7-11-2019

J'Accuse: An Essay on Animus

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

J'Accuse: An Essay on Animus

Richard Delgado

52 U.C. DAVIS L. REV. ONLINE 119 (2018)

UC DAVIS LAW REVIEW ONLINE

VOL. 52 OCTOBER 2018

J'Accuse: An Essay on Animus

Richard Delgado[*]

TABLE OF CONTENTS

INTRODUCTION: IN WHICH I ENCOUNTER RODRIGO IN AN UNEXPECTED MANNER AND LEARN ABOUT HIS LATEST THESIS 121
I. IN WHICH RODRIGO DISCUSSES RECENT EXAMPLES OF PRESIDENTIAL ANIMUS 127
II. IN WHICH RODRIGO EXPLAINS THE NATURE OF ANIMUS 133
III. RECENT WRITING ON LAW AND ANIMUS: IN WHICH RODRIGO OUTLINES A CATEGORY MISTAKE AND SHOWS HOW EARLY WRITERS COMMIT IT 134
A. Recent Writing 134
1. William A. Araiza, Animus: A Short Introduction to Bias in the Law 134
2. Law Review Authors 138
3. The Psycho-Linguist's Study 141
B. A Scholarly Category Mistake 142
IV. GALLANT OR DEEPLY ASTRAY? 144
A. Laura Weinrib and the Taming of Free Speech 144
B. Unlikelihood of Self-Correction — Footnote Four Reasoning 149

 John J. Sparkman Chair of Law, University of Alabama School of Law. Thanks to Jean Stefancic for comments and suggestions.

V. WHAT TO DO? ANIMUS — WHEN A PRESIDENT ACTS ULTRA VIRES 151
CONCLUSION 152

INTRODUCTION: IN WHICH I ENCOUNTER RODRIGO IN AN UNEXPECTED MANNER AND LEARN ABOUT HIS LATEST THESIS

I had been reading the headlines while waiting for the small commuter plane to push off from the gate and was feeling quite drowsy. In fact, I may well have been drifting off, worn out by the high-pitched pace of the conference from which I was returning, when a slight pressure on my arm and a familiar voice brought me to consciousness. "Professor, it turns out we're on the same flight. Do you mind if I sit here?"

I looked up with a start to see the smiling face of my young friend and protégé Rodrigo, standing in the aisle beside me.[1] "Of course not,"

[1] *See* Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1357-59 (1992) [hereinafter Delgado, *Rodrigo's Chronicle*] (introducing Rodrigo). The son of an African American serviceman and Italian mother, Rodrigo was born in the United States but raised in Italy when his father was assigned to a U.S. outpost there. Rodrigo graduated from the base school high school, after which he attended an Italian university and law school ("one of the oldest in the world, Professor") on government scholarships, graduating near the top of his class. When the reader meets him, he has returned to the United States to investigate graduate law (LL.M.) programs with the goal of becoming a law professor. At the suggestion of his half-sister, famed U.S. civil rights lawyer Geneva Crenshaw, see DERRICK A. BELL, AND WE ARE NOT SAVED 7, 18-25 (1987) (discussing Geneva's adventures), he seeks out "the Professor" for career advice. Despite their age difference, the two become good friends, discussing affirmative action and the decline of the West (Delgado, *Rodrigo's Chronicle*, supra at 1361-64, 1367-70); law and economics (Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183, 1187-98 (1993) [hereinafter Delgado, *Rodrigo's Second Chronicle*]); love (Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387, 397-98 (1993) [hereinafter Delgado, *Rodrigo's Third Chronicle*]); legal rules and their effect on racism (Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133, 1152-55 (1993)); the critique of normativity (Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581, 1595-99 (1993) [hereinafter Delgado, *Rodrigo's Fifth Chronicle*]); relations between men and women (Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 639-42 (1993)); Enlightenment political theory (Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721, 729-36 (1993)); crime (Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears — On the Social Construction of Threat*, 80 VA. L. REV. 503, 506-41 (1994)); the rule of law (Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379, 389-95 (1994)); affirmative action (Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1713-45 (1995) [hereinafter Delgado, *Rodrigo's Tenth Chronicle*]); empathy and its limitations (Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 70-80 (1996)); the problem of desperately poor border settlements (Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 669-89 (1997); legal formalism (Richard Delgado, *Rodrigo's Thirteenth*

I said, patting the empty seat next to me. "I was just resting my eyes. I didn't see you get on. Are you flying stand-by?"

"I am," he said. "I got to the gate at the last minute and was lucky to get on. Let me check with the flight attendant to make sure it's OK." Pointing at the newspaper open in my lap, he added, "Some friends and I were talking about that same story. I'd like to run some ideas past you, if you have a minute."

"As always," I said. "My colleagues are up in arms about it, too."

He walked quickly to the head of the aisle, where the flight attendant was standing, microphone in hand. While he was speaking to her, gesturing once or twice in my direction, I thought how lucky I had been to meet him, years ago, during a return visit to the States to investigate LL.M. programs in preparation for a career in law teaching. During a meeting in my office we had discussed affirmative action, the decline of the West, his early years in Italy, and his reasons for returning to the country of his birth.[2] Despite our age difference, we became fast friends, meeting for family get-togethers, at academic conferences, and sometimes by chance.[3] I got to meet 'Giannina,' a playwright and love of his life,[4] and followed with interest his progress through an LL.M. program,[5] his winning a national writing competition for students, and his first teaching job.[6] He and I had

Chronicle: Legal Formalism and Law's Discontents, 95 MICH. L. REV. 1105, 1109-20 (1997)); interracial indifference (Richard Delgado & Noah Markewich, *Rodrigo's Remonstrance: Love and Despair in an Age of Indifference — Should Humans Have Standing?*, 88 GEO. L.J. 263, 275-97 (2000); Latino civil rights (Richard Delgado, *Rodrigo and Revisionism: Relearning the Lessons of History*, 99 NW. U. L. REV. 805, 813-36 (2005); Latino civil rights and the black-white paradigm (Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181, 1183-99 (1997) (reviewing LOUISE ANN FISCH, ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE (1996)); postcolonial theory (Richard Delgado, *Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1689, 1703-1718 (2007); capitalism (Richard Delgado, *Rodrigo's Equation: Race, Capitalism, and the Search for Reform*, 49 WAKE FOREST L. REV. 87, 91-98 (2014)); and many other topics over the next few years. During this period, the brash, talented Rodrigo earns his LL.M. degree and embarks on his first teaching position. The professor meets Rodrigo's friend and soulmate, Giannina, and her mother, Teresa; he also learns that Rodrigo's father's family immigrated to America via the Caribbean. His father Lorenzo looks African American and identifies as such, but speaks perfect Spanish.

[2] Delgado, *Rodrigo's Chronicle*, *supra* note 1, at 1357-66.

[3] *See e.g.*, Delgado, *Rodrigo's Second Chronicle*, *supra* note 1 at 1183-84.

[4] Delgado, *Rodrigo's Third Chronicle*, *supra* note 1, at 402 (introducing Giannina).

[5] *See* Delgado, *Rodrigo's Fifth Chronicle*, *supra* note 1, at 1582-95 (recounting some of his adventures in the LL.M. program).

[6] *See* Delgado, *Rodrigo's Tenth Chronicle*, *supra* note 1, at 1719-21 (describing his

exchanged manuscripts and notes of work in progress, leading to many articles and books on my part,[7] and several on his.

Returning to my seat, he said, "It's OK. She had to check with the pilot because they have to make sure the weight of the passengers on both sides is roughly equal."

"A metaphor for the times," I said. "Journalists are always trying to be evenhanded, even about something as outrageous as that." I gestured at the headlines, which were about the latest federal action against immigrant families. As he stowed his backpack in the overhead compartment, I noticed how lean and fit he looked. "I doubt we'll cause the plane to tip over," I said. "I don't think you've gained an ounce since we met years ago."

"Giannina and I have taken up running again," he said. "It helps keep the weight down."

"We could all use more of that," I said, patting my stomach. "I missed a few days of my exercise routine with that running injury I told you about.[8] But it's better now, and I'm back to my fighting weight. Neither of us will drag the plane down."

"Glad to hear you're better," he said, easing himself into the seat beside me. "As mentioned, my friends and I were talking about that story" (indicating the newspaper open on my lap), "but I had to leave quickly when my travel agent texted me about space on this flight. We had been discussing the current climate toward immigrants and foreigners and some of the hateful remarks we have been hearing out of the mouth of the President practically on a daily basis."

"Oh, you must mean animus," I said.[9] "Courts and commentators have started writing about that."

"Exactly. My friends and I came up with at least a dozen examples.[10] Do you know the work of Joel Kovel?"[11]

---

fortunes on the job market).

[7] *See supra* note 1, listing several articles and books.

[8] Richard Delgado, *Rodrigo and* Ressentiment*: "I Don't Want It If You are Going to Get it, Too" — Why Classical Economic and Political Theory Fails to Explain the Obamacare Vote, But Legal Realism and CLS Can*, 52 UC DAVIS L. REV. 4 (forthcoming Apr. 2019) (discussing the Professor's running injury) [hereinafter *Rodrigo and* Ressentiment].

[9] *See, e.g.*, The Editorial Board, *Will the Court Stand Up to Mr. Trump?*, N.Y. TIMES, April 23, 2018, at A18 (noting that many of President Trump's actions aim "to legitimize a presidential command that was born of animus, persists in animus, and seeks to make animus the law of the land") (quoting Brief of Constitutional Law Scholars as Amici Curiae Supporting Respondents, Donald J. Trump v. State of Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965) 2018 WL 1605673, at *7.

[10] *See infra* Part I.

"I read him some time ago," I said. "He's a social psychologist who coined the term aversive racism, if I recall."

"Right," he said. "He and two other scholars.[12] It's a type of racism with psychosexual roots and is associated with a cold, distant approach to minorities that some folks exhibit. Often their body language and facial expression show distaste, as though wanting to keep their distance and not get too close."[13]

"I gather you think it underlies much of what we see from the White House these days."

"I do," he said. "For Kovel, the aversive racist associates people of different races, especially ones who are darker, with dirt, filth, and excrement. In the presence of such a person, they will often exhibit distaste and avoidance.[14] On a bus, for example, an aversive racist might refuse to take an empty seat next to a black passenger, even if it's the only one remaining and the passenger is neatly dressed with a briefcase on his lap.[15] When an aversive racist has to shake hands with an African American or Latino, he may retract his own quickly and wash it as soon as he can.[16] When a lawyer is on an interviewing committee and the candidate is a Latino or an African American, he or she may stare out the window or cross his arms across his chest and say nothing."[17]

"And you believe this lies behind the kind of behavior we've been seeing from the White House?"

"I do. And as you'll see, it calls for a new approach to executive action. A few court opinions note the President's history of racial slurs and invective, but don't know what to make of it.[18] In the meantime,

---

[11] JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY (1970).

[12] *See* Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, *in* PREJUDICE, DISCRIMINATION AND RACISM 61 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

[13] *See* Richard Delgado, *Law's Violence: Derrick Bell's Next Article*, 75 U. PITT. L. REV. 435, 454-55 (2015), discussing aversive racism.

[14] *See id.*

[15] *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 31, 168 (3d ed. 2017) (discussing and defining aversive racism) [hereinafter INTRODUCTION].

[16] *Id.* I immediately thought of the President's well-known "germaphobia." Ben Guarino, *Shaking Hands Is 'Barbaric': Donald Trump, the Germaphobe in Chief*, WASH. POST (Jan. 12, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/01/12/shaking-hands-is-barbaric-donald-trump-the-germaphobe-in-chief/?utm_term=.147b3337bd0c.

[17] *See supra* notes 13–14.

[18] *E.g.*, Alan Feuer, *Citing Trump's 'Racial Slurs,' Judge Says Suit to Preserve DACA Can Continue*, N.Y. TIMES (Mar. 29, 2018), https://www.nytimes.com/2018/03/29/

the scholarly community is offering very little that is deep, probing, or helpful."

"I can't wait to hear more," I said. "Why don't you start by reviewing some of the government's recent actions.[19] After that, tell me more about aversive racism and how it relates to them.[20] I cover that form of racism in my course, but I have the feeling you've gone into it more deeply than I have. Then, I'd love to hear what you think about animus and its relation to judicial review.[21] I've seen some articles on the subject and, I think, one book."[22]

Rodrigo jumped up and fished something out of his backpack in the overhead compartment. "One of these two, I bet. I was reading them on my way here. Have you seen them?"

I peered at the two books he was holding out for me to see. "*Animus*, by William Araiza," I said.[23] "And *The Taming of Free Speech*, by Laura Weinrib.[24] I read the first one when it came out, although this was before Donald Trump really hit his stride. And I have the Weinrib

nyregion/daca-lawsuit-trump-brooklyn.html ("[N]oting that his numerous 'racial slurs' and 'epithets' — both as a candidate and from the White House — had created a 'plausible inference' that the decision to end DACA violated the equal protection clause of the Constitution."); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2408-09, 2423 (2018) (permitting a much-rewritten travel ban to stand because it fell in an area — national security — in which the President enjoys wide latitude). *But see id.* at 2447 ("By blindly accepting the government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one 'grave wrong' decision with another.") (Sotomayor, J., dissenting). Even before the current administration, a few courts had noted animus on the part of a participant in a judicial drama, but generally treated it as a heightened form of racism-as-usual. *See, e.g.*, Pena-Rodrigues v. Colorado, 137 S. Ct. 855, 871 (2017), requiring an exception to the no-impeachment rule for jury deliberations when a juror expressed animus toward Latinos in the course of advocating for conviction.

[19] *See infra* Part I. For a discussion of the Trump administration's record in the area of civil rights, see Shin Inouye, The Leadership Conference Education Fund Releases Report on Trump's Civil and Human Rights Rollbacks, THE LEADERSHIP CONFERENCE, Jan. 31, 2018, https://civilrights.org/leadership-conference-education-fund-releases-report-trumps-civil-human-rights-rollbacks. The reader will note that in the following passage, the Professor is supplying the mandatory "map" of the rest of the article.

[20] *See supra* notes 12-16; *infra* notes 68-71.

[21] *See infra* Part II.

[22] *See infra* Part III, discussing recent writing.

[23] WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW (2017) [hereinafter BIAS].

[24] LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE (2016) [hereinafter TAMING].

book on my reading list. But I thought it was a history of free speech law, not civil rights."

"I see a connection between the two, as I'll show later. In addition, there are two recent law review articles, one by a young immigration-law writer,[25] another by a Muslim scholar,[26] and a study of coded language in an amicus brief prepared by an expert linguist for a civil rights center.[27]"

"That all sounds fascinating," I said. But just then, an ear-splitting voice echoed through the address system, ordering us to fasten our safety belts and return our trays to the upright position for take-off. We did, although I noticed that Rodrigo kept the two books on his lap. I added that I probably knew some of the scholars, as well as the director of that center, and hoped he was not going to be too hard on them.

"I wasn't at first," he admitted. "Now, I think they may be on the wrong track.[28] They make a common mistake that might be in the nature of lawyering. But unless someone points it out, we'll keep on repeating it."

The voice of the airline attendant came on again, advising us of what to do in case of a water landing. I wondered idly if Rodrigo knew how to swim. Like many African Americans, I did not.[29]

After her voice faded away, Rodrigo added. "You're right, though. I don't want to be harsh. Maybe they are gallant warriors for taking on a powerful opponent at all. Very few do."

---

[25] Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. (forthcoming 2019) [hereinafter *Plenary Power*].

[26] Shahar F. Aziz, *A Muslim Registry: The Precursor to Internment?*, 2017 BYU L. REV. 779 (2017) [hereinafter *Registry*].

[27] Brief of 42 Historians and the Fred T. Korematsu Center for Law and Equality as Amici Curiae in Support of Plaintiffs-Appellees-Cross-Appellants, Regents of the University of California v. U.S. Dep't of Homeland Sec., (2018) (Nos. 15068) 2018 WL 1511444, at *9-10 [hereinafter *Code Word Analysis*] (asserting that "code word analysis is an accepted historical methodology for discerning racial animus and an accepted category of evidence . . . in equal protection claims and in other [settings] in which discriminatory intent must be shown" (quoting Brief of Constitutional Law Scholars as Amici Curiae Supporting Respondents, Donald J. Trump v. State of Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965) 2018 WL 1605673, at *7)).

[28] *See infra* Part IV ("Gallant or Deeply Astray?").

[29] As the reader might know, "the Professor," a senior man of color teaching at a major law school, is African American and a veteran of many civil rights struggles. Rodrigo is of mixed race, the son of an African American serviceman posted to a detachment in Italy and an Italian mother. Neither character is real, but a composite of many people I have known. Part of my objective in writing about them as I have done is to give readers a glimpse of how intellectuals of color interact and converse.

"We can decide later," I said. "Let's hear your thesis, starting with examples of Trump's rhetoric."

I. IN WHICH RODRIGO DISCUSSES RECENT EXAMPLES OF PRESIDENTIAL ANIMUS

"Animus," he began, "particularly of the coarse, frontal kind we have seen from the President, has now moved from right-wing websites to the point where it is practically a daily occurrence. Even before he was elected, Trump appealed to his base to hate minorities and immigrants.[30] And his language was not at all coded or veiled.[31] For example, in a campaign speech, he told African Americans that they lived in disaster areas and that they should vote for him because, after all, 'What do you have to lose?'"[32]

"Their neighborhoods were supposedly full of pathology and crime," I said. "'Carnage,' he called it.[33] And didn't he suggest that the police should treat criminal suspects none too politely?"

---

[30] *See generally* SOUTHERN POVERTY LAW CENTER, AMERICA THE TRUMPED: 10 WAYS THE ADMINISTRATION ATTACKED CIVIL RIGHTS IN YEAR ONE (2018), https://www.splcenter.org/20180119/america-trumped-10-ways-administration-attacked-civil-rights-year-one [hereinafter SPLC, *TRUMPED*] ("As a candidate, Trump . . . was mostly speaking the language of a distinctly racist and misogynistic white nationalist movement known as the alt-right.").

[31] *See infra* Part III.A.3, discussing coded language.

[32] SPLC, TRUMPED, *supra* note 30; Thomas Frank, *Four More Years: The Trump Reelection Nightmare and How We Can Stop It*, HARPER'S MAG. (Apr. 2018), https://harpers.org/archive/2018/04/four-more-years-2/ ("[R]ight-wing populism is itself a freakish historical anomaly . . . it rails against elites while cutting taxes for the rich; it pretends to love the common people while insulting certain people for being a little *too* common; it worships the workingman while steadily worsening his conditions."). On the supposed MS-13 gang infestation, see Donald J. Trump (@realDonaldTrump), TWITTER (July 3, 2018, 3:49 AM), https://twitter.com/realDonaldTrump/status/1014098721460686849 ("When we have an 'infestation' of MS-13 GANGS in certain parts of our country, who do we send to get them out? ICE! They are tougher and smarter than these rough criminal elelments [*sic*] that bad immigration laws allow into our country. Dems do not appreciate the great job they do! Nov.").

[33] SPLC, TRUMPED, *supra* note 30; Donald J. Trump (@realDonaldTrump), TWITTER (Jul. 12, 2016, 4:58 AM), https://twitter.com/realDonaldTrump/status/752834632907943936?ref_src=twsrc%5Etfw ("Crime is out of control, and rapidly getting worse. Look what is going on in Chicago and our inner cities. Not good!"). Perhaps the reason is that, in his mind, black leaders are not very bright. Donald J. Trump (@realDonaldTrump), TWITTER (June 25, 2018, 10:11 AM), https://twitter.com/realDonaldTrump/status/1011295779422695424?ref_src=twsrc%5Etfw ("Congresswoman Maxine Waters, an extraordinarily low IQ person, has become, together with Nancy Pelosi, the Face of the Democrat Party. She has just called for harm to supporters, of which there are many, of the Make America Great Again movement. Be careful what you wish for

"Yes. He told an audience of police officers that he had noticed that when they arrested a subject and placed him in a police car, they would press down lightly on his head, so as not to bump it on the way in. He said 'You can take the hand away, OK'? The audience laughed.[34]

"And everyone knows that he called for a 'total and complete shutdown of Muslim immigration, until our country . . . can figure out what the hell is going on.'[35] This naturally implied that there is something wrong with them."[36]

"All 1.6 billion of them, I suppose," he replied dryly. "And his first national security advisor, Michael Flynn, had a long history of backing stridently anti-Muslim organizations and hate groups.[37] Trump later circulated three videos that purportedly showed Muslims committing various crimes. It turned out that they were made up to look misleading and provided by a British anti-Muslim hate group."[38]

"He hasn't treated our Latino friends much better," I said.

"No. He refers to them as murderers and rapists,[39] even though immigrants are much more law-abiding than the average citizen.[40]

Max!").

34 SPLC, TRUMPED, *supra* note 30.

35 *Id.* (quoting Donald Trump at Mount Pleasant, S.C., campaign rally on Dec. 7, 2015); David D. Cole, *Move Over, Dred Scott*, WASH. POST (June 26, 2018), https://www.washingtonpost.com/opinions/move-over-dred-scott/2018/06/26/6f8f425c-796d-11e8-aeee-4d04c8ac6158_story.html?noredirect=on&utm_term=.7924c82b8940 (noting that Trump told his followers that "Islam hates us").

36 *See* Melissa Santos, *Don't Let Dreamers Become Collateral in Trump's War of Words with MS-13*, SEATTLE TIMES (May 21, 2018), https://www.seattletimes.com/opinion/trumps-war-of-words-with-ms-13-hurts-dreamers/ ("He has broadly associated Muslims with terrorism."). Moreover, he has asserted that Muslims "celebrated" the 9/11 terrorist attacks. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 25, 2015, 5:03 PM), https://twitter.com/realDonaldTrump/status/669682774673137665?ref_src=twsrc%5Etfw ("Credible Source on 9-11 Muslim Celebrations: FBI http://wkrg.com/2015/11/25/credible-source-on-9-11-muslim-celebrations-fbi/ . . . via @WKRG"); Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 2, 2015, 2:36 PM), https://twitter.com/realDonaldTrump/status/672182509111767041?ref_src=twsrc%5Etfw (". . . I likewise saw militant Muslims burning our flag and burning George Bush photos and figures, right after 9/11! Not#here!").

37 SPLC, TRUMPED, *supra* note 30.

38 Peter Baker & Eileen Sullivan, *Trump Shares Inflammatory Anti-Muslim Videos, and Britain's Leader Condemns Them*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/us/politics/trump-anti-muslim-videos-jayda-fransen.html; Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 18, 2012) (the Tweet has since been deleted, so no URL exists, but was a reTweet of three Islamophobic tweets from far-right extremist group Britain First).

39 *See* Peter Baker & Katie Rogers, *In Trump's America, the Conversation Turns Ugly and Angry, Starting at the Top*, N.Y. TIMES (June 20, 2018), https://www.nytimes.com/2018/06/20/us/politics/trump-language-immigration.html.

Other times, he calls them 'animals,'[41] who might take advantage of sanctuary cities by doing too much 'breeding while enjoying their safe harbor.'[42] He referred to our immigration policy, which he regards as overly lenient, as tantamount to 'catch and release,'[43] a term borrowed from fishing. He raged against a judge handling a case against him on the ground that being 'Mexican,' he couldn't be fair."[44]

"Doesn't he also refer to immigration from Latin America as 'chain migration?'"[45]

---

[40] Anna Flagg, *The Myth of the Criminal Immigrant*, N.Y. TIMES (Mar. 30, 2018), https://www.nytimes.com/interactive/2018/03/30/upshot/crime-immigration-myth.html (recounting an empirical study demonstrating that crime rates have decreased in areas where immigration has increased); Christopher Ingraham, *Two Charts Demolish the Notion that Immigrants Here Illegally Commit More Crime*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/06/19/two-charts-demolish-the-notion-that-immigrants-here-illegally-commit-more-crime/?utm_term=.61b7cbcb0049 (recounting an empirical study by the Cato Institute which found that native-born residents were significantly more likely to be convicted of a crime than both documented and undocumented immigrants).

[41] Baker & Rogers, *supra* note 39; Julie Hirschfeld Davis, *Trump Rants on Unauthorized Immigrants: "These Aren't People, These Are Animals,"* N.Y. TIMES, May 16, 2018, at A13; Elise Foley, *Trump Refers to Immigrants as 'Animals.' Again*, HUFF. POST, (May 17, 2018), https://www.huffingtonpost.com/entry/trump-calls-immigrants-animals-again_us_5afca15fe4b0779345d59e2a; Vann R. Newkirk II, *The Real Risk of Trump's Dehumanization of Immigrants*, ATLANTIC (May 19, 2018), https://www.theatlantic.com/politics/archive/2018/05/the-real-risk-of-trumps-dehumanization-of-immigrants/560762/.

[42] Z. Byron Wolf, *Trump Blasts "Breeding" in Sanctuary Cities. That's a Racist Term*, CNN (THE POINT) (Apr. 24, 2018), https://www.cnn.com/2018/04/18/politics/donald-trump-immigrants-california/index.html; Donald J. Trump (@realDonaldTrump), TWITTER (April 18, 2018, 2:59 AM), https://twitter.com/realDonaldTrump/status/986544648477868032 ("There is a Revolution going on in California. Soooo many Sanctuary areas want OUT of this ridiculous, crime infested & breeding concept. Jerry Brown is trying to back out of the National Guard at the Border, but the people of the State are not happy. Want Security & Safety NOW!").

[43] *See* Michelle Goldberg, *Lying Trumpists, Crying Kids*, N.Y. TIMES, June 18, 2018, at A23.

[44] Eli Rosenberg, *The Judge Trump Disparaged as 'Mexican' Will Preside over an Important Border Wall Case*, WASH. POST (Feb. 5, 2018), https://www.washingtonpost.com/news/politics/wp/2018/02/05/the-judge-trump-disparaged-as-mexican-will-preside-over-an-important-border-wall-case/?utm_term=.061bb5134e5f; *see also* Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 5, 2015, 2:51 PM), https://twitter.com/realdonaldtrump/status/573616949957124096?lang=en (stating "I hope the Mexican judge is more honest than the Mexican businessmen who used the court system to avoid paying me the money they owe me." Implying Trump thought he probably could not be "honest" due to his Mexican heritage).

[45] Brian Bennett, *Trump Says Chain Migration Allows 'Virtually Unlimited Numbers of Distant Relatives*,' L.A. TIMES (Jan. 30, 2018), http://www.latimes.com/politics/la-na-pol-essential-washington-updates-hold-trump-on-chain-migration-1517356312-

"Yes, as though it's some sort of mechanical force or spring that produces it, rather than normal familial love and connection. He said that he much prefers immigrants from countries like Norway."[46]

"Rather than those shithole countries of Africa,"[47] I mentioned, wondering if Rodrigo's law review editor would let him spell the word out on the page.[48] "Didn't he also refer to them in terms of the parable of the snake — as creatures who would bite the person who rescued them?"[49]

"He did. And he accused Latinos of impersonating real electors in a scheme that cost him the popular majority. He invented polls that supposedly showed that dead people voted for President Obama overwhelmingly."[50]

"He treated gays, lesbians, and transgendered people as curses, too, I believe."

---

htmlstory.html#.

[46] *Norwegians Say "No, Thanks, Mr. President!" to Immigration Welcome*, EURONEWS (Jan. 13, 2018), http://www.euronews.com/2018/01/13/norwegians-say-no-thanks-mr-president-to-immigration-welcome.

[47] *See* Philip Rucker, *'A Blowtorch to the Tinder': Stoking Racial Tension is a Feature of Trump's Presidency*, WASH. POST (June 20, 2018), https://www.washingtonpost.com/politics/a-blowtorch-to-the-tinder-stoking-racial-tensions-is-a-feature-of-trumps-presidency/2018/06/20/e95e71dc-73d9-11e8-805c-4b67019fcfe4_story.html?utm_term=.8b4eea8ef56d&wpisrc=nl_politics-pm&wpmm=1 [hereinafter Rucker, *Blowtorch*]; *see also supra* notes 13–14 and accompanying text, noting that aversive racism often includes unconscious association of stigmatized people with dirt and excrement. See President Trump describing South Africa's non-existent war on white farmers. Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 27, 2018, 7:28 PM), https://twitter.com/realDonaldTrump/status/1032454567152246785 ("I have asked Secretary of State @SecPompeo to closely study the South Africa land and farm seizures and expropriations and the large scale killing of farmers. 'South African Government is now seizing land from white farmers.' @TuckerCarlson @FoxNews").

[48] *UC Davis Law Review Online* gladly accepts this addition. Martin Luther King Jr., Hall, UC Davis School of Law, boasts not only a minority-majority class, but also a minority-majority teaching faculty. Many of which PROUDLY come from supposedly "shithole countries." Our students were first responders to the Muslim ban (*see Immigration Clinic Aids Detained Travelers at San Francisco Airport, Draws Media Coverage*, UC DAVIS SCH. OF LAW (Feb. 3, 2017), https://law.ucdavis.edu/news/news.aspx?id=8227) and continue to fight for equality across all channels with determination, excellence, and our constant belief that diversity makes us all stronger.

[49] Rucker, *Blowtorch*, *supra* note 47.

[50] *See* SPLC, TRUMPED, *supra* note 30, at 16; *see also* Janet Murguia, *Trump, The Nation's Most Anti-Latino President*, NILP REPORT (March 15, 2018), https://www.nyrealestatelawblog.com/manhattan-litigation-blog/2018/april/trump-most-anti-latino-president/; *see also* Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 27, 2016, 12:30 PM), https://twitter.com/realDonaldTrump/status/802972944532209664 ("In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally").

"He did. He tried to keep transgendered people out of the military.[51] He spoke at the Family Research Council, which considers gays sick and a danger to children.[52] And everyone remembers how he mocked a disabled journalist who shook and could not speak clearly.[53] And just the other day, a high-ranking advisor mocked a child with Downs Syndrome, saying 'Womp, womp,' as though she were an idiot."[54]

"A damning indictment, all coming in just a few months from the leader of a country that supposedly believes in the equal dignity of all human beings,"[55] I said. "And you haven't even mentioned the children at the border."

"I was just coming to that. That newspaper of yours" (pointing at my lap) "is full of stories about them. His 'zero tolerance' policy has the authorities removing children, some as young as four, or even babies, from their parents.[56] The news has been full of terrified children crying inconsolably and asking for their mothers and fathers."[57]

"How hard-hearted," I said. "He likens them to an invading army,[58] because in his mind, each child is a potential M-13 gang member.[59]

---

[51] Helene Cooper & Thomas Gibbons-Neff, *Trump Approves New Limits on Transgender Troops in Military*, N.Y. TIMES (March 24, 2018), https://www.nytimes.com/2018/03/24/us/politics/trump-transgender-military.html.

[52] SPLC, TRUMPED, *supra* note 30, at 19.

[53] *Trump Mocks Reporter with Disability*, CNN NEWS (Nov. 26, 2015), https://www.cnn.com/videos/tv/2015/11/26/donald-trump-mocks-reporter-with-disability-berman-sot-ac.cnn/video/playlists/atv-politics-original. For a list of further public statements by Donald Trump, see David Leonhardt & Ian Prasad Philbrick, *Trump's Racism: The Definitive List*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html.

[54] The advisor (Lewandowski) mocked a child with Downs Syndrome. Baker & Rogers, *supra* note 39; Peter Haag, *"Womp, Womp": Corey Lewandowski Mocks Child with Down Syndrome Separated from Mother*, N.Y. TIMES (June 20, 2018), https://www.nytimes.com/2018/06/20/business/media/corey-lewandowski-womp-womp-down-syndrome.html.

[55] *See* Cole, *supra* note 35.

[56] *See, e.g.*, Diane Feinstein, *Protecting Defenseless Children Is Not an Immigration "Loophole,"* WASH. POST (April 13, 2018), https://www.washingtonpost.com/opinions/protecting-defenseless-children-is-not-an-immigration-loophole/2018/04/13/11bf9012-3e64-11e8-a7d1-e4efec6389f0_story.html?utm_term=.f6cee31f139f.

[57] *E.g.*, *'My Babies Started Crying' as ICE Took Them Away*, N.Y. TIMES, May 30, 2018, at A23.

[58] Rucker, *Blowtorch*, *supra* note 47.

[59] Seung Min Kim, *Trump Warns Against Admitting Migrant Children: "They're Not Innocent,"* WASH. POST (May 23, 2018), https://www.washingtonpost.com/politics/trump-warns-against-admitting-unaccompanied-migrant-children-theyre-not-innocent/2018/05/23/e4b24a68-5ec2-11e8-8c93-8cf33c21da8d_story.html?utm_term=.687af4e1e392.

His administration locks them up in cages, like animals[60] or an army of insects.[61] Their parents are 'murderers and thieves.'[62] He maintained, for years, that Obama, an intelligent, well-educated black man, could not possibly have been born in the United States."[63]

After a pause, I asked, "How do you account for it all? We've had presidents and high officials before who were uncomfortable with minorities and thought of them as moochers and layabouts.[64] Some cut back on welfare programs for this reason.[65] But Trump's administration seems different somehow, with overtones of outright malice."[66]

"It does," he said. "For one thing, the previous presidents who were unfriendly toward minorities did not show outright hatred and contempt. They might have taken actions that set back civil rights progress, but they never said aloud that they were doing so because they found minorities dangerous or contemptible. They didn't treat them as less than human."[67]

---

[60] *See* Betsy Klein & Kevin Liptak, *Trump Ramps Up Rhetoric: Dems Want 'Illegal Immigrants' to 'Infest Our Country*,' CNN POLITICS (June 19, 2018), https://www.cnn.com/2018/06/19/politics/trump-illegal-immigrants-infest/index.html.

[61] *See id.*

[62] *See* Philip Rucker et al., *Trump Defiant as Crisis Grows over Family Separation at the Border*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/politics/trump-defiant-as-crisis-grows-over-family-separation-at-the-border/2018/06/18/210c78ca-730f-11e8-805c-4b67019fcfe4_story.html?utm_term=.292d13ec1cac&wpisrc=nl_most&wpmm=1.

[63] Rucker, *Blowtorch*, *supra* note 47; Donald J. Trump (@realDonaldTrump), TWITTER (May 18, 2012), https://twitter.com/realDonaldTrump/status/203568571148800001 ("Let's take a closer look at that birth certificate. @BarackObama was described in 2003 as being 'born in Kenya.'").

[64] *See* Bryce Covert, *Clinton Touts Welfare Reform: Here's How It Failed*, NATION (Sept. 6, 2012), https://www.thenation.com/article/clinton-touts-welfare-reform-heres-how-it-failed (noting that President Bill Clinton cut back on welfare in response to a general sense that the poor were lazy and undeserving and that work requirements would help them stand on their own two feet).

[65] *Id.*

[66] *See* Joshua Matz, *Trump's Despicable Decisions Look Awfully Alike*, WASH. POST (March 27, 2018), https://www.washingtonpost.com/opinions/getting-deja-vu-on-trumps-transgender-ban-youre-not-alone/2018/03/27/4e78091e-312e-11e8-8bdd-cdb33a5eef83_story.html?utm (calling attention to their common threads and nature).

[67] *See* STEVEN W. BENDER, MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY 8-9 (2015) (identifying dehumanization as the touchstone of many historical acts of cruelty). Are all countries engaged in the same practices that Rodrigo criticizes? No. A few European countries have seen the rise of right-wing, populist, and anti-immigrant parties or leaders, but not all have done so, nor as profusely. *See, e.g.*, Lee Rawles, *Could Canada Be a Haven for Dreamers?*, ABA J. (Apr. 2018), http://www.abajournal.com/magazine/article/canada_haven_dreamers_daca (noting that

"That's quite an indictment," I said. "Especially when you hear it all at once. But where does it come from? You said it has something to do with the work of Joel Kovel."

II. IN WHICH RODRIGO EXPLAINS THE NATURE OF ANIMUS

"It does. What lies behind much of it is aversive racism, a coarser than usual kind that is based on distaste and fear of dark skin, associating it, consciously or unconsciously with dirt, contamination, and feces, often accompanied by sexual associations.[68] The aversive racist shrinks from the prospect of touching or being close to a person of color.[69] The idea of white people having sex with one of them is particularly distasteful.[70] Even those who believe themselves genuinely colorblind may be racists of this kind. Their body language gives them away. They avoid close contact with dark people, won't make eye contact, at least for long."[71]

"I have a colleague like that," I said. "When we have a faculty candidate of color come through, he invariably asks to meet him or her in one of the small-group interviews. My friends and I always make sure one of us is there to balance things out."

"What does he do?" Rodrigo asked.

"He'll cross his arms and stare out the window, just like you said. When it comes his turn to ask the candidate a question, it will be out of left field and have nothing to do with the subject of the candidate's job talk. After he asks it, he averts his eyes and looks out the window while the candidate is struggling to answer. It drives them crazy. The most self-assured, confident speakers falter and give poor answers. Afterward, my colleague will say we can't possibly hire someone like that. The candidate doesn't know what he is talking about. He has poor communication skills, and lacks a command, even, of his own subject."

"It sounds right out of Joel Kovel's playbook," Rodrigo said, "Or the President's. Averse racists look, act, and speak as though minorities and foreigners were objects of distaste, as something to shy away from and avoid."

Canada's climate is much more welcoming than that of the United States).

[68] *Cf.* Delgado, *Rodrigo's Corrido*, *supra* note 1, at 1722-23 (describing a triple taboo that forbids interracial sex between young farmworkers and the farm-owner's daughter).

[69] *See, e.g.*, DELGADO & STEFANCIC, INTRODUCTION, *supra* note 15, at 156 (explaining the term).

[70] *Id.*

[71] *Id.*

"Hence the term aversive racism," I said. "But I believe you said that some legal scholars exhibited a mild form of the same behavior. How so?"

III. RECENT WRITING ON LAW AND ANIMUS: IN WHICH RODRIGO OUTLINES A CATEGORY MISTAKE AND SHOWS HOW EARLY WRITERS COMMIT IT

"Although well meaning, these scholars illustrate a mild form of the same behavior, Professor. They pull their punches, treat presidential animus as a mere problem of civil procedure. This is what I was thinking about on my way here."

A. Recent Writing

"I don't want to be too harsh," he continued. "At least they're trying — taking on a powerful opponent. You have to hand it to them for that. Let's start by considering these two books," he said, holding them up once again. "If you juxtapose them, you'll see what I mean. Some of the law review articles are a little better, but of course the authors have had the advantage of seeing Trump in action for a longer period than did the book's author, William Araiza. Let's start with his 2017 book, though, because it exemplifies an approach to animus that I hope doesn't stick."

I squinted at the two books that were lying sideways on his lap.

"It's this one, right here," he said, holding up a slender volume with a red cover. "Then, as mentioned, there are a handful of articles, including an otherwise excellent one by a young immigration scholar, and another by a prominent Muslim rights activist. Finally, there's that amicus brief by a civil rights center. They all exemplify an approach that I think holds little promise. A second book, by Laura Weinrib, helps explain why."

"And that approach is what?" I asked, pricking up my ears.[72]

1. William A. Araiza, Animus: A Short Introduction to Bias in the Law

"Let's start with Araiza. He wrote a solid book, succinct and well written. It doesn't go deeply into the nature of animus, though, so that

[72] I had in the back of my mind writing about animus in review of administrative action in the immigration field, a subject I occasionally taught at my law school.

his analysis and remedy offer little promise to ease the predicament of people in Trump's sights."

"I read that book, but some time ago when it first came out. Remind me what it's about."

"It opens with a few examples of harsh treatment, including authorities who require that immigrants from an area suffering an outbreak of communicable disease undergo special screening before entering the United States [73] A state cracking down on jaywalkers, something that happens often in minority communities.[74] A town denying a building permit for a group home for the mentally disabled because the neighbors object to 'those kind of people' in the neighborhood.[75] The author says the first two are legitimate . . . ."

"Even the happy African American teenagers cutting across the street and getting a citation and criminal record for their troubles?" I interjected, raising my eyebrows. "That's legitimate? How so?"

"Even them," he says. "For Araiza, only the third example bespeaks animus. The book mainly concerns legislative action, because the author says it is hard to impute bad motives to a legislative body, which is made up of many people. It's the toughest case to make."[76]

"That may be," I said. "But limiting one's inquiry that way avoids the most pressing case. Animus that emanates from the President originates from a single person, and so is very easy to lay at his doorstep. It poses the problem more acutely than does animus underlying legislative action, such as denial of a building permit for a group home by a city council."

"The author does go into the nature of animus to some extent but situates it in terms of our political system, whose founders contemplated a nation under leaders who would aim to advance the public good. For Araisa, the Constitution aims to make it hard for leadership to come under the control of a faction that would act to oppress a different group simply because the rulers don't like them.[77] For him, the prohibition of animus reflects a core constitutional commitment."[78]

---

[73] ARAIZA, BIAS, *supra* note 23, at 1-2.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 5, 174-75, 180.

[77] *Id.* at 2-3, 6, 11-27, 111-24, 177 ("In Federalist No. 10, the same pamphlet in which he identified the problem of factions, Madison explained how the proposed Constitution would limit their power.").

[78] *Id.* at 3 ("[T]he Equal Protection Clause eventually became understood as a guarantee against the hijacking of governmental power for purely private ends. Such

"As well it should," I agreed, pounding the table for emphasis.

"He also points out that it's essential to focus on animus today because strict scrutiny is running out of steam and seems not to be helpful for new groups, such as transgendered people or Muslims."[79]

"All true," I said. "I'm going to re-read that book. It's sounding better and better."

"I would not discourage you. For one thing, it points out that an increasingly diverse society produces more occasions for animus."[80]

"Didn't Robert Putnam say much the same thing?"[81]

"He did, and I think both are right. Araiza then goes on to define animus as strong hostility or dislike, for example not wanting to live around a certain type of person. Subjective motivation is part of the story, but not all."[82]

"I gather you think his definition is lacking."

"Yes and no. Kovel discusses its essence much more comprehensively. But Araiza's book seems not to mention him at all. Subsequent chapters discuss a number of Supreme Court decisions exhibiting or discussing animus — including *Dep't of Agriculture v. Moreno*,[83] *City of Cleburn v. Cleburne Living Center*,[84] *Romer v. Evans*,[85] and *Lawrence v. Texas*.[86] He finds the analysis in each in need of improvement. They are all, however, cases of the legislative, not executive, variety, where things are almost never unclear. Of course, he was writing before Trump really got rolling."

"You said this author thinks an ideal approach would combine subjective and objective intent."[87]

---

purely private ends include the suppression of a group for no reason other than the fact that the dominant political faction does not like them. Thus, the prohibition on animus reflects a core constitutional commitment . . . .").

[79] *See id.* at 3-4, 27-28, 144-62 (discussing governmental animus toward three new groups).

[80] *Id.* at 3-4, 179.

[81] Robert D. Putnam, *E. Pluribus Unum: Diversity and Community in the Twenty-First Century: The 2006 Johan Skytte Prize Lecture*, 30(2) SCANDINAVIAN POL. STUD. (2017), https://scholar.harvard.edu/robertputnam/publications/e-pluribus-unum-diversity-and-community-21st-century-2006-johan-skytte-pri.

[82] ARAIZA, BIAS, *supra* note 23, at 4-5, 79-88.

[83] 413 U.S. 528 (1973); *see* ARAIZA, BIAS, *supra* note 23, at 29-36.

[84] 473 U.S. 432 (1985); *see* ARAIZA, BIAS, *supra* note 23, at 37-47.

[85] 517 U.S. 630, 634-35 (1996) (declaring that Colorado's anti-gay referendum was "inexplicable by anything but animus"). *See* ARAIZA, BIAS, *supra* note 23, at 48-63.

[86] 539 U.S. 558 (2003); *see* ARAIZA, BIAS, *supra* note 23, at 63-64.

[87] ARAIZA, BIAS, *supra* note 23, at 89-104.

"He does, citing the gay-rights cases, particularly *United States v. Windsor*[88] and *Obergefell v. Hodges*,[89] one an example of a court whose analysis was poorly developed, and the other (*Windsor)*, based on dignity and much superior, in his view.[90] Basically, he is looking for a treatment that combines subjective dislike with external discriminatory action."

"Nothing wrong with that," I said. "But where does he go from there?"

"Nowhere particularly helpful, in my opinion. He spends the final one-third of the book discussing the technique for adjudicating cases of animus, including such questions as how stringent judicial review should be.[91] When and if the challenger gets to demand an explanation for the animus,[92] the burden of proof — how much evidence is required[93] — when it shifts from one side to the other,[94] and whether the behavior should be unconstitutional per se.[95] He ends by saying that all this is technically complex, in part because legislatures are a multi-group body,[96] and you never know for sure whether a given measure is a product of animus.[97] But if we pay close attention — to civil procedure, mainly — we'll solve it. Or at least come close. We will know when animus is afoot because it will seem abnormal[98] or even 'hysterical.'[99] History matters."[100]

---

88 570 U.S. 744 (2013); ARAIZA, BIAS, *supra* note 23, at 65-75.

89 135 S. Ct. 2584 (2015); *see* ARAIZA, BIAS, *supra* note 23, at 163-72.

90 ARAIZA, BIAS, *supra* note 23, at 170-72.

91 *Id.* at 26-27, 71-75, 132, 139 (implying that it should be strict).

92 *Id.* at 70-74, 132 (recommending that "government affirmatively justify its action" in cases seemingly motivated by animus).

93 *Id.* at 134-38.

94 *Id.* at 70, 121-23, 128, 132, 139-40 (noting how difficult it can be to know whether a given statement or action bespeaks animus).

95 *See id.* at 111-14 (approving this idea, but further noting that the Supreme Court appears to have endorsed it only in a single case (*Cleburne*), and opaquely at that, but should do so more often); *id.* at 146 ("Unfortunately . . . the Court does not appear to do this . . . the Court just doesn't get it . . . ."); *see also id.* at 120-21 (providing the same information).

96 *Id.* at 114.

97 *Id.* at 117-19, 128-29 (noting that the very idea can be disrespectful to a judge or legislator), 134-43.

98 *Id.* at 147; *see also id.* at 119 (noting that animus, in the end, may amount to nothing more than old-fashioned discriminatory intent).

99 *Id.* at 147.

100 *Id.* at 132, 169. A full year after publication of his book, Professor Araiza's ideas on animus were little changed. *See* Brooklyn Law School, *Prof. William Araiza's Animus: Book Talk and Panel Discussion*, YOUTUBE (Feb. 13, 2018),

2. Law Review Authors

"It sounds a little on the cautious side," I admitted. "Maybe a bit fussy. But bracingly comprehensive. And to his credit, the author seems to have been the first to write at length about the problem. You did say you had another book, but it's about free speech, and I gather you consider it a cautionary tale of some sort."

"I do, and I'll get to it in a minute," he said. I noticed that the engine sound of our small plane had levelled off, perhaps because we had reached our cruising altitude.

We could hear each other better now, so I took the opportunity to open a plastic packet of honeyed peanuts that the flight attendant had handed out that turned out to be surprisingly good. "You should try these," I said.

"I will in a minute. Let's discuss three final readings first. Recent law review articles by Shalini Ray[101] and Sahar Aziz[102] are illustrative. An earlier one by Susannah Pollvogt outlined some of the issues, as well."[103]

"The two newer ones focus on Muslims, right?"

"Yes, to their credit, although they do consider other groups. Also to their credit, they review some of the atrocious statements and actions emanating from the Trump administration. But then, like Araiza, they focus on questions that are almost entirely procedural."

"Do they build on what he says in his book and go beyond it?" I asked.

"Only in points of detail. Neither analyzes the nature or source of animus. If they had, they would have encountered Joel Kovel and realized that they were dealing with a deep-seated human disorder. On the positive side, neither limits her focus to legislative action, as Araiza did. One even mentions the word 'Trump.' Yet the questions they raise remain almost entirely — maddeningly — procedural. During Reconstruction the Supreme Court took an analogous view in *Cruikshank v. United States* with the enforcement of civil and political rights, and the result was disastrous.[104] It's as though the issue of

https://www.youtube.com/watch?v=e-Uz4ac8i2k.

101 *See* Ray, *Plenary Power*, *supra* note 25.

102 *See* Aziz, *Registry*, *supra* note 26.

103 Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 888-91 (2012).

104 James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385 (2014). During Reconstruction "[w]hite supremacists launched a ferocious campaign of terrorism . . . but southern state governments, Congress, federal

standard of review and placement of the burden of proof were the only important things."

"The sociolinguist's brief, too?" I asked.

"Oddly enough, yes. All three of them. Each of the articles devotes entire sections to whether the plenary power doctrine tolerates racial or religious animus, without delving deeply into its nature.[105] They discuss whether animus by the executive branch should be reviewed under a deferential or an exacting standard,[106] and whether challengers should be required to plead it with particularity or just in general terms.[107] What if the President has both a good and a bad reason for maintaining a policy evincing animus?[108] Depending on how one answers questions like these, the burden of proof shifts back and forth from challenger to perpetrator in a dizzying succession of ways."

"It sounds like a civil procedure exam," I said. "Does the article about Muslim registries cover new ground?"

prosecutors, and southern juries responded effectively. Lower courts made this success possible by interpreting the Reconstruction Amendments broadly." *Id.* at 394. However, the circuit court and subsequent Supreme Court ruling in United States v. Cruikshank "unleashed the second and decisive phase of Reconstruction-era white terrorism[.]" *Id.* at 447. United States v. Cruikshank, 92 U.S. 542 (1876) was the first case where the United States Supreme Court found that the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment apply only to state action, and therefore not the actions of individual citizens. *Id.* at 423; *see also* United States v. Cruikshank, 92 U.S. 542, 554 (1876). One of the defendants in Cruikshank had been charged with participating in a massacre of black republicans. James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 407 (2014). For a brief history of the massacre, the legal case that followed, and a comparison of *Cruikshank* to *Trump v. Hawaii*, see Adam Sewer, *The Supreme Court is Headed Back to the 19th Century*, ATLANTIC (Sept. 4, 2018), https://www.theatlantic.com/ideas/archive/2018/09/redemption-court/566963/ (Robert's decision in *Trump v. Hawaii* echoed the logic of the Supreme Court's rulings in Redemption-era cases such as *Cruickshank* and *Williams* [v. Mississippi, 170 U.S. 213 (1898)]: that as long as the legal language itself did not explicitly mention the group being discriminated against, intent and effect were irrelevant.").

105 Ray, *Plenary Power*, *supra* note 25 (manuscript at 6, 14-24); Aziz, *Registry*, *supra* note 26, at 819.

106 Aziz, *Registry*, *supra* note 26, at 779, 827; Ray, *Plenary Power*, *supra* note 25 (manuscript at 4-5).

107 Ray, *Plenary Power*, *supra* note 25 (manuscript at 5-6, 10, 22, 41).

108 Both authors discuss the possibility that a President may act from mixed motives, so that courts would invalidate his action if animus was a but-for motive or factor behind it. *Id.* (manuscript at 27, 30, 37-41); Aziz, Registry, *supra* note 26, at 827.

"It does. Like the other authors, this one devotes much attention to the standard of review — rational basis[109] or strict scrutiny[110] — but goes on to consider whether the basis for a registry might be not national, but religious.[111] Part religious and part something else?[112] Which of the two Establishment Clause tests (*Larson* or *Lemon*) should the courts use in evaluating immigration laws against a group like Muslims?[113]

"We are not only treated to a crash course in civil procedure," he continued. "Many of these writers devote a lot of attention to evidentiary questions. Should a president's statements during an election campaign count against him later?[114] What is the burden of proof for the government in trying to establish a compelling interest, such as national security?[115] Is there a causal link between being a Muslim and being a terrorist, and who has the burden of proof for that connection?[116] One even considers whether animus needs to be narrowly tailored.[117] If it's too broad, it could easily fall on a group that is not fully deserving of it; if too narrow, it could miss a group that is."[118]

"But hold on," I said. "In a free country, it's almost never in order, isn't it? Except maybe for axe murderers."

"Of course not," he said. "But that's the direction your analysis leads if you set out to treat executive animus largely as a question of judicial review. It would be like German courts during the Third Reich fretting about whether a person is a Jew if he is one-tenth Jewish or has two last names, one Schmidt, the other Feinberg, or what the standard of review should be for stolen art works that formerly belonged to Jews sent to the gas chambers[119] — to the exclusion of anything else. Or as though, in another era, the NAACP lawyers had tackled school segregation purely in procedural terms instead of as an evil in itself."

---

109 *See* Aziz, *Registry*, *supra* note 26, at 779, 788, 807, 810-12.

110 *Id.* at 788, 811, 829.

111 *Id.* at 779, 811; Ray, *Plenary Power*, *supra* note 25 (manuscript at 27-30).

112 Aziz, *Registry*, *supra* note 26, at 811-12.

113 *Id.* at 812, 819, 837.

114 *Id.* at 779, 818, 831; Ray, Plenary Power, *supra* note 25 (manuscript at 2, 8).

115 Aziz, Registry, *supra* note 26, at 820-21; Ray, Plenary Power, *supra* note 25 (manuscript at 5, 10).

116 Aziz, *Registry*, *supra* note 26, at 788, 811, 822.

117 *Id.* at 788, 811, 829-30.

118 *Id.*

119 *See* WOMAN IN GOLD (BBC Films 2015).

"Perhaps it's a perfectly understandable avoidance move," I said. "The topic is so awful one's mind veers away and opts not to treat it directly, but reaches for something else."

"Or touch it," he replied. "Like something disgusting, that might stick to you and never go away. Other articles demonstrate much the same approach."[120]

"So, one takes refuge in the realm of procedure. It wouldn't be the first time this sort of thing happened."

3. The Psycho-Linguist's Study

After a pause, I asked, "How about the psycho-linguist's study? Maybe social scientists are less susceptible to dancing around the topic. You mentioned Joel Kovel."

"Nothing prissy about him," Rodrigo said admiringly. "But the expert's brief carefully avoids the worst examples of presidential rhetoric, limiting itself to 'code words' that the expert believes might easily escape notice, such as 'harmful elements' and 'those people.'[121] It also cites a court that used 'seniority' in a case of possible age discrimination[122] and a Presidential speech that co-opted the term 'Dreamers,' used to describe DACA recipients. The speech described the Dreamers as 'interlopers whose unlawful presence threatens the rightful economic opportunities of 'American' children.' These last ones, for Trump, are the real Dreamers."[123]

"Pretty tame stuff," I agreed. "The President has said much worse about all those groups. Why would the social scientist limit himself to those examples alone?"

"Perhaps out of a concern for delicacy, or maybe not wanting to use words, like 'shithole,' and phrases, like 'womp, womp,' 'infestation,' or 'criminals and rapists.'"[124]

---

[120] *See, e.g.*, A. Reid Monroe-Sheridan, *"Frankly Unthinkable": The Constitutional Failings of President Trump's Proposed Muslim Registry*, 70 ME. L. REV. 1, 24-29 (2017) (discussing the registry in war-powers terms).

[121] Code Word Analysis, *supra* note 27, at 19, 25-31 (noting that animus over the centuries has taken subtle, coded forms and giving the example of legislators who used terms like "wetback," "[la] Raza," "radical," and "Communist" in describing a program of Mexican American Studies in Tucson, Arizona that they wanted to terminate, and deploring the "Mexicanization" of Arizona).

[122] *Id.* at 21.

[123] *Id.* at 26.

[124] *See supra* Part I (discussing recent cases of executive-level animus).

B. A Scholarly Category Mistake

"I see what you mean. The scholars veer away from a horrible reality and reach, instinctively, for a safe, familiar approach. They are naturally troubled by the actions of Donald Trump toward defenseless immigrants, Muslims, and Mexicans. But in framing his behavior as a problem for judicial review and civil procedure they are engaged, intentionally or not, in an act of concealment, much like someone harboring a fleeing felon in their basement and feeding him food at regular intervals."

He continued: "In addressing the problem as they do, gingerly, as though trying not to bother anyone, they avoid coming to terms with the harms that the President of the United States is visiting on defenseless people. The name of those harms is racism, specifically aversive racism, the worst kind, a type with psychosocial roots in fear of dirt, filth, sexuality, and excrement.[125] In treating the problem of a President who does these things as though it were mainly a case of misaligned evidentiary categories and burdens of proof, these scholars shrink from the horrific reality of what Donald J. Trump and others in his administration are doing.

"In some ways," he continued, "these scholars have been acting much like legal counterparts in 1930s Germany who deplored the growing confinement of Jewish people, homosexuals, and gypsies, but treated the problem as one of classifying the victims more accurately.[126] Does mixed parentage count? Should we offer hearings before locking them up, and if so what kinds? Who bears the burden of proof? What kind of evidence constitutes proof of Jewishness or its opposite? What about Gypsies? And is a homosexual one who is only that way part of the time, or exclusively so in the choice of partners?"

"So," I said. "You use the term category mistake to describe what some of the early scholars appear to be doing — shrinking from the horrible reality of what the President is doing and rendering it neat, sanitary, and familiar — a question of procedure, not substance, when their analysis should be more frontal, more interdisciplinary."

---

125 *See supra* Part II.

126 *See* Robert Jay Lifton, THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE 214-54 (1986) (on the role doctors performed during this period); Lovell Fernandez, *The Law, Lawyers and the Courts in Nazi Germany*, 1 S. AFR. J. HUM. RTS. 124, 124-36 (1985) (same, for lawyers and judges); John Dugard, *The Judiciary in a State of National Crisis with Special Reference to the South African Experience*, 44 WASH. & LEE L. REV. 477, 483-84 (1987) (quoting Fernandez).

"I do. History comes to mind,[127] and also the social psychology of hate and disgust. When the President announces that he has contempt for certain kinds of people and is taking action against them, basing his authority on his role as commander in chief of the military (in the case of trans-sexual soldiers), on national security (in the case of Muslim families wishing to immigrate), or on plenary power (in the case of Central Americans seeking asylum from death squads), why should courts assume that he has a legitimate basis for this at all? How could sheer, undisguised hatred be legitimate? The commentators suggest that we approach it with lawyerlike attention to standards of review, burdens of proof, and all the rest. But does this make sense? Is it not a category mistake?"

"Justice Sotomayor certainly didn't make it in her dissent in the Hawaii case," I said.[128] "But for the sake of argument, how about considering whether hate could be a compelling state interest?" (I was determined to push my young protégé as hard as I could.)

He paused for a second, then said, "That way lies insanity."

"Perhaps we could shift the burden of proof to the government to prove the legitimacy of their animus. Is that any better?"

"Of course not."

"Maybe we could heighten the proof requirement to 'clear and convincing evidence'?"

He gave me a third disbelieving look. "But of what — that the President's hatred is permissible under the Constitution? The framers wanted to make factions impossible, remember.[129] Stirring up hatred, as the President does in these cases, is a pristine example of faction-creation. It is what the founders most feared. Araiza pointed that out, and he's spot on."

After a long pause, he continued: "Evidentiary tinkering is powerless against executive meanness, especially when the conduct carefully chooses to express itself in the guise of military action,[130] plenary power,[131] national security,[132] or control over immigration.[133]

---

[127] The U.S. Supreme Court has a long history of ignoring practical realities in favor of legal formalisms when it comes to recognizing minority rights. *See, e.g.*, Williams v. State of Mississippi, 170 U.S. 213, 225 (1898) (where the Court did not find Fourteenth Amendment discrimination in Mississippi's voting requirements, which included a literacy test and poll taxes).

[128] *See supra* note 18.

[129] ARAIZA, BIAS, *supra* note 23, at 2-3, 130-31.

[130] Korematsu v. United States, 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[131] Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[132] *Korematsu*, 323 U.S. at 224.

Then, a different approach is in order: 'Ultra vires now, impeachment later.'[134] That's my new motto."

We paused for a moment as the airline attendant came by to pick up trash in preparation for landing. While she did and while he demolished his own packet of honeyed peanuts, I pondered what we had covered, beginning with the rhetoric and actions President Donald Trump aimed at minorities, Muslims, Mexicans, and transsexuals.[135] Then, we had considered animus and whence it derives, using the work of Joel Kovel to understand its root.[136] Rodrigo noted how animus is different from ordinary discrimination and why procedural tools and review are ill suited to redress it.[137] I wondered why legal scholars instinctively try to tackle it this way and resolved to ask him for his thoughts.

IV. GALLANT OR DEEPLY ASTRAY?

I didn't have long to wait. After the attendant picked up our snack wrappers, Rodrigo began:

"Nice lady," he said. "She looks a little like one of my students, who is a former airline attendant. She's tops in her class. Got an A in mine. But let's get back to my argument. Usually when they come around to pick up the trash, it's because they're going to land soon. Where were we?"

"I was hoping you would address whether the attempt to frame executive animus in procedural terms is a form of evasion — a common kink of lawyers — or a gallant effort to at least do something about a vexing problem. And if it is a mistake — a category error, you called it — I hope you explain why we make it time after time. Is that where that second book of yours comes in?"

A. Laura Weinrib and the Taming of Free Speech

"It is. You read my mind, Professor. I love the way you push me. Consider an earlier effort by pro-labor partisans to strike a compromise with the business community by means of an invigorated

133 *Trump*, 138 S. Ct. at 2406-07.

134 "Ultra vires" means beyond one's power or authority. *Ultra Vires*, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (1919). For example, a corporate executive who ordered his workers to vote Republican in the next election would be acting ultra vires. *Id.*

135 *See supra* Part I.

136 *See supra* Part II.

137 *See supra* Part III.

free speech clause. Laura Weinrib in *The Taming of Free Speech*[138] discusses an early period in our history, before about 1920, when the Constitution protected free speech, but few cases were brought under that Clause.[139] Activists were energetically striving to expand the rights of working people and the disenfranchised.[140] But these labor sympathizers, including the predecessor organization of the ACLU, mainly struggled to expand the right to strike, picket, boycott, and above all, to unionize."[141]

"I've read about that period," I said, "and how radicals back then believed that their right to agitate — as they called it — predated the Constitution.[142] I also read about the opposition they stirred up."

"They did," he said. "They got labelled communists, which some of them were, but not all, by any means.[143] But red-baiting was a convenient tool by powerful business forces and others eager to defend economic power and label the union activists as un-American and subversives.[144] Just then, the founders of the ACLU, including Roger Baldwin, proposed a compromise. In it, both sides would agree on a bold conception of free speech that would encompass the right to picket, boycott, and unionize.[145] The arbiters of the new rights would, of course, be the courts. Nobody would red-bait anybody else because it would be irrelevant."

"Many radicals were unhappy with this compromise, if I recall."

---

138 WEINRIB, TAMING, *supra* note 24.

139 *Id.* at 3-5, 14-15; *see also* David Cole, *Why Speech Is Not Enough* (book review), N.Y. REV. BOOKS (Mar. 2017), http://www.nybooks.com/articles/2017/03/23/why-free-speech-is-not-enough/ (noting that "the Bill of Rights existed long before (1920), but . . . had little effect on national life") [hereinafter *Not Enough*].

140 WEINRIB, TAMING, *supra* note 24, at 1, 4, 7 (discussing how early radicals were mainly interested in the right of agitation), 82-110 (Ch. 3, "The Right of Agitation"), 190 ("But the most important fracture of civil liberties alliance involved the right of agitation and the New Deal state.").

141 WEINRIB, TAMING, *supra* note 24, at 1-5, 13 (noting that "a movement founded on antipathy to the judiciary helped to rescue judicial review"); Cole, *Not Enough*, *supra* note 139 (noting that the early activists "disavowed law of all kinds").

142 Cole, *Not Enough*, *supra* note 139 (describing the "right of agitation" as the radicals' central claim).

143 *See, e.g.*, WEINRIB, TAMING, *supra* note 24, at 6, 64 (discussing an investigation of Roger Baldwin), 231-32.

144 *Id.*; *see also id.* at 80 (noting how free speech defenders suffered under the onslaught of national-defense hysteria), 111-45 (Ch. 4, "Dissent," noting how some of them went to jail for their beliefs), 191-93 (noting that progressives suffered from red-baiting but were, in fact, allied with communists on a number of issues).

145 *Id.* at 1-2, 4, 166, 270-328.

"They were. They much preferred direct action. Until then, they had considered all the agencies of the state, especially the courts, the enemy.[146] In league with business interests, judges would find ways, when the chips were down, to advance the interests of their corporate patrons.[147] The early radicals filed few lawsuits, mainly because of the propaganda value that they believe inhered in losing.[148] They objected to Roger Baldwin's new strategy, fearing that it would legitimize a judiciary in thrall to business interests or the military.[149] For their part, conservatives were happy to join the party, perhaps realizing that doing so would slow the march toward Congressional oversight of industry through workplace safety rules, laws forbidding child labor, pollution, and the like.[150] Weinrib's book begins with the words 'Civil liberties once were radical.'"[151]

"I gather she believes that they no longer are."

---

[146] *Id.* at 1-4, 8, 13 (noting the irony that the early radicals "knew how often courts had blocked the way to democratic change. Even so they hoped that a neutral vision of civil liberties would usher in a new and better world . . . . We are still living with the legacy of the deal they struck"), 40-44 (noting the early radicals' distrust of the judiciary).

[147] *Id.* at 2-4, 9-11, 69 (noting "their inveterate opposition to court-centered constitutionalism"), 143-44, 222 (noting that conservatives like Justice George Sutherland were pleased to declare First Amendment freedoms "cardinal rights "); *see also* Lochner v. New York, 198 U.S. 45 (1905) (invalidating a worker-protection measure as a violation of economic liberty).

[148] WEINRIB, TAMING, *supra* note 24, at 132, 70 (discussing the organization's tentative early approach to litigation); Cole, *Not Enough*, *supra* note 139 (noting that when the organization "did file lawsuits, it was not with any hope of winning, but simply for the propaganda value of losing").

[149] WEINRIB, TAMING, *supra* note 24, at 1, 11 (noting that they "disavowed law of all kinds"); Cole, *Not Enough*, *supra* note 139 (same); WEINRIB, TAMING, *supra* note 24, at 190 (noting their "aversion to the courts"), 220 (discussing their distrust of the state and its agents). Their fears came true. Schenck v. United States, 249 U.S. 47, 53 (1919) (upholding punishment of an anti-war leafleter as posing a clear and present danger); and Abrams v. United States, 250 U.S. 616, 624 (1919) (upholding wartime punishment for espionage) both showed that military necessity would often defeat the rights of speakers and dissenters. In the latter, the Court held that the "clear and present danger" test was satisfied in a wartime situation. *See* WEINRIB, TAMING, *supra* note 24, at 142-43, 297-98 (noting the radicals' disappointment over these decisions).

[150] WEINRIB, TAMING, *supra* note 24, at 2, 8-9, 12 (noting that "conservatives appropriated the ACLU's sporadic legal victories . . . as evidence of the benefits of judicial review"), 147, 195-97, 205-07; *see also* Cole, *Not Enough*, *supra* note 139 (noting that by 1940, the ACLU found itself so committed to free-speech neutralism that it "officially objected to a National Labor Relations Board order that prohibited employers from distributing anti-union leaflets to workers").

[151] WEINRIB, TAMING, *supra* note 24, at 1.

"She does, and the early months of the Trump presidency must have confirmed her suspicion. Cases like *Citizens United v. FEC* [152] had already greatly strengthened the hand of the well-heeled, giving them the ability to use their economic force to 'speak' in a louder voice than anyone else. And Trump has accused the press so often of publishing fake news that half the country believes it.[153] His administration bans government employees from talking to reporters or posting uncomplimentary material on social media.[154] He pursues would-be 'leakers' with a vengeance[155] as well as those who burn flags or disagree with him."[156]

"That's not all," I added. "He has threatened to take the press credentials away from news organizations that don't speak of him favorably enough,[157] as well as paid to kill stories that reflect unfavorably on him.[158] He would like to fire athletes who are insufficiently respectful during the playing of the national anthem."[159]

"Weinrib shows that by 1938 Roger Baldwin's organization, now called the American Civil Liberties Union, was proudly asserting that

---

[152] 558 U.S. 310 (2010). *See* WEINRIB, TAMING, *supra* note 24, at 320-21 (noting how free speech soon came to protect commercial speech and other values close to the heart of corporate capitalism).

[153] *See Trust in the News Media*, PEW RES. CTR. (May 9, 2017), http://www.journalism.org/2017/05/10/americans-attitudes-about-the-news-media-deeply-divided-along-partisan-lines/pj_2017-05-10_media-attitudes_a-05/.

[154] For an example of Trump's policy, see Matthew Ingram, *Trump Administration Puts Gag Order on Several Government Agencies*, FORTUNE (Jan. 24, 2017), http://fortune.com/2017/01/24/trump-gag-order/.

[155] For an example of Trump's hatred of leakers, see Jonathan Weisman, *President Trump Denounces 'Low-Life Leakers,' Pledges to Hunt Them Down*, N.Y. TIMES (Feb. 16, 2017), https://www.nytimes.com/2017/02/16/us/politics/trump-russia-leaks-twitter.html.

[156] *See* Charlie Savage, *Trump Calls for Revoking Flag Burners' Citizenship. Court Rulings Forbid It.*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2016/11/29/us/politics/trump-flag-burners-citizenship-first-amendment.html.

[157] Adam Liptak, *Barring Reporters from Briefings: Does It Cross a Legal Line*, N.Y. TIMES (Feb. 28, 2017), https://www.nytimes.com/2017/02/28/us/politics/white-house-barring-reporters-from-briefings.html.

[158] Jim Rutenberg et al., *Investigators Focus on Another Trump Ally: The National Enquirer*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/us/politics/trump-national-enquirer-american-media.html.

[159] *See, e.g.*, Greg Sargent, *This Revealing Anecdote Unmasks Trump's Dehumanization Game*, WASH. POST (May 25, 2018), https://www.washingtonpost.com/blogs/plum-line/wp/2018/05/25/this-revealing-anecdote-unmasks-trumps-dehumanization-game/?utm_term=.59c6b5face06 ("[Football players kneeling] are protesting police brutality and systemic racism, but Trump instead attacks them for disrespecting the flag and our country, to avoid drawing attention to who and what he's actually denigrating — African Americans who are demanding racial equality.").

it had no brief with any cause. They had 'no isms to defend' — just a neutral right of free speech."[160]

"Which, as we've seen," I interjected, "now is almost totally in the thrall of corporate interests."[161]

"Right. But by 1939, Baldwin was proclaiming, 'We are neither anti-labor nor pro-labor.'[162] We go 'wherever the Bill of Rights leads us.'"[163]

"And where that goes is nowhere, at least nowhere that a self-respecting radical should want to go," I said. "And you believe that the Weinrib book offers a lesson for scholars who advocate controlling executive animus through procedural means and burden-shifting?"

"I do. As though by instinct, autocratic leaders like Trump are beginning with anti-minority actions in areas, such as control of the military, national security, and immigration that traditionally afford the President wide scope."[164]

"In our system, by invoking plenary power," I said.[165]

"Exactly. The procedural approach is toothless. Yet the public seem blind to what he is doing. In fact, animus is very popular with one segment of the populace.[166] For them, the country is not doing well.[167]

---

160 Cole, *Not Enough*, *supra* note 139 (quoting Roger Baldwin); *see also* WEINRIB, TAMING, *supra* note 24, at 2, 73-76 (noting the origins of the compromise in wartime hysteria), 267-68, 290, 298-303, 327-28 (noting Baldwin's and the ACLU's embrace of "neutral . . . realm of thought").

161 *See* Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news. The ACLU, of course, does valuable work in a number of other areas, such as immigrants' rights. Joel Lovell, *Can the A.C.L.U. Become the N.R.A. for the Left?*, N.Y. TIMES. (July 2, 2018), https://www.nytimes.com/2018/07/02/magazine/inside-the-aclus-war-on-trump.html.

162 Cole, Not Enough, *supra* note 139.

163 *Id.*

164 *See supra* notes 105–06, 161–63 and accompanying text; *see also Hungary Just Took Steps to Crack Down on Illegal Immigration*, MSN NEWSEY (June 20, 2018), https://www.msn.com/en-us/movies/celebrity/hungary-just-took-steps-to-crack-down-on-illegal-immigration/vi-AAyVHBf.

165 *See supra* notes 105, 124–25, 131, 133 and accompanying text.

166 Anti-minority animus is "the oldest and simplest way of shaping public opinion: stirring up resentment toward a minority group." Ellen Barry, *Long Before Cambridge Analytica, a Belief in the 'Power of the Subliminal*,' N.Y. TIMES (April 21, 2018), https://www.nytimes.com/2018/04/20/world/europe/oakes-scl-cambridge-analytica-trump.html. Misogyny is on the upswing, as well. *See* Jessica Valenti, *When Misogynists Become Terrorists*, N.Y. TIMES (Apr. 28, 2018), https://www.nytimes.com/2018/04/26/opinion/when-misogynists-become-terrorists.html.

167 *See* Delgado, *Rodrigo and* Ressentiment, *supra* note 8; Peter Temin, THE VANISHING MIDDLE CLASS: PREJUDICE AND POWER IN A DUAL ECONOMY (2017); *see also*

Their jobs are disappearing.[168] People they don't like are getting ahead.[169] An African American — one of Them — even got elected president — no doubt through affirmative action. Trump gives them someone to blame."[170]

B. Unlikelihood of Self-Correction — Footnote Four Reasoning

"So executive animus is not apt to be self-correcting, but self-reinforcing? This sounds like a 'footnote four' reason for heightened scrutiny,"[171] I said.

"Good point, Professor. Social scientists believe that racial or religious castigation is among the most effective tools for whipping up support by a right-wing populist figure.[172] Ordinary racism is costly —

The Vanishing Middle Class: Prejudice and Power in a Dual Economy, WEHC BOSTON 2018, https://mitpress.mit.edu/books/vanishing-middle-class-new-epilogue (noting, in a summary, that "Conservative white politicians still appeal to the racism of poor white voters to get support for policies that harm low-income people as a whole, casting recipients of social programs as the Other") (last visited Sept. 24, 2018).

168 Delgado, *Rodrigo and* Ressentiment, *supra* note 8.

169 *Id.*

170 *See* Richard Delgado, *Why Obama: An Interest-Convergence Explanation for the Nation's First Black President*, 33 L. & INEQ.: J. OF THEORY & PRAC. 345, 346-47 (2015).

171 *See* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938), explaining that:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

See also Richard Delgado, *Rodrigo's Footnote: Multi-Group Oppression and a Theory of Judicial Review*, 51 UC DAVIS L. REV. ONLINE 1, 6 (2018) explaining this line of reasoning.

172 *See* Michael V. Hayden, *The End of Intelligence*, N.Y. TIMES (April 9, 2018), https://www.nytimes.com/2018/04/28/opinion/sunday/the-end-of-intelligence.html (noting that in a post-truth society, an autocratic leader feels free to propagate exaggerated fears of immigrants and foreigners, which his followers swallow whole); Eduardo Porter & Karl Russell, *Migrants Are on the Rise Around the World, and Myths About them Are Shaping Attitudes*, N.Y. TIMES (June 23, 2018), https://www.nytimes.com/interactive/2018/06/20/business/economy/immigration-economic-impact.html ("People who are against

the racist businessman pays a price,[173] while the political candidate with a history of ordinary racism is apt to be 'outed' and lose 25 percent of his support. But the candidate or president who speaks and promises animus collects votes and solidifies his position. And, with the backing of a large portion of the citizenry . . . ."

"Not to mention Supreme Court justices," I interjected.

"Right. With them in tow, an animus-fueled Executive can appoint more clever judges and legislators who will, in turn, find ways to implement his policies. It's the oldest known human instinct.[174] Counter-speech, elections, and factual disproof are unlikely to make inroads. Animus, like hate speech on a campus, stimulates a crowd but causes many of its victims to fall silent.[175] Some internalize the messages, feel shame, and reflect that in their demeanor and body posture.[176] The broader society loses their energy and input.[177] Moreover, as you mentioned, national leaders are apt to limit statements expressing animus to areas, such as immigration and

immigration generate a sense of crisis . . . . They create a sense that 'This is a huge problem; we need a wall'"); Ishaan Tharoor, *Does the West Actually Face a Migration Crisis*, HUFF. POST (June 28, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/06/28/does-the-west-actually-face-a-migration-crisis/ (noting that the answer, for the United States at least, is no, but that conservative forces have found that whipping up fear of immigrants is the easiest way to energize their base and mobilize it to rally round a strong leader who will build a wall and take other tough measures to reduce their number); *Trump Thrills White Supremacists in 2017*, 48 SPLC REP., Spring 2018, at 1, 3 (same); Aziz, *Registry*, *supra* note 26, at 793-95 (noting one example of this mechanism in operation).

173 Gary S. Becker, THE ECONOMICS OF DISCRIMINATION, 153 (1957).

174 Namely, stick to your clan; distrust others; they represent danger and threat. *See supra* notes 68–71 and accompanying text (discussing animus, taboos and fears of outsiders); Robert L. Tsai & Calvin Terbeek, *Trumpism Before Trump*, BOS. REV. (June 11, 2018), http://bostonreview.net/politics/robert-tsai-calvin-terbeek-trumpism-trump (noting that promulgating hatred toward a minority group is a popular and ancient way of drumming up support); Aziz, *Registry*, *supra* note 26, at 793 (noting that anti-Muslim bans are now popular with much of the American public).

175 *See* Richard Delgado & Jean Stefancic, *Four Ironies of Campus Climate*, 101 MINN. L. REV. 1919, 1928 n.50 (2017) (noting that hate speech can silence its victims); Dean Obeidallah, *Trump's America* (Opinion), DAILY BEAST (July 7, 2018), https://www.thedailybeast.com/they-fled-violence-in-iraq-only-to-find-it-in-the-united-states (noting that a University of Warwick study showed that Trump's tweets are often followed by a large increase in hate crimes).

176 *See* Stephanie Fetta, Shaming into Brown: Somatic Transaction of Race in Latin Literature 15-20 (unpublished manuscript) (forthcoming 2019) (on file with author). Others make plans to leave the country permanently. Interview with Anonymous Individual in Seattle, Wash. (May 2018).

177 Fetta, *supra* note 176, at 15-20.

national security, where they traditionally enjoy wide discretion. Why should they rein themselves in?"[178]

"They can even associate it with nationalism," I said. "With patriotism. With being a real American."[179]

"Yes, in contrast to our scholarly friends who deplore it and want to curb its worst expressions . . . ."

"Bravely," I said. "But by tame means, such as by analyzing the standard of review."

The engine noise abated somewhat. We both looked at each other, realizing that the pilot was throttling back.

"It looks like we're going to be landing soon," I said. "So, what can we do, given that animus is apt to be popular with a large segment of the electorate? If formulating more and more elaborate proposals for judicial review is not a useful exercise, what is?"

V. WHAT TO DO? ANIMUS — WHEN A PRESIDENT ACTS ULTRA VIRES

"We must try something entirely new," he began. "An approach that draws on democratic principles and considers the concept of animus head on, in its full, appalling reality. But hold on for a second." He gestured in the direction of the airline attendant, standing at the front of the aisle, microphone in hand. "Fasten your seat belt, Professor," he continued. "Here comes the announcement — as well as my proposal."

I quickly did what the attendant asked, and looked up at my companion.

"It is twofold," he continued, "with one course of action for ordinary citizens and another for courts and Congress. Both rest on the idea that a national leader who exploits animus to advance policies that inure to the benefit of his 'base' is, in effect, not a president but an ordinary citizen, and not a very attractive one at that. He or she acts in a purely private capacity — ultra vires — and is due no special deference by the courts, legislators, the citizens, or anyone else."

---

178 For more information regarding that wide support, see *supra* note 166–70.

179 Recall the slogan "Make America Great Again." Donald J. Trump (@realDonaldTrump), TWITTER (Sep. 1, 2018), https://twitter.com/realdonaldtrump/status/1036024180087644160?lang=en. *Compare Fact Check: Donald Trump's Speech on Immigration*, NPR (Aug. 31, 2016), https://www.npr.org/2016/08/31/492096565/fact-check-donald-trumps-speech-on-immigration (showing Trump's repeated assertions that his campaign, supporters, backers, and crowds are "beautiful"), *with* SUSAN M. SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC 1-2 (2009) (showing the ugly laws of a previous day, which forbade the disfigured and cripples from going about the streets).

"And what's your advice for citizens at large?" I asked.

"Simple. It's to engage in what the ACLU was doing, years ago, before it became a neutral force. Namely, protest, as often and forcefully as possible, in ways large and small, against illegitimate authority."[180]

We were both silent for a moment, absorbing the force of Rodrigo's proposal, when the voice of the pilot came on, announcing that the airport in which we would be landing in a few minutes was in the midst of a large demonstration against the government's role in flying unaccompanied children to distant detention facilities and that we might experience a crowd in the main hallway and should allow ourselves extra time to get to our gate or parking lot.

We looked at each other, and just then half the passengers on the plane slowly began to clap. I searched in my pocket for a magic marker that I had brought along to edit my latest law review article. Rodrigo immediately grasped what I was doing, smiled, and got two large sheets of paper out of his backpack.

My handmade poster read "Where are the children?" His, "Down with illegitimate authority."

The seatmate across the aisle from us, noticing what we were doing, borrowed a sheet of paper from Rodrigo and my magic marker and made his own sign. It was only later, while we marched through a throng of excited people at the airport, that I caught a glimpse of him and his sign. It read, "Physicians for Social Responsibility."

CONCLUSION

Rodrigo and I made our separate ways home on different flights and did not see each other for some time. My own flight, a short one, allowed just enough time for me to gather my thoughts. I thought he was correct in seeing animus as a growing threat and also in his identification of its root causes. I thought he was also right in criticizing some of the early work by legal scholars. The label he attached to their approach, which was almost entirely procedural — "category mistake" (he later told me he was considering calling it "meta-animus") — was certainly catchy and reminded me of an article I had read, years ago, which similarly identified a trend in legal scholarship, showed whence it came, and what damage it caused.[181] I appreciated his attention to the possibility that the scholars he

[180] *See supra* notes 139–49 and accompanying text.

[181] Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 562-65 (1984).

mentioned may have exhibited real courage in even tackling the problem as they did. I noted that in the recent travel-ban case (*Hawaii v. Trump*), the Supreme Court majority opinion, like many lower-court ones, analyzed Trump's action almost purely in presidential-power terms, ignoring its glaring overtones of animus.[182] The scholars perhaps merely followed suit.

After arriving home, I pondered his twin ideas about remedying the situation. The demonstration at the airport gave me hope that ordinary citizens were already adopting his first course of action. As for the second — courts and legal scholars treating the President as an ordinary citizen — I had lingering doubts. Perhaps the best we could do was to proceed incrementally, as the four scholars he criticized had done. But was this like German lawyers and doctors performing bloodless rituals in the face of the growing power of the Third Reich?

If so, what would be better and more consistent with our historic role as lawyers?

A week later, I found, in my virus-screened file of quarantined e-mail, a note from Rodrigo asking whether I got home safely and saying that he, too, had been thinking about measures that progressive legal scholars and students could take to counter executive animus. He mentioned a possible book series on resistance edited by the two of us; a national conference of students, faculty, and community activists; and a syllabus bank for new courses taking on illegitimate authority. It concluded by asking if I planned to be at the annual meetings of Association of American Law Schools (AALS) and offering to take me to dinner afterwards. I told him that Teresa and I had been cutting back on our travel, but that we both loved New Orleans and might make this an exception. He promised to send me new thoughts and ideas soon, including ones on a new theory, based on solidarity, that would combine scholarship and a role for both ordinary citizens and organic intellectuals.[183] Teresa and I soon ordered our air tickets and sent in our registration forms.

---

[182] *See supra* notes 18, 131–33 discussing Trump v. Hawaii, 138 S. Ct. 2392 (2018), which disposes of the case entirely in executive-power terms:

> Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.

[183] *See supra* note 170, describing the author's thoughts on solidarity. On organic

intellectuals, see Antonio Gramsci, THE PRISON NOTEBOOKS (Quintin Hoare & Geoffrey Nowell Smith eds., 1971).