjected. Then I added: "Except for women and minorities of color. My law school class boasted only four women and three students of color in addition to me. Even outstanding graduates like Sandra Day O'Connor and my friend Santos Keller had trouble getting jobs. Surely, you don't maintain that conditions for today's lawyers are worse?"

28. See Samborn, *supra* note 27, at 24.

29. See Samborn, *supra* note 24, at 22.

30. See Alan M. Slobodin, *Pro Bono Should Be Free Choice*, NATL. L.J., May 25, 1992, at 13.

31. See Dart, *supra* note 16, at B11.

32. See Robert L. Haig, *Lawyer-Bashing: Have We Earned It?*, N.Y.L.J., Nov. 19, 1993, at 2.

33. See *id.*

34. See *id.*

"I'll let you decide," Rodrigo said, opening a second folder. "Here's a study of lawyer satisfaction. An estimated 40,000 lawyers a year are leaving the profession — almost as many as enter the law schools.³⁵ A Maryland survey showed that more than one-third were unsure they would continue practicing law.³⁶ *Time* cited a major increase in working hours and greater stress as contributing to the erosion of the quality of life for attorneys.³⁷ Firms today often require that lawyers perform 2,000 to 2,500 hours of billable work—"38

"Which, as we both know, means many more hours than that on the job," I interjected.

"Of course. One can't bill for time spent eating, talking with colleagues, or going to the washroom. That 2,500-hour figure, by the way, is almost one-third greater than it was a decade ago.³⁹ Many attorneys routinely put in twelve-hour days."⁴⁰

"It's gotten to the point that books are now warning students about the hazards of law school," I added. "While browsing at a bookstore in the airport, I noticed one entitled *Full Disclosure: Do You Really Want To Be a Lawyer?*⁴¹ Another was entitled *Running from the Law: Why Good Lawyers Are Getting Out of the Legal Profession*.⁴² Both warned that law practice is becoming all-consuming, that lawyers have no family life, and that the practice of law is repetitious and dull. Lawyers say that law is not as enjoyable as it once was.⁴³ It leaves little time for reflection, contemplation, or creativity.⁴⁴ It's a business, not a learned profession.⁴⁵ I went back for my fortieth-year law school class reunion. All my friends were saying the same thing. Some were retiring or going into other lines of work."

35. See Andrea Sachs, *Have Law Degree, Will Travel: Fed Up With Thankless Conditions, Many Lawyers Are Taking a Hike*, *TIME*, Dec. 11, 1989, at 106.

36. See *id.*

37. See *id.*

38. See *id.*; see also MARY ANN GLENDON, *A NATION UNDER LAWYERS* 29-31 (1994).

39. See Sachs, *supra* note 35, at 106.

40. See *id.*

41. *FULL DISCLOSURE: DO YOU REALLY WANT TO BE A LAWYER?* (Susan J. Bell et al. eds., 1992).

42. DEBORAH L. ARRON, *RUNNING FROM THE LAW: WHY GOOD LAWYERS ARE GETTING OUT OF THE LEGAL PROFESSION* (1989).

43. See Sachs, *supra* note 35, at 106.

44. See Steven Keeva, *Opening the Mind's Eye*, A.B.A. J., June 1996, at 49.

45. See GLENDON, *supra* note 38, at 37; SOL M. LINOWITZ, *THE BETRAYED PROFESSION* 2, 24 (1994); Jean Stefancic & Richard Delgado, *Panthers and Pinstripes: The Case of Ezra Pound and Archibald MacLeish*, 63 S. CAL. L. REV. 907, 920-21, 929-31, 936 & n.228 (1990).

"A whole new industry counsels lawyers who are unhappy with their situation," Rodrigo interjected.⁴⁶ "They see lawyers who are dejected and liken themselves to hamsters in a cage. Studies reveal that many lawyers are dissatisfied, depressed, or even suicidal.⁴⁷ Some good students don't even try for law jobs."

"I bet you have something on that right there," I said, indicating a pile of neatly clipped computer printouts nestled in Rodrigo's file folder.

"Do I ever," Rodrigo replied. "One American Bar Association study showed" — Rodrigo looked down — "a 'deterioration in the lawyer workplace that will likely continue until law firms and other employers begin to address the management practices that are causing the problem.'⁴⁸ The same study showed that more attorneys describe themselves as seriously discontent than did in 1984."⁴⁹

"I have the impression this is even more true of women," I added.⁵⁰

"It is," Rodrigo said. "And it's on the rise for partners and senior associates as well as for sole practitioners and very young attorneys. Lawyers say the work atmosphere is not warm or personal; that they have difficulty advancing; that the work is monotonous and pressured. Many describe themselves as burned out or overstressed.⁵¹ An ABA survey found that more than half of second-year associates in big firms were deeply dissatisfied.⁵² Even the big paycheck cannot compensate for the long hours and tedious detail. According to one analyst, '[m]any of the smartest college students don't know exactly what they want to do, so they turn to one of modern society's last refuges for the generalist — law school.'⁵³ Those who do well win summer clerkships, then first-year

46. See Sheila Nielsen, *What Firms Do To Alleviate Attorney Dissatisfaction; Drastic Times Call for Drastic Measures*, ILL. LEGAL TIMES, Oct. 1995, at 6, available in LEXIS, Legnew Library, ILT File; see also Lynne Pregenzer, *Substance Abuse Within the Legal Profession: A Symptom of a Greater Malaise*, 7 NOTRE DAME J.L. ETHICS & PUB. POLY. 305, 308-15 (1993).

47. See Pregenzer, *supra* note 46, at 306, 320-21 (noting that lawyers have high rates of depression and that many attorneys develop addictions to chemical substances as a coping mechanism for job-related stress); see also Timothy Harper, *The Best and Brightest, Bored and Burned Out*, A.B.A. J., May 15, 1987, at 28.

48. Ronald L. Hirsch, *Is the Grass Greener? How Does Your Current Career Compare with Others Across the Country?*, in CHANGING JOBS, A HANDBOOK FOR LAWYERS FOR THE 1990s, at 7 (Heidi L. McNeil ed., 1994).

49. See *id.* at 9.

50. See *id.* at 11-14.

51. See Nielsen, *supra* note 46, at 6; see also Hirsch, *supra* note 48, at 15.

52. See Harper, *supra* note 47, at 28.

53. *Id.* at 29; cf. GLENDON, *supra* note 38, at 29.

associateships making sixty, seventy thousand dollars a year or more. But then they learn how solitary law practice is, with so many hours passed in the library. Little time is spent with clients or learning to be a wise counselor.⁵⁴ One law graduate says: "There's an incredible amount of dissatisfaction out there [Associates would] come in and shut the door and literally start crying. So many wanted to leave . . . but felt they couldn't. There's a conspiracy of silence among people who doubt that the law is for them."⁵⁵

"Former students of mine have told me they love the law and their jobs," I added, "right up until the day they quit. One writes me regularly about life on her strawberry farm. One of my top students — she had been in line to become partner at one of the most prestigious law firms in Washington, D.C."

"Here's another one," Rodrigo exclaimed. "Twenty-three percent of New Jersey lawyers were certain they would leave law practice before they retire.⁵⁶ The same percentage of North Carolina lawyers said that if they had to do it all over again, they would not become lawyers.⁵⁷ A 1990 ABA study showed that about half of lawyers in solo practice complain they do not have enough time for their families.⁵⁸ Three-fourths said they felt fatigued or exhausted by the end of the workday.⁵⁹ A report cosponsored by the A.B.A. Young Lawyers Division and several other A.B.A. sections — entitled *At the Breaking Point* — found that lawyers in their early years perceive law practice as almost unbearably intense.⁶⁰ Associates juggle several projects at the same time, working nine to twelve hours a day in the office and still taking work home."⁶¹

"I understand that many lawyers prop themselves up with drugs or alcohol."⁶²

54. See Harper, *supra* note 47, at 29.

55. *Id.* at 30 (quoting attorney Liza Yntema about her resignation from a large Chicago law firm).

56. See Nancy D. Holt, *Are Longer Hours Here to Stay? Quality Time Losing Out*, A.B.A. J., Feb. 1993, at 62.

57. See *id.*

58. See *id.* at 63-64.

59. See *id.* at 64.

60. See *At the Breaking Point: A National Conference on the Emerging Crisis in the Quality of Lawyers' Health and Lives — Its Impact on Law Firms and Client Services*, 1991 A.B.A. SECS. GEN. PRAC.; LITIG.; REAL PROP., PROB. AND TR. L.; TORTS AND INS. PRAC.; AND YOUNG LAW. DIVISION 9.

61. See Holt, *supra* note 56, at 64.

62. See Richard L. Fricker, *Frankly Speaking: Conversations with Seven Lawyers*, A.B.A. J., Dec. 1992, at 69, 71.

"Studies bear that out," Rodrigo replied. "Divorce is common, as well. Some marriage counselors and psychiatrists have practices devoted exclusively to attorneys.⁶³ One laid the blame on changes in the structure of law and law practice. Forty or fifty years ago, many who entered law were motivated by money. But others were attracted by the intellectual challenge and opportunity to help people and society. Back then, law practice allowed you actually to fulfill those aspirations. Today, it does not. Law and legal education take broad-based humanists and generalists and turn them into narrow, driven specialists. Naturally, they end up unhappy."⁶⁴

"Did you find anything on specialization? Law today is much more compartmentalized than it was when I was starting out."

"I did. A number of studies mentioned how unsatisfying it is for many young associates to work on only one piece of a project over and over again — say, document retrieval or analysis of damages. They complain that they never see the clients or even the attorneys working on other parts of the case."⁶⁵

"I've read of a felt decline in civility," I said. "Some articles complain of hate speech directed by lawyers or judges against other lawyers.⁶⁶ Others report dirty tricks and cutthroat tactics that old-time practitioners never would have tolerated."⁶⁷

Rodrigo was silent for a moment. Then: "It just occurred to me that the two types of discontent may be related. If lawyers believe the public hates and distrusts them, their job satisfaction obviously will be affected. Almost nine of every ten attorneys believe the image of the profession has been suffering.⁶⁸ The O.J. Simpson 'disgrace' didn't help, either, according to one study.⁶⁹ *New Jersey Lawyer* asked attorneys, 'Is the public becoming more antilawyer?'

63. See Martin Wald, *Why a Law Firm Is Not a Business*, LEGAL INTELLIGENCER, Nov. 27, 1995, at 3, 10; cf. Sachs, *supra* note 35, at 106 (noting that an entire industry of career counseling has arisen to assist unhappy attorneys).

64. See ARRON, *supra* note 42, at 5; Harper, *supra* note 47, at 30; Holt, *supra* note 56, at 66.

65. See GLENDON, *supra* note 38, at 37-39; LINOWITZ, *supra* note 45, at 106; Harper, *supra* note 47, at 30; *Blue-Collar Law*, CONN. L. TRIB., Nov. 20, 1995, at 39 (excerpting online discussion from LEXIS Counsel Connect).

66. See Rocco Cammarere, *Uncivil Lawyers, or Just Bad Image?*, N.J. LAW., July 24, 1995, at 1, available in LEXIS, Legal News Library, NJLAWR File; Telephone Interview with Andy Taslitz, Professor of Law, Howard University School of Law (Aug. 18, 1996) (member of state bar task force addressing this problem).

67. See LINOWITZ, *supra* note 45, at 10, 14, 18, 104; Wald, *supra* note 63, at 3; *Uncivil Lawyers*, *supra* note 66, at 1.

68. See Rocco Cammarere, *How Lawyers See Their Image: From Bad to Worse*, N.J. LAW., Apr. 29, 1996, at 1, available in LEXIS, Legal News Library, NJLAWR File.

69. See *id.*

Eighty-six percent answered yes.⁷⁰ Only 12.1% said the image of the lawyer is not deteriorating.⁷¹ Women are even more dissatisfied with their professional lives than men are.⁷² Just a couple of months ago, a Justice of the U.S. Supreme Court lamented 'legal capitalism' — the excessive influence of the profit motive in the practice of law.⁷³

"Ironical!" I exclaimed. "The Court has been a bastion and protector of corporations and capitalism."

"Scholars such as Mary Ann Glendon report the same thing — that law is overcommercialized.⁷⁴ Oh, here's another poll. Seventy percent of California lawyers would choose another line of work; three-quarters would not want their children to be lawyers.⁷⁵ Sol Linowitz says that today's lawyers and law firms no longer think of law as a learned profession. They are 'hired guns' for whom winning is everything.⁷⁶ Lawyers no longer think of themselves as officers of the court.⁷⁷ As someone put it, 'the mechanics have increasingly supplanted the humanists.'⁷⁸ No one reads for pleasure any more. Work leaves little quiet time or opportunity for creativity."⁷⁹

A knock at the door caused both of us to start. "Giannina!" Rodrigo exclaimed. "Come in."

I leaped to my feet. "I'm so glad to see you."

The slim, dark-haired young woman set down her backpack and gave me, then Rodrigo, quick hugs. "I'm starved. My study group went almost two hours late. Have you two been entertaining each other?" Giannina looked down at the mess of papers on Rodrigo's desk. "Law's troubles again?" Then, to me: "How was your flight?"

70. See *id.*

71. See *id.*

72. See Marjorie M. Shultz, *Morale Problem: Study Sends Message to Law Firms*, NATL. L.J., Nov. 26, 1990, at 22, 23; see also Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1222-23, 1245-46 (1988).

73. See *Justice Laments Legal "Capitalism,"* DENVER POST, May 26, 1996, at 17A.

74. See GLENDON, *supra* note 38, at 40-59 (arguing that increased competition for business in the legal profession since the 1960s has resulted in the rise of litigation and commercialization).

75. See Robert N. Saylor & Anna P. Engh, *Litigators to Examine Lack of Funding*, ACCESS, NATL. L.J., Aug. 9, 1993, at S3.

76. See LINOWITZ, *supra* note 45, at 10, 67; see also GLENDON, *supra* note 38, at 37.

77. See LINOWITZ, *supra* note 45, at 10.

78. *Id.* at 67.

79. See *id.* at 107; Holt, *supra* note 56, at 64; Keava, *supra* note 44, at 52;.

"Fine. I got in just three days ago. Saw the baby and my daughter. And now I want to get caught up on the two of you."

"No babies on our side, yet," Giannina said with a laugh. "But I'm in law school, as Rodrigo no doubt told you. How's your grandchild?"

"Both are fine. They named the little one after you. I'll have to introduce all of you sometime. But for now, can I take you two out to dinner? Talking makes me hungry. And your friend here seems able to eat any time." I looked over at Rodrigo, who nodded vigorously. "Maybe we can find a quiet place. Rodrigo has been regaling me with tales of despair. But he promised to tell me his theory of why the profession has been in such a tailspin. Have you heard it?"

Giannina said, "I don't think so. But Rodrigo is never at a loss for theories. He and Laz have been toiling away on this committee. Although I must say, the first-year experience is so peculiar that it practically begs for reform. I can't believe the Socratic method. Professors seem to believe that not telling you something is more educational than telling you. And the way lawyers write — it's deplorable."

Giannina, a published poet and playwright, wrinkled her nose in disgust.⁸⁰ "I've just gotten through moot court," she said. "The idea seems to be that when writing a brief, the flatter and more boring the better. My writing instructor is actually not too bad. She knows how to put words on paper pretty decently and sometimes lets me get away with a metaphor or simile. But the structure of a brief — I can't believe it. It goes against all the rules of good writing. I thought of using a flashback technique, for example, in my reply brief. She told me to get rid of it, for no good reason other than it just isn't done."

I gave her a sympathetic look and added, "I know. Hang in there. Will a bit of dinner help?"

II. IN WHICH THE PROFESSOR AND GIANNINA HEAR RODRIGO'S THESIS ABOUT LAW'S DISCONTENTS AND ATTEMPT TO FIND AN EXPLANATION FOR WOMEN'S AND MINORITIES' DISENCHANTMENT WITH LAW AND LAW SCHOOL

A few minutes later we were seated in a small but comfortable Japanese restaurant that Giannina pronounced, "Fine. I like this

80. On Giannina's accomplishments in her pre-Rodrigo period, see *Rodrigo's Sixth Chronicle*, *supra* note 1, at 640 n.3.

place. They have good food, plus it's far enough from the law school that I won't be running into uptight fellow students." The waiter took our orders: vegetarian tempura for Giannina, some sort of fish stew for my omnivorous friend Rodrigo, and scrambled tofu ("It doesn't have MSG, I hope?") for me. The waiter filled our teacups and departed.

"Now, Rodrigo," I said. "Why do you think that doctrinalism in teaching and scholarship is responsible for law's woes? It's a little counterintuitive. In fact, all the authorities your dean asked you to look at diagnosed the problem in exactly the opposite way. I love policy analysis and critical thought, as you know. But it seems to me that turning out technically well-trained lawyers is a law school's central mission. If lawyers knew their craft and made fewer mistakes, maybe the public and judges would like us more."

"Oh, we all have to know our craft," Rodrigo agreed. "The question is what that craft is. Carrington, MacCrate, and Harry Edwards speak as though critical theory and interdisciplinary scholarship have very little place in legal theory or practice. In this, they are completely wrong — one hundred percent off. *Ignoring* all these realist-based approaches and obsessing over doctrine and law-as-science are what's responsible for our woes."⁸¹

"I don't mind doctrine," Giannina said quietly, "up to a point. But I've noticed that most of the professors, including some of the young ones, cut off discussion when it wanders too far afield, when it begins to get into politics, or when a student wants to talk about feelings. Even though the classes are plenty challenging, a sameness is beginning to set in. How does this case square with that? Can this rule and that be reconciled? What difference would it have made in the court's result if the plaintiff were blind, left-handed, or a child? All my fellow students are beginning to comment on this. So, I'm curious why you think a steady diet of this is bad for you."

"Me, too," I chimed in.

Rodrigo took a deep draft of his tea. "Laz and I were talking about this the other day. In fact, it's his idea that something is wrong with doctrinalism. But it's because he loves law and eco-

81. On legal realism, see *supra* note 13 and sources cited therein. Developed in the 1920s as a reaction to the crude scientism of Langdellian thought, realism holds that law's essence is experience, not science or any other form of mechanical precision. According to the early realists, judges decide cases not on the basis of precedent — blindly and mechanically followed — but of politics, practicality, instinct, experience, and wise social policy. Realism later spun off critical legal studies, feminism, critical race theory, and other such approaches. See Mensch, *supra* note 13, at 26-29.

nomics and thinks the curriculum slights his favorite approach. All the public-law courses teach about the majesty of *Brown v. Board of Education*,⁸² *Marbury v. Madison*,⁸³ and all the other big liberal cases, over and over, he said, with very little about judicial restraint and other notions dear to conservatives. We're buddies, even though he's the sponsor of the local Federalist Society, as I may have mentioned."

"And yet you're best friends," I said with wonderment. "For a conservative, he certainly seems ecumenical: he gets along fine with minorities like you, as well as persons of his own persuasion. He also feels passionately about social justice and poverty, if I recall."

"His family grew up poor. Anyway, we had a good long talk, after which I did some more thinking. I think formalism — the sort of thing Judge Edwards and Paul Carrington admire and the MacCrate Report champions — is responsible for law's laments in a number of ways, some of which have special force for minorities."

"We'd love to hear them," Giannina and I broke in simultaneously.

A. *Rodrigo's First Connection: The Mechanical Quality of Doctrinalism and Scientific Jurisprudence as Responsible for Law's Discontents*

"I realize this is paradoxical," Rodrigo began. "But I believe that legal formalism — the kind of teaching and scholarship that all three of our authorities hold up as the ideal — makes matters worse, not better."

"That *is* paradoxical," I agreed. "Everyone thinks the opposite. This had better be good."

"You can decide for yourselves," Rodrigo replied evenly. "It's like prescribing that someone go stand in the rain to get rid of a cold. Today's exaggerated focus on doctrine and case law contributes to law's low estate in at least five separate ways."

"Your discussions always seem to break down into four or five parts," Giannina interjected with a wry smile. "You're like one of my professors. Everything is either a three- or a four-part test."

"Sounds like a doctrinalist," Rodrigo replied with a smile. We all paused as the waiter set our plates down before us. "This looks good," Rodrigo said, dipping a fried shrimp in some sort of yellow-

82. 347 U.S. 483 (1954).

83. 5 U.S. (1 Cranch) 137 (1803).

ish sauce. "A five-course meal to go with a five-part analysis. My favorite evening."

"Mine, too," I said, patting my stomach a little ruefully. "And how do MacCrate, Harry Edwards, and Carrington prescribe exactly the wrong cure?"

"The first way those three giants — who, incidentally, are quite correct about the problem — err is by overlooking the mechanical quality of law-as-doctrinalism."

"It certainly makes for a dull classroom," Giannina chimed in. "Several of mine are that way. The professor never gets to the big issues, the ones we're all dying to discuss. But how does that cause the laments you two were discussing earlier?"

"It's not responsible for all of them," Rodrigo replied. "For that, we need the other critiques I'll share with you in a minute. But mechanical jurisprudence⁸⁴ goes hand-in-hand with emotional insensitivity and underdevelopment of law students and lawyers. It's the famous 'hired gun' mentality that the public accuses us of. Lawyers seem to them equally prepared to take either side of a case, with no personal attachment or conviction."⁸⁵

"I don't agree," I said. "In the criminal law, for example, our system holds that every defendant is entitled to a lawyer. If lawyers were to decide on which side justice lies and were to refuse to take the other, half the cases would have no lawyer."

"It's not a case of black and white," Rodrigo conceded. "Rather, a subtle quality of mind sets in. Lawyers come to strike their clients as mere craftsmen, going through the paces, citing cases and precedent, highlighting the worst-case scenario, and so on, when the client's life or property may be on the line. Several of the clinical theorists, like Lucie White and Anthony Alfieri mention this.⁸⁶ The lawyer is cold and technical, wanting victory above all. The client, who may be poor or black, wants something else. Good lawyering is more an art form than a science. Under the apprenticeship system that prevailed until not so long ago, lawyers learned to use intuition and creativity to solve problems, more than they do

84. "Mechanical jurisprudence" is the term of belittlement some of the early realists applied to early Langdellian formalism. See, e.g., Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) (describing mechanical jurisprudence and showing its defects and conceptual impossibilities).

85. See *supra* notes 21-24, 63-64, 76 and accompanying text.

86. See, e.g., Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2109-13 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 23-26 (1990).

in today's Socratic classroom. Even Paul Carrington acknowledges that technocratic learning can 'dehumanize' and that law professors need to teach the 'effective use of intuition going beyond technical knowledge'⁸⁷ and precedent. The apprenticeship system included hands-on learning in a practical setting. There are much better ways to teach imaginative lawyering."

"If you mean clinical classes," Giannina interjected, "I'm greatly looking forward to taking some of those next year. Unfortunately, our school is thinking of closing one of its two clinics. The immigration clinic just lost its funding due to federal cutbacks."

"Bad news," Rodrigo commiserated. "Because clinical classes *would* help. But they must offer theory, too. Otherwise they can easily become mere cookie-cutter exercises in which an experienced practitioner drills a student in the practitioner's favorite way of handling a certain kind of case. This sort of teaching, as much as the Socratic classroom where formalism holds sway, can ignore a whole range of questions. Both teach instrumental reasoning: If you want to get from A to B, use C or D. Cite the right holding. Bring your case under a certain rule. The means by which an attorney can achieve an end for his or her client should be independently morally justifiable. But the ends should be as well. As Sol Linowitz says, we are a profession that no longer can say no to the desires of a client.⁸⁸ The action may be technically legal, but it may be an abominable thing to do to a consumer, say.⁸⁹ It may also not be what Mrs. G. wants.⁹⁰ The mechanical approach says, go ahead and do it anyway."

"I'm not sure I would go that far," I said. "It seems to me a lawyer needs to know technique just as much as he or she needs to have a firm grasp of values. If you have the right values but don't know how to advance the client's cause because you don't know the precedents or statutes, your advocacy is going to be a mess. Your critique needs more than that, Rodrigo, to convince me, at least."

"I *do* have more," Rodrigo replied. "Mechanical jurisprudence goes hand-in-hand with some unlovely traits, including hyper-aggressiveness and extreme obsession with production — billable hours and rainmaking over all. A focus in law school on borderline

87. Carrington, *supra* note 6, at 224, 226.

88. See LINOWITZ, *supra* note 45, at 88.

89. See *id.* at 10, 13-14, 18, 67 (noting that law was once an honorable profession and lately has become obsessed with winning at all costs, and urging that lawyers can do better).

90. See White, *supra* note 86, at 28-32 (describing the trial of Mrs. G., a client who wanted dignity more than a conventionally defined legal victory).

cases — which, of course, are the only ones in the casebook — fosters a litigator's mentality. Lawyers learn to love to fight, in part because the cases on which they cut their teeth are ones in which someone staged a full-scale battle with someone else.⁹¹ The curriculum neglects planning, mediation, and prevention of the mess in the first place. We don't train law students to be wise counselors and conciliators, much less to understand and empathize with clients from radically different cultures. We train them to be killers. The focus on appellate cases is one reason why."

Rodrigo was quiet for a moment. I took a bit of my tofu, swallowed, and then said: "You said something about obsession with production."

"Oh, that's right," Rodrigo said, offering Giannina, then me, a morsel of his own steaming dish. After depositing small portions neatly on our plates with his chopsticks, he continued. "If citing cases and filing papers is all there are in life, then the only thing that separates you from the next lawyer is doing more of it. With case law, you go round and round in little circles like a hamster on a treadmill."⁹²

"And witness the rise of the Rambo lawyer," I added. "The lawyer who places winning above all. Older lawyers say that there weren't that many of them just fifteen years ago.⁹³ Maybe the return to case law and doctrine has something to do with it."

"I'm sure it does," Rodrigo agreed. "But the means of production and the conditions of making a livelihood also have taken a turn for the worse, so that even more humane teaching and theory couldn't solve all of our problems. Doctrinalism is a discourse of power, of mastery. Like positivist thought in early social science, it serves the rise of specialization and meshes well with the profit-making motive already prevalent in our capitalist society.⁹⁴ The rise of the megafirm, the introduction of departments within firms,

91. That is: a trial, an appeal, and frequently a second or even third appeal.

92. See Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053, 2054-55 (1993) (questioning whether judicial reliance on case precedent is actually *critical* legal analysis); Schlag, *supra* note 13, at 188-89 (arguing that legal reasoning is circular and inscribed and creates boredom in practitioners); see also Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 936-54 (1991) (arguing that the dominant normative discourse is manipulable, stereotyped, and cliché ridden).

93. See GLENDON, *supra* note 38, at 74-84.

94. See generally MAX HORKHEIMER, *ECLIPSE OF REASON* 75-91 (1947) (critiquing positivism); MAX WEBER, *BASIC CONCEPTS IN SOCIOLOGY* (H.P. Secher trans., Peter Owen 1962) (1925) (describing the rise of corporate organization and the regulatory state); MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., 2d ed. 1976) (1930) (discussing the values of a capitalist society).

and the decline of the generalist all are aspects of the same thing. Doctrinalism is a cause of all this, but it is also a symptom of something broader."

"With *that* I think I agree," I said.

Giannina also nodded vigorously and then added, "It's a discourse of mastery. The case method and Socratic teaching foster arrogance, not humility. They reward the confident, snap answer rather than the thoughtful, modest response. I see it in my classes every day.⁹⁵ The competitive individualism these traditional methods foster carries over into daily life. All my classmates notice that they have become more argumentative. Three couples have divorced in my first-year class alone, and the year isn't half finished. It stands to reason that the habits of mind inculcated by the traditional classroom could carry over into practice and replicate overzealous, uncollegial advocacy and relations inside the bar."

"Older practitioners complain that civility is declining, and that lawyers treat each other with less respect, both in and out of the courtroom,"⁹⁶ I went on. "The educational goal may be to develop effective advocates, but doctrinalism contains no stopping points, no built-in checks. It goes hand-in-hand with confrontationalism and rabid advocacy at the expense of interpersonal decency, communicative skills, empathy, and justice. Negotiation, counseling, and compromise are fast becoming lost arts. In my day, a few professors emphasized these things. Today, I get the impression hardly any do."

"Maybe that is part of the reason why women and minorities of color are unhappy with the law and the legal classroom," Giannina said. "I was just reading Professor Guinier's study.⁹⁷ It mirrors some of the complaints I've read about from young women in the bar. If so, things won't change until we resolve to teach and practice differently."

"Just as it would counsel that we shy away from the Carrington-Edwards prescription in our scholarship," Rodrigo added. "And this concludes my first point. Should we order dessert? I think I can go through my other critiques a little more quickly."

95. See Lani Guinier et al., *Becoming Gentlemen: Women's Experiences At One Ivy League Law School*, 143 U. PA. L. REV. 1, 46 (1994) ("Many women report, however, that when speaking feels like a 'performance,' they respond with silence rather than participation, especially when the Socratic method is employed to intimidate or to establish a hierarchy within large classes.").

96. See *supra* notes 66-67 and accompanying text.

97. Guinier et al., *supra* note 95.

I looked at my watch. "My daughter and her husband turn in around ten. I've got some time, if you two do."

Giannina nodded and summoned the waiter, who materialized quickly, dessert menus in hand. We ordered — candied yams for my rail-thin friend, mango sherbet for Giannina and me. After the waiter departed, Rodrigo resumed as follows:

B. *Rodrigo's Second Connection: Extreme Doctrinalism
Dehumanizes Clients and Legal Problems — The
Anarchy-and-Elegance Critique*

"The second connection is related to the first. Legal formalism breeds dissatisfaction with the legal profession, on the parts of both the public and lawyers, because it mistakenly tries to make law a science.⁹⁸ Law deals with people and the myriad fact situations in which they find themselves, rather than the orderly and relatively predictable phenomena of, say, chemistry or physics. The attempt to map scientific epistemology onto a humanistic subject naturally produces frustration. People are not like molecules, solar systems, or microbes; their behavior is not like that of liquid in a tube or objects on an inclined plane. Chris Goodrich wrote a fine book (Giannina and I both nodded to show we were familiar with it) about law and law school.⁹⁹ A journalist who spent a year at Yale Law School in a program for journalists and writers, he wrote about how law, with its elegant structures of rules and principles, struggles to come to terms with an unruly world. In the words of his title, the law represents elegance; daily life; anarchy. He marveled at how well the elegant lectures and treatises he absorbed did the trick. But I think if he had stuck around for another year or two — or, better yet, visited a busy city court — he would have been more tempered in his praise. Formalism tries to make law a science, reducing human factors and fact patterns into pre-existing forms called precedent. It minimizes the role of judgment, experience, politics, love, compassion, discretion, and what our friend Duncan Kennedy calls 'intersubjective zap.'¹⁰⁰ Critical legal studies tells us that these other things are all there is, which I don't agree with. But even the more modified scientism of legal process and Paul Car-

98. In other words, with one right answer. See *supra* note 13.

99. See CHRIS GOODRICH, *ANARCHY AND ELEGANCE: CONFESSIONS OF A JOURNALIST AT YALE LAW SCHOOL* (1991).

100. See Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 11 (1984) ("It's a distanced, mocking ironization of the mode of discourse in which you have abstract, analytically specified goal language, which is supposed to be the context and set the boundaries and be the reassuring structure for behavior.").

rington manifestly give less scope than CLS and Derrick Bell do to politics, history, compassion, instinct, and all the rest."¹⁰¹

"That's certainly true," Giannina replied. "I've been studying Duncan Kennedy in my reading group."

"Didn't you meet him last year?" Rodrigo asked.

"No, I was out of town when he spoke. You told me he was amazing."

"He was. Judges, however, being busy bureaucrats with large case loads, do not much like that role. They prefer to think of themselves as technicians whose hands are tied when they send prisoners to jail, deny welfare rights to the poor, reduce recovery for consumers injured by dangerous products, and so on.¹⁰² Clients also feel something is wrong when they find their own lawyer taking the other side and spelling out for them the worst case scenario. They want a friend, and they get a laboratory technician. 'Mr. Jones, I'm sorry, but your test shows you have cancer. Please make an appointment next week with the doctor.' "

"Your scientific example reminds me — we seem to be back to positivism again. You mentioned that earlier, if I recall."¹⁰³

"I guess I did," Rodrigo exclaimed, seemingly pleased at discovering how his critiques fit together. "Dissatisfaction with mechanistic law may be part of a more general movement away from rigid, pseudoscientific approaches toward 'softer,' more modest, interdisciplinary ones.¹⁰⁴ This new emphasis came on the heels of widespread criticism, mainly from philosophers and critical social scientists, some in Europe, of positivist epistemologies. In the old, discredited paths, social scientists would try to see human behavior as subject to unvarying rules, independent of social context. These 'dominant discourses,' as they came to be called, ultimately failed because they marginalized subjectivity, ignored perspective and positionality. They simply could not deal adequately with the het-

101. See, e.g., DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* (3d ed. 1992) (discussing the political and social forces that shape law at least as much as doctrine); Gabel & Kennedy, *supra* note 100 (same).

102. See Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 845-47 (1991) (comparing Dworkin's ideal judge, "Hercules," to normative legal thinkers who struggle to persuade decisionmakers to stretch positive law to achieve a particular result).

103. See *supra* note 94 and accompanying text.

104. On this general change, see, for example, MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF HUMAN SCIENCES* (R.D. Laing ed., Random House 1970) (1966); THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS* 1-6 (1995).

erogeneity of social life and the situated, contingent nature of knowledge.”¹⁰⁵

“Well put. But I assume you mean human knowledge, not physics and mathematics,” I said, resolving to push Rodrigo as long as possible.

“Well, at least in that realm, and maybe in math and science too. I assume you are familiar with Kuhn and the study of the sociology of science that he pioneered?”¹⁰⁶

“I am,” I said.

“Even scientific knowledge is constructed and has an element of convention. A real world exists outside of us, of course. But how we choose to describe it is contingent and subject to differing interpretations at different times.”¹⁰⁷

“Granted,” Giannina broke in. “But I’m still not sure what all this has to do with the public’s dissatisfaction with law and lawyers. Science clings tenaciously to past paradigms, embraces objectivism, and yet the public worships scientists. Why is this a special problem for lawyers?”

“Nice question,” Rodrigo conceded. “One reason has to do with the habits of mind it creates. We talked about those before.”¹⁰⁸ Another is the client’s sense that you simply are not on the same wavelength as he or she is, that you don’t care about — or even understand — the human dimensions of his or her situation. You talk about funny things — ‘material elements’ of a cause of action, and so on.¹⁰⁹ You slice their problem up into little pieces, so that they end up hardly recognizing it.¹¹⁰ You translate their injury into

105. See, e.g., PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966) (describing the situatedness and power dimension of what we call knowledge); MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977* (Colin Gordon ed., Colin Gordon et al. trans., 1980); see also Derrick Bell & Erin Edmonds, *Students as Teachers, Teachers as Learners*, 91 MICH. L. REV. 2025, 2038 (1993) (characterizing Judge Edwards’ article as advocating positivism).

106. See KUHN, *supra* note 104.

107. See *id.* at 92-135 (discussing changes in scientific thought and description); see also WERNER HEISENBERG, *PHYSICS AND PHILOSOPHY: THE REVOLUTION IN MODERN SCIENCE* (Ruth Nanda Anshen ed., 1958) (same); STEPHEN TOULMIN, *FORESIGHT AND UNDERSTANDING: AN ENQUIRY INTO THE AIMS OF SCIENCE* (1961) (exploring the evolution of scientific ideas).

108. See *supra* text accompanying notes 84-98 (discussing traits and emotional responses of lawyers).

109. See *Rodrigo’s Eleventh Chronicle*, *supra* note 1, at 81-85, 87-92 (discussing emotional and professional gaps that separate lawyers from their clients).

110. See *id.* at 81-82, 87 (noting that pleading rules make little accommodation for storytelling and narrative).

something they may hardly recognize.¹¹¹ Good lawyering requires engagement, manipulation, and strategy. It requires judgment and knowledge of human beings and their motives. It requires the ability to see the world in shades of gray, acting fearlessly in situations of factual uncertainty and even moral ambiguity.”

“I know what you’re going to say,” Giannina said with excitement in her voice. “Good lawyering requires great literature, psychology, social science, and even religion.¹¹² All these may be better models than science for what lawyers do — good ones, anyway.” (I recalled that in her pre-law school life, Giannina had been a poet and playwright, publishing a number of volumes and even winning a prize or two.)

“So,” Giannina went on, “you think that the illness in lawyers’ souls comes from *denial* — the failure to deal straightforwardly with the way one sometimes manipulates, lies, fudges, and generally maneuvers to promote your clients’ ends.”¹¹³

“Which, optimistically, include justice,” Rodrigo added. “Formalism leaves you with no moral anchor. You go out into the world, confront its anarchy, and quickly become cynical. Doctors deal with sick people; lawyers, sometimes anyway, with bad ones. But formalism looks the other way, concealing all this. It’s as though doctors were trained only in science, not in how to take care of sick people.”

“I had a doctor like that once,” Giannina shuddered. “He was a terrific technician but had a horrible bedside manner. I quickly changed to another.”

“Would you folks like some coffee?” asked the waiter, who had materialized at the side of our table. “We have cappuccino, decaf, and herbal teas.”

“Decaf for me,” I said.

“Make mine the real thing,” said my high-energy young friend.

“I’ll pass,” said Giannina. Then after the waiter left: “Although you can’t do that in a Socratic classroom.”

“It’s a different discourse,” said Rodrigo with a wink. “In restaurants, no one pretends everyone else is the same. But some harried judges and lawyers do. The crits who are calling attention to

111. See *id.* at 81-83, 87 (arguing that in civil rights cases the injured party has to prove her injury by telling the other party’s story).

112. See JAMES B. WHITE, *HERACLES’ BOW* (1985) (making this general claim).

113. See Schlag, *supra* note 102, at 811, 850 (noting that the normative legal thinker constructs arguments to support norms that agree with the legal thinker’s own moral values, political values, or both).

law's contingency and political underpinnings may be speaking for the widespread feelings of impoverishment many feel throughout the legal community. This is especially so of the growing minority communities, who are most poorly served of all by cookie-cutter law. Far from teaching cynicism or neglect of craft, the new critical scholars may be in tune with the public and its needs.¹¹⁴ Carington, MacCrate, and Harry Edwards put their fingers on what's wrong. But they err in their prescription, urging instead what will only make matters worse."

"Like that brilliant doctor I had once," Giannina said. "He prescribed a regimen that should have worked, ignoring that my body was different from that of the usual person. I changed doctors fast. Oh, here's your coffee. Actually, it looks good."

"Will you have some, Miss?" the waiter asked. "We do have decaf."

"Okay. I'll have a decaf latté, if you have it."

"We can make it," the waiter said and departed.

"He's like a good lawyer," all three of us said at once.

"He didn't stick to the menu," said Giannina.

C. *Rodrigo's Third Connection: Formalism and Doctrinal Pedagogy Deflect Us From Things That Matter*

As the waiter wrote down her order and walked away, Rodrigo looked up at his friend.

"Giannina, do you remember how you said that formalism is a type of massive denial?"¹¹⁵ (Giannina nodded.) "Well, my third critique builds on that. I think formalism, whether in legal scholarship, teaching, or practice, is bad for our souls and our ethics. It narrows political options. And it predisposes lawyers to developing the bad characteristics that some of the public accuse us of having."

"Oh, dear," Giannina sighed. "I knew I should have stayed with writing. I made less than three thousand dollars most years, but if you're right, at least I was able to preserve my immortal soul."

Rodrigo shot her an inquiring look. "I expect this to be the most controversial part of my thesis. Nobody likes being told their soul is in danger."

"Get on with it," I said. "The public already thinks we're a bunch of unscrupulous sharks. If you can draw a connection be-

114. See *Rodrigo's First Chronicle*, *supra* note 1, at 1365-76 (pointing out the utility of critical analysis and minority viewpoints to developed societies mired in stasis).

115. See *supra* text accompanying note 113.

tween their low opinion and the way we think, write, and practice, come right out and say so. It can't hurt and might do some good."

"Let's take the least controversial part first," Rodrigo said, stirring his characteristic four teaspoons of sugar into his coffee. "Formalism is a deflection. It points you neatly away from the things that matter. This is bad for you and, in the long run, for your reputation."

"By deflection, I assume you mean from politics," Giannina ventured. "I've been reading *The Politics of Law* in my reading group.¹¹⁶ So if that's your point, it's not exactly new."

Rodrigo shot her a quick look. "I do think the crits are right, but I had something a little different in mind. Have you gotten to *Erie v. Tompkins*¹¹⁷ yet in Civil Procedure?

"We're starting it next week. I've read it, though. I often skip around in the casebook if I find something interesting."

"Then you know *Erie* is about the distribution of judicial power between the federal and state judiciaries. It's essentially a choice-of-law case. What you may not know yet is that a sort of mystique surrounds it.¹¹⁸ Many consider it one of the handful of most important cases in American law — the fulcrum that separates the state and federal judiciaries, that allocates power between the two levels of government. It's said to be the cornerstone of our federalist system."¹¹⁹

"My goodness," Giannina exclaimed. "At first glance it just looked like an interesting choice-of-law case about somebody who happened to be walking along a railroad."

"In the eyes of many, it's much more than that," Rodrigo elaborated. "It tells us when a state versus a federal judge has the right to proclaim the common law. In diversity of citizenship cases, it says that federal courts must look to state substantive law rules, but may apply their own procedure. In federal-question cases, more or less the opposite prevails."

"Nice and neat," Giannina commented. "But why is the case considered so important? It just seems to say that an earlier decision, *Swift v. Tyson*,¹²⁰ was wrong — that is, too narrow — in its

116. See *THE POLITICS OF LAW* (David Kairys ed., 2d ed. 1990).

117. 304 U.S. 64 (1938).

118. This mystifying quality of the famous case was first pointed out to me by my colleague Leon Letwin.

119. See CHARLES A. WRIGHT, *FEDERAL COURTS* 374, 377 (5th ed. 1994) (discussing *Erie's* prominence and importance in American law).

120. 41 U.S. 1 (1842).

application of the Federal Rules of Decision Act, requiring that federal judges, sitting in diversity, bow only to state law incorporated squarely in a statute.”

“According to the usual view, it’s the cornerstone of federalism, setting up the limits of federal judicial power and carving out a region of state autonomy.”

“Well, I can see how it’s at least a moderately important case,” Giannina said. “I assume you think the opposite. Such a contrarian! Why do you think the case is unimportant or misguided?”

“It’s not misguided,” Rodrigo replied. “It may well be rightly decided. What I think is curious, though, is the veneration showered on it by a number of very bright people. There’s practically a cult following, going back to Justice Frankfurter and the Harvard school of institutional analysis, which holds that the most important questions have to do with determining which person, authority, or branch of government is the most appropriate decisionmaker for a particular question.”

“A kind of latter-day formalism!” Giannina exclaimed.

“Exactly,” Rodrigo replied. “A way of avoiding hard substantive questions. It *is* important to know whether a federal or a state judge has the right to declare the common law, for example on tort duties toward trespassers who walk along railroad tracks at night.¹²¹ But in another sense, *Erie* is a trivial case. I hope I’m not poisoning your mind.”

“Thank you very much, Professor,” Giannina said. “But what I’d really love to know is why you think it isn’t such a big deal.”

“Well, consider the profile of the typical federal judge,” Rodrigo replied. “How old? Say, fifty-five. Which color? White. Male. Socially moderate to conservative. Lives in a nice suburban community. Went to a good, but probably not great, law school. Plays golf on Sundays. Has two or three kids.”

“I suppose you’re going to say we need to do better than that,” Giannina replied.

“We *should*, although that’s not my point.”

“Oh?” Giannina said inquiringly.

“Now consider the profile of the average *state* judge. Fifty-five years old. A moderate Republican. White. Male. Went to a good, but not great law school. Plays golf on Sundays. My point is that the two sets of judges look pretty much alike. Not exactly, of course. The federal judiciary is sometimes a little better, a little

121. See *Erie*, 304 U.S. at 69-71 (setting out the facts and choice-of-law issue in the case).

more select. But the similarities overwhelm the differences. *Erie*, however, creates a huge fuss over which white, male, moderate Republican, fifty-five year old judge gets to have his version of the common law applied to the case at hand. Now, I'm not saying it makes *no* difference who gets to do so, in railroad cases or in any other. But there are very few female, black, working class, or gay or lesbian judges. Few with disabilities. Few younger than thirty-five. Few single mothers. Few with working-class roots."¹²²

"Now *that's* a question that really matters," I said.

"Yet the *Erie* line of cases neatly blinds us to it, focusing instead on whether Tweedle Dee or Tweedle Dum gets to declare the law. This is what I mean by a deflection. Doctrinalism, the worship of the conventionally framed question, blinds us to questions that really matter, ones of power and authority."

"You're not saying *Erie* is unimportant, are you?" I asked.

"Not at all. I'm merely saying that its importance is overblown. And if we focus single-mindedly on the question it asks, and don't ask the other one, we'll never get anywhere."

"Now that's a serious critique," I conceded. "To me, it's more forceful than the first one. But is it limited to a few big cases like *Erie*? If so, the cure for doctrinalism would be simply to remind ourselves that the case is not the be-all and end-all, that many important questions remain even after this one is addressed — such as the racial composition of the very judiciary that propounds the rule."

"I think the risk is general," Rodrigo replied. "Are you familiar, Professor, with Laurence Tribe's notion of structural due process?"¹²³

"You mean his suggestion about an interaction between procedural law and social change?"¹²⁴

122. For information on the makeup of the state and federal judiciaries, see ALMANAC OF THE FEDERAL JUDICIARY (Christine Housen et al. eds., 1996) (containing profiles and evaluations of all judges in the federal district and circuit courts); 1996 JUDICIAL STAFF DIRECTORY 659-928 (Ann L. Brownson ed., 1996) (containing the biographies of 1900 federal judges); THE AMERICAN BENCH (Marie T. Finn et al. eds., 8th ed. 1995/96) (containing nearly 18,000 biographies of judges from all levels of both the federal and state court systems); see also Susan Maloney Smith, *Diversifying the Judiciary: The Influence of Gender and Race on Judging*, 28 U. RICH. L. REV. 179, 179-81 (1994) (laying out statistics that show the relative lack of women and minority judges in both federal and state courts).

123. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 17-1, 17-2, 17-3 (2d ed. 1988); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

124. See TRIBE, *supra* note 123, at 1674 ("Inescapable is the substantive question: given the relevant social and economic realities, which path now points away from domination in a constitutionally relevant sense?"); Tribe, *supra* note 123, at 269 (urging that a third category

"Exactly. He proposed that judges and other legal decisionmakers apply rules and procedures with an eye to the moral and political status of the case being adjudicated. Cases that present few novel or controversial issues ought to be adjudicated summarily, via streamlined procedures and under uniform, bright-line, across-the-board rules. Cases that present novel, controversial issues ought to be treated differently. These other cases ought to be aired fully, openly, and by means of procedures that allow full consideration of the entire range of issues they present.¹²⁵ Examples of such cases, lying in the zone of moral flux, might include constitutional challenges to sodomy statutes or cases concerning women's procreative rights or the right to die."

"So you are saying that with cases falling within what you call the zone of moral flux, we benefit by forcing ourselves to undertake serious, prolonged analyses?" Giannina asked.

"Tribe thinks so," Rodrigo replied. "Doing so will enable us more rapidly to arrive at consensus. When this happens, adjudication may become more summary and routinized. We can then use presumptions, summary judgment, tight evidentiary rules, and other devices to confine discussion to the most centrally relevant points, since we will know what they are, and eliminate the others."

"A sensible approach," I commented. "Saves time and effort. One is not constantly reinventing the wheel."

"And quite liberal," Giannina added. "It seems to me an outgrowth of institutional analysis, as you mentioned before. Curve-fitting. And I suppose you think it has a flavor of formalism about it?"

"It does," Rodrigo acknowledged. "Consider the contrast with critical legal studies. CLS points out that vast reaches of law are shot through with contradiction and indeterminacy.¹²⁶ A judge deciding a case can invoke different principles and precedents and come to diametrically opposite conclusions.¹²⁷ We use rules and rights to make it appear as though law is fair, neutral — a science

of constitutional limitation exists that focuses on the structures through which policies are both formed and applied).

125. See *TRIBE*, *supra* note 123, at 1675-76 (same); *Tribe*, *supra* note 123, at 310 (urging that the judiciary focus its concern not just on substance and procedure but also on the structure of the dialogue between the state and those whose liberty is constrained by the laws of the state).

126. See generally *Critical Legal Studies Symposium*, 36 *STAN. L. REV.* 1 (1984).

127. See, e.g., Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 114-16 (discussing indeterminacy and contradiction in law).

with only one right answer.¹²⁸ Legal discourse and all the elements of legal culture — legal education, the bar exam, the rituals, robes, and esoteric jargon — all serve to conceal a series of result-oriented replications of the status quo. Why do we put up with this? CLS's answer is that the myth of law's objectivity and rationality compels our loyalty."

"In short, we are persuaded by law's veneer of fairness to believe it actually serves our interests when it does not," Giannina interjected. "David Kairys says much the same thing."¹²⁹

"CLS's solution, though, is not revolution in the ordinary sense. Most CLS writers are idealists who believe our main chains are mental. Because of the mystifying ideology with which we are all imbued, we cannot conceive of a better world, one based on love and cooperation. We are taught that the rule of law in its majesty must be preserved even though it does injustice in Mrs. G's case.¹³⁰ The crits' solution, then, is to think and teach, to move methodically from one area of the law to the next, showing the political, contingent, interest-serving nature of doctrine in each area. In this program of 'trashing,' CLS scholars draw on methodologies such as neo-Marxism, literary interpretation, and structural analysis."¹³¹

"I think I see where you are going," I interjected, snapping erect. "You are saying that CLS challenges Tribe's liberal thesis, in fact stands it on its head. Liberal theory focuses on the difficult, or controverted, case — the *Brown v. Board of Education*¹³² or *Erie v. Tomkins*¹³³ — to which it devotes lavish attention. CLS, by contrast, says that we must be most on guard regarding matters and issues that seem routine — ones that seem comfortable and familiar, that have been relegated to 'rules.' The familiarity and comfort these rules give us — their 'naturalness' — mean that they are most likely to form part of the ideology by which we submit to illegitimate domination."

"The tyranny of the ordinary," Rodrigo replied. "Judge Edwards' notion of practical scholarship suffers from the same vice. Practical scholarship greases the wheels. It helps judges accomplish

128. See *supra* notes 13, 81 and accompanying text (discussing this Langdellian vision).

129. See DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME 186-87 (1993) (noting that law's unstated agenda mystifies and induces our consent to a seemingly fair structure that in reality does injustice).

130. See *supra* note 90 and accompanying text.

131. See, e.g., Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984) (describing critical program of deconstruction and its techniques and strategies).

132. 347 U.S. 483 (1954).

133. 304 U.S. 64 (1938).

more easily and smoothly what they are doing already. But the point of scholarship — theoretical or clinical — ought to be to make judging harder, not easier. A judge might say he or she wants useful scholarship, but useful to whom? As Judge Posner puts it—"Rodrigo paused for a moment while he shuffled some papers he had brought. " 'Perhaps the ultimate criterion of all scholarship is utility, but it need not be utility to a particular audience.'¹³⁴ He goes on to describe legal scholarship as second-rate, but writes that he has nevertheless found much of it important¹³⁵ — in short, legal scholarship is a 'high-risk, low return activity.'¹³⁶

We were all silent for a moment, absorbing what Rodrigo had said. Then, I said: "To summarize then, Rodrigo, you believe the doctrinalist counterrevolution is fundamentally misdirected. Edwards and Carrington ignore that in times of change, like now, the familiar is where the greatest danger lies; reform may be the most practical thing. Outsider and critical scholarship, of both the theoretical and clinical variety, may be what our profession needs most. The call for a return to doctrine is a form of collective denial."

"Many of my most doctrinal classes," Giannina began, "seem to have had the least practical effect in the real world. For example, doctrinal approaches to criminal law have had little or no effect in reducing the crime rate or understanding the forces that lead to crime. They lead to cases like *McClesky v. Kemp*,¹³⁷ which pretend that race does not exist and that a form of sterile neutralism compels us to ignore what everybody knows."

"Speaking of denial," Rodrigo interjected tactfully. "It's getting late, and the Professor may be tired. Do we need to think about calling it quits soon?"

"I'm going strong," I insisted. "I'd love to hear your two final connections. If it gets too close to ten o'clock, I'll just call and ask them to leave a key under the mat. This is all very stimulating. Did I tell you I'm serving as a consultant to Mexico's national law school? They're thinking of reorganizing their curriculum more along American lines. I'd like to be able to report the good as well as the bad. So, please go ahead. If you have the energy, I have the time."

134. Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1928 (1993).

135. See *id.* at 1927 (listing names of interdisciplinary and outsider scholars he considers significant).

136. *Id.* at 1928.

137. 481 U.S. 279 (1987).

D. *Rodrigo's Fourth Connection: Doctrinalism Dulls the Moral Senses and Injures Minorities and Women*

"I'm glad you find this useful. You're a great sounding board, Professor. Giannina and I are both in your debt. We hope you have a lot of grandchildren and make dozens of return trips to this country."

"You two can always come down to see *me*," I pointed out. "Other than that one visit, you haven't been down at all. My art collection has grown considerably since you were last there. I'd love to show you my new pieces."

"Just as we'd love to see them," said Giannina with alacrity. "You also promised to introduce me to your friends in that writers' colony. I'll definitely be down, even if Rodrigo won't," she concluded, smiling at Rodrigo so he would see she was only half serious. "What's your theory about formalism's ethical deficiencies?"

"Formalism and its pedagogical equivalent," Rodrigo began, "rely on appellate cases. They have to — that's where the law resides. These cases have relatively few facts and a great deal of doctrine and case shuffling. No party stands before the court — that happened below — nor are there witnesses, police officers, documents, or expert scientific or medical testimony. All of this is presented in a sterile, highly summarized 'record of the case.' The actors are stick figures — the 'plaintiff,' the 'appellee,' and so on. The concrete details — the drama of the trial — are missing. Little confronts one to get excited, to engage the imagination, or to inflame one's sense of justice."

"I think we spoke about something similar once before. We agreed it is only concreteness, not abstraction, that triggers conscience, that engages one's sense of moral outrage.¹³⁸ It's as though medical students never studied using actual sick patients and only reviewed hospital records of deaths, accidents, medical dosages, erroneous diagnoses, and so on."

"I think it was the fourth or fifth time we met," Rodrigo agreed. "The Langdellian case method and Socratic teaching breed reductionism. For idealistic students, this approach is soul sapping, leading easily to a fatalistic acceptance of bad law. With less idealistic students, it can breed crooks. Doctrinalism, much more so than its critique, may be responsible for a pessimistic sense in students and

138. See Delgado, *supra* note 92, at 956 (commenting that "it is particularity and real world detail that alone move us").

young lawyers that the legal system is hopelessly confining and unfair and will always be that way."

Giannina added, "I see it all the time. My feminist classmates understand that truth is situated, and that the struggle for truth is about political negotiation — a power play, really — that seeks a broader (or at least different) equalization of legal benefits and protections.¹³⁹ We know that this is not at all nihilistic, as Carrington charges. Rather, we see law as a sort of orchestral power play, fluid and always ongoing. As such, lawyers must be ever vigilant, never resting on their laurels or being content to say, 'Well, that's the doctrine.' Each victory signals another battle to come. Good doctrine always slips away. As legal professionals, we have the duty constantly to be skeptical watchdogs of the oppressed and disadvantaged, to be catalysts of social change."¹⁴⁰

"I wish I had more students like you," Rodrigo exclaimed. "Are you sure you and your friends don't want to transfer?"

"I'm very happy where I am," Giannina declared. "But go on. You said that particularity enhances empathy and moral instincts. I think all of us agree with that. But you also hinted earlier that rigid doctrinalism is especially hard on minorities and women. Do you mean as learners, clients, or what?"

"Both," Rodrigo said. "You mentioned the Guinier study, which found that women were apt to be more turned off than men by the Socratic classroom — by verbal aggression, showmanship, bluffing, sparring, and demand for performance.¹⁴¹ But I was really thinking more of minorities and women as consumers."

"Hmm," I said. "I must remind you that the greatest civil rights advocate of recent times, Justice Thurgood Marshall, had quite a reputation as a stickler for civil procedure.¹⁴² He displayed little sympathy for civil rights advocates who hadn't bothered to learn the rules of procedure and evidence or how to file a motion properly.¹⁴³ Don't civil rights attorneys need to know these things even better than the average attorney because their papers and motions

139. Cf., e.g., CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 70-77 (1987) (discussing women in law and the demand on them to be professionally masculine (the "man standard") and personally feminine (the "lady standard")).

140. See, e.g., Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 378 (1992) (arguing that although law is unlikely to bring about racial fairness, we must nonetheless make the effort); *Rodrigo's Third Chronicle*, *supra* note 1 (exemplifying the search for new solutions).

141. See Guinier, *supra* note 95.

142. See Geoffrey C. Hazard, Jr., *Justice Marshall in the Medium of Civil Procedure: Portrait of a Master*, 80 GEO. L.J. 2063 (1992).

143. See *id.* at 2079.

will be scrutinized even more searchingly than those of the average corporate lawyer or drafter of wills?"

"Lawyers must always know their craft," Rodrigo conceded. "But we must also understand how the rules are stacked against us. Consider the demand for neutral principles of civil rights law.¹⁴⁴ Neutrality — the idea that any rule operates the same way in different settings and for different litigants — very much advantages those who currently enjoy a privileged position in society. This approach sees affirmative action as reverse discrimination: it disadvantages 'innocent' whites, who have done nothing wrong, for the benefit of blacks, who — for all we know — may never have suffered discrimination in their lives.¹⁴⁵ Our system is color-blind.¹⁴⁶ In one grotesque case, the Supreme Court held that women who could not obtain a pregnancy benefit were not discriminated against, because men could not obtain the benefit either.¹⁴⁷ The law denied insurance benefits to all pregnant *persons*, male or female."¹⁴⁸

Giannina rolled her eyes. "Doctrinalism also disadvantages women and minorities simply because of the great emphasis it places on precedent. It justifies a current action or rule by virtue of an earlier decision or rule.¹⁴⁹ Yet that earlier rule, laid down in an age when women and people of color were less significant factors, will likely disadvantage them. In this way, law's rules and narratives incorporate the ruling group's sense of things. Doctrinalism passes that invisible advantage down to succeeding generations.¹⁵⁰ Practical scholarship does the same — it ratifies and renders more efficient the operation of class advantage."

144. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (urging that public law must rest on neutral principles, rather than on any sort of favoritism for particular groups).

145. See Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 310-15 (1990) (showing how the "innocent white" concern underlies much of the resistance to racial remediation); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 34-37 (1990) (detailing the obstructive power of the narrative of "white innocence" in the search for reparational remedies for blacks).

146. See Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2-3 (1991) ("A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans.").

147. See *Geduldig v. Aiello*, 417 U.S. 484 (1974).

148. See *Geduldig*, 417 U.S. at 496-97.

149. See Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 817-22 (1992).

150. See *id.* at 818, 823-24.

"In both ways, doctrinalism replicates the status quo," Rodrigo summarized. "In the classroom, it rewards a conventional sort of quick-witted cleverness that relies on a few formulaic maneuvers and axioms. It rewards posturing and self-assurance. In legal scholarship, it greases the wheels of industry. And in real life, it perpetuates past inequalities."

"The objective 'reasonably prudent man' standard, for example," Giannina hazarded. "Consider how it silently advantages men and disadvantages women in tort law and a host of other areas.¹⁵¹ I was reading about a date-rape case on my campus the other day. Two undergraduates had been talking and walking after a campus party. Both had been drinking. Later they had sex, which the woman said was coerced and nonconsensual. The man said she led *him* on. The campus committee adopted his story, holding that a reasonable male could interpret her lack of resistance, the way she was dressed, and her willingness to kiss and cuddle as evidence of her readiness to have sex. All of this she strenuously denied. In many such cases, the man believes he is merely being commanding, she coy. The woman, however, experiences the whole episode as degrading and pressured. A legal standard predicated on what a reasonable male date would see as consent simply buys into one story — the man's.¹⁵² And it does this under the guise of neutral rules regarding what a reasonable, average person would understand about the situation."

"Formalism always narrows the range of considerations a legal rule will take into account," I said. "That's its nature. And, in a way, it has to. Otherwise, law would not work. The decisionmaker potentially could take into account an infinitude of details. But I gather you are not complaining about that, but rather the way doctrine submerges the interest of the weaker party?"

"I am," Rodrigo replied. "Nonstandard cases and people, such as minorities, are excluded neatly under many legal rules. We use nonformal rules when we want to do *real* justice, to corporations for example. Consider long-arm jurisdiction and the multifaceted minimum-contacts test we employ there.¹⁵³ Or recall the large number of defenses antidiscrimination law makes available to defendants: business necessity, lack of intent, lack of causation, and so on."¹⁵⁴

151. See *id.* at 816, 821-22 (using example of a hypothetical date-rape case).

152. See *id.* at 819-20.

153. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

154. See NORMAN VIEIRA, *CONSTITUTIONAL CIVIL RIGHTS* 231-33, 238-39, 252 (2d ed. 1990).

"Are you saying that predictability and the rule of law are not goods?" I asked, determined to challenge Rodrigo as long as possible.

"Not at all," he replied. "They are. Legal process and formalism, however, do not deliver them. They allow result-oriented decisions that favor the empowered party or his class. Only in that sense is formalism predictable. The right to property, for example, would protect everyone equally if everyone had approximately the same amount of it. But, of course, they don't.¹⁵⁵ So, the way things are now, the right to hold property increases inequality, exacerbating the gap between the haves and the have-nots. Similarly, in a society like ours, a neutral rule that says 'race doesn't count' tends to advantage whites. Since they are members of the more advantaged race, the one that controls most of the assets, and the one whose history, traditions, and narratives are reflected in the law, customs, and form of government, the right to ignore one's race — white, brown, or black — will tend to advantage them at the expense of all the others. All this while everyone loudly proclaims: 'Race is not important. We are all equal. We are all the same race: American.'"¹⁵⁶

"I agree," I said. "Formalism is not much of a friend to minorities. But what about the formalism that most conservatives love most dearly: merit? Can there be any objection to using *that* principle — the most neutral of all — as a basis for distributing benefits and goods, like places in a law school class? You and I are teachers, Rodrigo. And perhaps Giannina, too, will be one some day. Rodrigo, you and I see differences among students every day. Some answers in class are better than others. Some exams are better than others. This you cannot deny."

"I think you and I discussed this before, Professor.¹⁵⁷ Merit only exists relative to some set of conditions and objectives. Move the hoop in a basketball game up or down six inches and you radically change the distribution of who has merit. The LSAT, for example, predicts first-year grades, but only because the curriculum is the way it is. It predicts success as a lawyer much less well, because

155. On the gap in well-being between rich and poor and between whites and blacks in the United States — one of the largest in the industrialized world — see Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923, 931-32 & n.34 (1988) (reviewing DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987)). For other indications of social pathology, see *Rodrigo's First Chronicle*, *supra* note 1, at 1370, 1376-77.

156. I am grateful to J.S.W. Park for this suggestion.

157. See *Rodrigo's Tenth Chronicle*, *supra* note 1, at 1732-40.

lawyering requires many skills — empathy, communication, perseverance, cooperation — that neither the test nor the first-year curriculum emphasizes.”¹⁵⁸

“Our friends Farber and Sherry have written about that,”¹⁵⁹ I said, searching my memory. “I heard someone referring to their article the other day. Oh, yes, it was my daughter’s husband, who is an assistant dean at a metropolitan campus downtown.”

“Giannina and I were talking about it, too. One of her professors held it up in class as a model of doctrinal clarity and scholarly precision. She urged all of her students to read it, which most of them went out and did. In the article, the two Minnesotans point out that when crits like you and me trash conventional merit — do you remember that news story about how coachable the SAT is? — we neglect the impact of our actions on Jews and Asians. Those two groups have climbed the ladder of conventional merit. So, when the crits criticize conventional merit, they are being unwittingly anti-Semitic and anti-Asian.”¹⁶⁰

“A perfect standoff,” I said. “Conventional merit hurts most minorities but helps Jews. Attacking conventional merit hurts Jews but helps other minorities. How do you deal with that? It seems like a good argument to me. They turn things around, just like you do, Rodrigo.”

“It’s not a standoff at all,” Rodrigo replied. “The SAT has a thoroughly disreputable history of racism and Aryan supremacy.¹⁶¹ Critical thought does not. Nor do civil rights activists, crits, or other progressive people have any comparable history of anti-Semitic or anti-Asian sentiment. Quite the opposite: minority soldiers fought to liberate the Jews in Germany and have opposed domestic anti-Semitism throughout our history. The traditional civil rights alliance includes Jews and blacks marching side by side. Only extreme formalism, ignoring history and context, could make Farber and Sherry’s two propositions look similar. A huge difference separates attacking implicit racism in standard testing and attacking Jews and Asians. It’s like looking at the World Trade Center and a nomad’s

158. See *id.* at 1740-45 (pointing out that the distribution of merit is always relative to a set of background considerations, such as economic and racial bias).

159. See Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853 (1995).

160. See *id.* at 856-57 (arguing that once standards of merit are discounted, any other explanation of the success of Jews and Asians will be racist or anti-Semitic).

161. See *Rodrigo's Tenth Chronicle*, *supra* note 1, at 1741-45.

tent through blinders and pronouncing them the same because both are gray."

"What about more universalistic ethical and political principles, such as promise keeping or ethical utilitarianism? Are these not immune to your antiformalist attack?" Giannina asked. (I was glad to see she sometimes joined me in pushing our young *Wunderkind* to test his ideas.)

"They're certainly better than formalism's sterile neutralisms and cliché formulas, especially in the area of civil rights. The problem is that we have a mixed ethical system, one that gives some weight to deontological principles — such as promise keeping — but that also affords some scope for utility and the maximization of social goods — such as pleasure and happiness."¹⁶²

"I could use an example," I said.

"Act utilitarianism is said not to require consideration of beings who lack any sense of their own futures. By the same token, the young, who have long futures, generally prefer utilitarian ethics and organization. Go ahead and adjust social security downward, they say, otherwise the system will go broke and nothing will be left for us. The elderly, by contrast, want promise keeping. Having lived longer, they're apt to have more promises out, more things owed to them, like social security. And so they say, 'Don't touch social security. It's a promise. We relied.'"

"I think I see where you are going," Giannina ventured. "Minorities are like adults — people whose cultural or collective history contains much mistreatment. As such, they will tend to emphasize recompense for harm and similar Kantian-style principles. White liberals, by contrast, will treat affirmative action like an ordinary social-engineering problem, with a forward-looking dimension."¹⁶³ 'How many doctors and lawyers of color do we have? Looks like we could use a few more. How about a program that . . . ?' I was reading an article that observed that white liberals almost always base affirmative action on utilitarian, forward-look-

162. That is to say, our ethical system seems to reflect, in nearly equal measure, Kantianism and Mills-Bentham-Rawls-style utilitarianism. We believe certain odious things — such as enslavement or cruel punishments — are wrong per se, while others — such as curfews for teenagers — are right or wrong only by virtue of their consequences (i.e., whether they deter traffic accidents or excessive drinking on the part of the young more than they demean or provoke resistance).

163. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 569-71 (1984) (urging that society see affirmative action in forward-looking terms); see also Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 83-84 (1986) (noting that courts are beginning to take this approach).

ing principles, while minorities do so on past, redress-oriented grounds."¹⁶⁴

"So you are saying that even the very choice of ethical principle to justify affirmative action is itself nonneutral."

"Exactly," Rodrigo and Giannina replied simultaneously, then smiling at each other.

Giannina looked at Rodrigo, then summarized: "Ethical formalism, a cousin of the legal variety, obscures the power dimension of the choice."

"Earlier you mentioned, Rodrigo, that formalism was bad not only for minorities but for lawyers at large. You said something about souls. I'd love to hear why. The older I get, the more interest I take in souls," I quipped.

"It's the last piece of the puzzle," Rodrigo agreed. "But," looking at his watch, "it's five minutes to ten. Don't you need to call?"

"Oh my goodness!" I exclaimed. "I'd better, or I'll be *persona non grata* in my own household."

"That I doubt," said Giannina smiling as she pointed out the corner of the restaurant where the pay phones were located.

After a brief conversation with my daughter ("Don't worry, Dad, we decided to watch the late news. If we're not up, we'll leave a key under the doormat"), I returned to the table, where my two young friends were conversing animatedly.

"No problem. So long as I can keep my eyes open," I said.

"While you were away, Giannina was saying she hates psychological critiques, because she thinks they're unfair to one's adversary. I think it's curious for a playwright like Giannina not to be interested in motivations. We just finished agreeing that it's okay to dissect habits of mind so long as you do so in general terms, not as applied to particular people."

"A sensible-sounding compromise," I said. "But is it a neutral principle?"

Both my companions smiled, then Rodrigo continued as follows:

164. See Delgado, *supra* note 163.

E. *Rodrigo's Fifth Connection: Extreme Doctrinalism Promotes Schizophrenia, Dishonesty, and Other Unfortunate Traits of Mind on the Part of Its Devotees*

"Formalism is a case of legal obsessionism, as Pierre Schlag calls it.¹⁶⁵ One devotes hours to small distinctions between this case and that, looking for minute differences, when they count for very little and when society and the legal system are in tatters. It also makes you lie — to profess beliefs, for example, in the majesty of the rule of law, in its internal consistency, and in the underlying coherence of contradictory platitudes. It makes you recite things you know are not true — that racism exists only when it is intended; that everyone knows the law; that all are rational-interest calculators and cost avoiders; and that judges are capable of balancing incommensurable values. All this amounts to a vast sort of schizophrenia, in which one knows things in ordinary life that one is forced to forget when functioning as a lawyer.¹⁶⁶ This allows the ACLU, for example, to assert that vicious hate speech ought to go unregulated and to maintain simultaneously that it is in the best interest of minorities that this be so.¹⁶⁷ It allows lawyers solemnly to proclaim that our system of criminal law is the best in the world, when over ninety percent of defendants plead guilty and get no trial whatsoever.¹⁶⁸ Doctrinal fascination, as Schlag calls it," Rodrigo said, reading from a sheet he pulled out from his briefcase, "breeds a mentality prone to 'coercion, wheedling, needling, harassment, and other rude and crude practices of lawyers.'¹⁶⁹ It also promotes grandiosity. Because no one else thinks that way, lawyers are superior to all the rest — real professionals."

"Wouldn't teaching legal ethics help?" I asked. "Carrington and MacCrate both think so."

165. See Pierre Schlag, *This Could Be Your Culture — Junk Speech in a Time of Decadence*, 109 HARV. L. REV. 1801, 1820 (1996) (book review).

166. See *id.* at 1813-20.

167. See Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 881 (1994) ("Many absolutists and defenders of the First Amendment urge that the First Amendment historically has been a great friend and ally of social reformers.").

168. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 21.1(c) (2d ed. 1992) (citing former Chief Justice Burger's estimate that ninety percent of criminal defendants plead guilty). For statistical corroboration of this estimate, see BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *SOURCEBOOK OF CRIMINAL STATISTICS — 1995*, at 489, 498 (Kathleen Maguire & Ann L. Pastore eds., 1996) (indicating that 92% of state felony convictions in 1992 and 91.9% of U.S. Sentencing Commission Guidelines cases in fiscal year 1995 were the result of guilty pleas).

169. Schlag, *supra* note 165, at 1816.

"I doubt it," Rodrigo replied. "As we mentioned earlier, it's concreteness, not abstraction, that triggers the moral impulse.¹⁷⁰ The usual course in professional responsibility merely takes the students through the rules. In a classic experiment, seminarians stopped to help a man lying groaning on the sidewalk at a rate even *lower* than passersby generally.¹⁷¹ Some just had heard the parable of the Good Samaritan in class, but walked right on by. By the same token, most students in professional responsibility classes mainly internalize rules — don't do this or you'll be caught and this is what will happen."

"Sounds dire. If not classes and teaching, then what?" I said.

Rodrigo replied, "Get the students out into the world. Give them hands-on experience with real clients, with poverty, crime, and neglect. The main use of language is to lie. As one of the most word-based professions, law is apt to be the most debased. In a fine book, Skover and Collins show how junk discourse edges out the tempered, rational kind that is the model for the First Amendment.¹⁷² Like bad money driving out good, small-minded, angling, wheedling habits of legal practice drive out the more civilized, temperate kind. Doctrinalism — too much 'law,' too many formulas — is the main, dominant cause of our sad estate."

"Why do judges like Harry Edwards seem so enthralled with it, then?" Giannina asked. "Is it merely professional self-interest, the natural hope to find a law review article on point that will make it easier to write that opinion?"

"Maybe so, in part," Rodrigo agreed. "But it may also be like that of a schizophrenic who looks for others to share his or her delusion. The desire may also contain an element of narcissism. Judges are like construction workers. They want the physics department to write about *them*, and complain that the theoretical physicists in the ivory tower never print anything they can use. Some practitioners make the same complaint: What are you crits doing for me, an overworked, harried legal services lawyer with a huge caseload of poor clients? And, in a way, both are right: their own work *is* vitally important. They are on the front lines. If the rivets aren't put in right, the building will fall down. But the physi-

170. See *supra* notes 138-40 and accompanying text.

171. See Alfie Kohn, *Between God and Good: Research Shows Believers Are No More Likely to Love Their Neighbor Than Nonbelievers*, S.F. CHRON. & EXAMINER, July 8, 1990 (This World), at 15 (summarizing various studies of helping behavior).

172. See RONALD K.L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE* (1996).

cist may be researching an altogether new principle of building. Judges are in some respects like the riveters, uninterested in what is going on over in the physics department and wishing they would do something for *me*."

"I'm not sure I'd go that far, Rodrigo," I interjected. "I've known many fine judges who are interested in justice and willing to innovate, if necessary, to find it. Maybe it's that legal scholarship speaks to many different audiences, something our friend Harry Edwards hasn't realized yet. Sometimes we aim our writing at the courts; at other times for each other, our communities, or the legislature. Sometimes we aim to change the legal paradigm, not make small refinements within it."

"Can I bring you folks something else?" our waiter asked. I looked at my companions and shook my head. "Not for me."

"Could you bring us the bill?" Rodrigo asked.

"Let me take care of it," I offered. "I *am* on vacation, and you two have helped bring me up to date. It's hard for an old guy in retirement to keep up, especially spending ninety-nine percent of my time outside the United States as I do without a comprehensive law library, except the tiny one at the embassy."

"No, it's on us," Rodrigo said quietly, but firmly. "You are always an honored guest."

Resolving to let things lie for now but to make a lightning move when the check arrived, I asked Rodrigo (partly in hopes of distracting him): "But Rodrigo, what use is it to know that doctrinalism in the law schools and as a judicial and scholarly philosophy promotes all these ills we spoke of before? Doctrinalism is law on the cheap. It's easy, lazy, and bureaucratic. It deflects you away from things that would make you have to think hard, to take responsibility. By the same token, the Langdellian classroom is legal education on the cheap. One professor holds sway over 100 students, dazzling them with imponderable questions and trick riddles. The system has a big stake in formalism. How can we change that without altering the material conditions of our work — that is to say, virtually everything else?"

"Ouch," said Rodrigo, whether because I swiftly and sneakily seized the check the waiter had deposited next to me — probably as the most senior-looking diner at the table — or because of the aptness of my question, I could not tell. "You seem to have got me, Professor. A neo-Marxist in most things, I may nevertheless have fallen prey to idealism, to thinking that if one simply names and recognizes an evil, it will go away by itself. It obviously won't. The

profit motive causes law firms to take on a certain structure, including hiring dozens of young associates they have no intention of making partner, and assigning them to the library where they write endless formalistic briefs, for which in turn they charge the client a great deal of money, necessitating that the lawyer on the other side write yet another massive case-cruncher, and so on forever. If the modes of production — the system of incentives — stays the same, tinkering with legal education, scholarship, or even new models of clinical practice won't help. Law practice gets more and more arcane just as the student pool becomes more and more talented, with LSATs, grades, and numbers of applicants soaring. Competition becomes ever more fierce for seats in law schools. Students become more cutthroat and less collegial than before, then go out into the world where they become even more that way. And the law schools cater to the large-firm mentality that now defines law practice. The cost of legal education skyrockets; students leave with huge debts, which means they must practice in the large firms, which pay the best salaries. The young associates lead lives of overwork, stress, competition, and early burnout."¹⁷³

"Not a very appealing prospect," said Giannina wryly, "for someone just starting out. But identifying an evil is a starting point. And discovering its source the second step. If so, we've made progress. At least I've decided to throw away the *Gilbert's* and focus on legal issues in the casebook that really matter."

"I'm betting your grades won't go down if you do," I said.

"I hope you're right," said Rodrigo. And with a laugh: "Our family income is riding on it."

After a pause, I said: "I wonder if the profession's dissatisfactions and pathology will be sufficient to stimulate change."

"Women *have* been getting some firms to adopt measures like maternity or family leave, part-time tracks, and child care allowances," Giannina pointed out.

"And those are all to the good," Rodrigo agreed. "But I think the Professor is saying that the public's discontent may prove to be a more vital stimulus for change, am I right?"

"I wouldn't be surprised," I said. "As my old friend Derrick Bell has pointed out more than once, interest convergence is almost everything."¹⁷⁴ If the public, including the big corporate clients, de-

173. See generally *supra* Part I.

174. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (pointing out that, at least in civil rights law, break-

cide lawyers are an expensive, nettlesome luxury, prone to tie a case up in knots, perform endless research, and postpone or interfere with an eventual resolution . . .”

“Nothing like a reality check for a person with a slight case of schizophrenia,” Rodrigo echoed.

“Minorities and the poor have long known the system was stacked against them,” Giannina observed. “Others may now find out as well. As the economy increases the disparity between high- and low-wage earners, the middle class continues to grow. Unless these consumers fall below the absurdly low cutoff for publicly funded legal aid, they will not qualify for any form of legal assistance. And the regular kind is simply too costly and intimidating. The big law firms, eager to perpetuate profits, seek out big and wealthy clients, usually corporate ones, leaving middle Americans without affordable legal services.”

“Something has to give,” Rodrigo summarized. “Costly, nit-picking, formalistic lawyering, as we’ve said, is not the solution. It is not craft, despite what our three authorities think. In fact, it’s the very thing that’s causing all the trouble.”

“Especially for women and minorities,” Giannina added.

I signed the credit card bill the waiter had brought. “Would the two of you like to see the baby?”

Giannina looked at Rodrigo. “We’d love to,” she said. “How about this weekend? My moot court reply brief is due Friday, so I’ll be feeling less pressured.”

I told them I’d check with my daughter and son-in-law and jotted down the address for them on a napkin. “She’s actually been hoping to meet you. She’s thinking of going to graduate school when the baby gets a little older, and, would you believe, one of the options she’s thinking about is law school. I’m sure she’ll have a lot of questions.”

We soon parted, Rodrigo and Giannina back to their apartment, me to my daughter’s home across town. As I rather sleepily rode the taxi through the darkened streets, I reflected on what we had said. The public was certainly disenchanted with law. Lawyers were as well. But was legal formalism the cause, as Rodrigo had argued? Or was it a type of refuge sought by a beleaguered profession — *both* cause and effect? Would outsider jurisprudence and the new clinical theory, with their emphasis on narrative, creativity,

and a sophisticated understanding of the client, provide a way out? Rodrigo had argued once before that only outsider thought could release a deadlocked West from decline and stasis.¹⁷⁵ Could legal storytelling and the pungent insights of writers like Derrick Bell, Mari Matsuda, Anthony Alfieri, Margaret Montoya, and, indeed, Rodrigo, lead the way to a humanized law and better relations with our various publics?

All this had a personal dimension as well, in light of my own daughter's plans. I looked forward to her meeting in a few days with Rodrigo and Giannina — what fortune to have them as role models! — and wondered, idly, about the wisdom of my own self-exile from my native country, where so many intriguing currents were playing themselves out — ideas being tested, new approaches to scholarship surging forward almost daily.

"That's the street," I told the cabbie. "Turn here please."

The key was under the mat, just where my daughter had told me it would be. I resolved to take a look at my visa and ask a few questions at the consulate when I got home.

175. See *Rodrigo's First Chronicle*, *supra* note 1, at 1369-76.