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INAUGURAL CHARLES HAMILTON HOUSTON LECTURE

The Racial Double Helix: Watson, Crick, and *Brown v. Board of Education* (Our No-Bell Prize Award Speech)

RICHARD DELGADO*
& JEAN STEFANCIC**

INTRODUCTION: CULTURAL DNA

*Legal interpretation takes place in a field of pain and death.*¹

But even that graphic statement by Robert Cover—perhaps the most famous ever written in a law review article—may understate. It is not merely that judges' dockets are full of murders, rapes, assaults, and other forms of gore that they are left to clean up because no one else will. Courts are also the *agents* of pain and death. They deal in it, dish it out, and administer it, both directly and indirectly. When they impose capital punishment on a homeless, mentally retarded man who spent his last years in a shelter, was addicted to alcohol and drugs, and suffered abuse as a youth, they administer death.² Their hands are not

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This Essay grows out of the Charles Hamilton Houston Inaugural Lecture (by Richard Delgado) and a Dean's Lecture (by Jean Stefancic) at Howard University School of Law on November 5, and 6, 2003, respectively. We gratefully acknowledge the opportunity to address such a prominent intellectual community and birthplace of Black legal activism.

1. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

2. On America's overuse of the death penalty, see, for example, AMNESTY INT'L, THE DEATH PENALTY, at <http://web.amnesty.org/pages/deathpenalty-index-eng> (last visited Jan. 6, 2004).

tied; courts in many other countries do not do that sort of thing,³ and even here it is generally possible to find a way around it.

But courts also administer another, more subtle, kind of death when they ruthlessly suppress a narrative which differs from the one law recognizes—for example, that of the same homeless man who explodes in a drunken rage, haunted by visions that no one else sees, and kills another unfortunate soul over some incomprehensible dispute. That defendant does not get to tell his story—unless his mental illness meets the current legal standard of insanity.⁴ And courts do this sort of thing every time, not just every now and then. They do it intrinsically, inherently, and by their very nature. That is what they are in the business of doing—killing narratives by a process of framing, winnowing, limiting, and shortening what one is allowed to say.

Unless you are very, very lucky, so that your story is absolutely standard—absolutely aligned with convention and social power—you cannot tell that story, as you might want to tell it, to a court. The law of evidence forces you to tell only a stylized version of it. No hearsay, no opinion, please.⁵ And you cannot tell it out of your own mouth, in your own way, and without interruption. No—you must have your lawyer pull it out of you, one fact at a time, in response to questions and subject to the other side's objections if you stray too far from the kind of story the court wants to hear.⁶ The other side then gets to cross-examine you to carve up your story even further.⁷ The story you end up telling is not your own, not the one you would recount if you were telling it to a friend. You do not feel that comfortable with it; it is not you, in a way. But now the other side asks you probing questions—do you really believe that story, the one that is not yours? Why did you hesitate just now over this detail or that? Why did your story deviate in some minor respect from the one you told the police when you were excited and scared six months ago? If you fail to answer those questions the right way, the jury will find against you. You may even be found guilty of perjury and sent to jail.

Take another case. An immigrant appears before an administrative judge to ask for sanctuary. She wants asylum because she knows

3. *Id.*

4. An example is the M'Naghton standard, which requires establishing that the defendant did not know right from wrong.

5. See, e.g., 1 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE 40-86 (5th ed. 1999).

6. *Id.* at 16-39 (on direct examination of an ordinary witness).

7. *Id.* at 87-121 (on cross-examination).

how to read, and back home, they think she is a witch or a subversive.⁸ Or she joined the wrong church or disobeyed her husband and he beat her. The judge will interrupt—"But did you fear imminent bodily harm or death?" The woman hesitates. "Not exactly." But her life was intolerable. She could not stand it. So she fled. Anyone would. But the judge does not want to hear that story. He would hear another story, one that is not hers, not the way she would put it. But it is the only one the judge can hear.

So, courts carve up your stories into little, unfamiliar pieces, and then quiz you to see if you really believe in each of them. They kill your narrative and transform it into something you do not recognize. They force you to choose and defend a past that is unfamiliar to you—one that is not yours. This is a great injury, and a form of systemic injustice. It alters memory and reorganizes a person's past for them. Systematically falsifying someone's life story is the epistemological analog of a stroke—a sudden cessation of blood to a part of the brain that causes part of it to die, erases memory and self-concept, requires arduous rehabilitation, or brings death, or death in life.

Or think of amnesia and the plight of people who, because of an accident or blow to the head, have lost their memory. Amnesia fascinates us because it deprives the sufferers of their sense of who they are. Their narratives are gone. They cannot tell the story of their lives anymore. They can be told who they are, but they still have lost their own self-narrative. They can recount the facts of their lives, but only because they memorize, not remember, them. It is as though those facts were the facts of another person's life—no different from that.⁹

Stroke and amnesia are terrifying because they destroy memory, the common thread of narrative. In killing a person's narrative capacity, they kill her as a person, leaving just a mass of skin, nerves, and bones—alert enough, but existing as a sort of skim on the surface of life. Law does much the same, although unlike a stroke, it is purposive. It commits narrative violence with an agenda in mind—its own agenda, not yours and mine.

How does society replicate itself? How is it that the hierarchy of race remains almost exactly the same from year to year, decade to decade, century to century, with Whites on top and people of color on

8. For discussion on asylum generally, see 3 CHARLES GORDON ET AL., *IMMIGRATION LAW AND PROCEDURE* § 3:33.05 (2003).

9. For discussion on these and other forms of neurological impairment, see OLIVER SACKS, *THE MAN WHO MISTOOK HIS WIFE FOR A HAT AND OTHER CLINICAL TALES* (1985).

the bottom? And with an economic gap year after year of seventy-one cents on the dollar, sometimes a little more, sometimes a little less?¹⁰ In other ways, however, our society exhibits a great deal of change. Cities grow or wither. Markets rise or fall. Regions gain or lose population. Companies either succeed or fail. Products either catch on or they do not. Styles and fads succeed one another. One corporation makes its shareholders rich, another loses all its money and has to fire its workers and raid their pension funds to pay for golden parachutes for the president and the board. But the gap between Whites and Blacks—and other non-White minorities—remains remarkably the same year after year, and that holds true whether you look at wages, longevity, infant mortality, school completion, family wealth, or anything else.¹¹

Fifty years ago, *Brown v. Board of Education*¹² declared that racial segregation in public schools violated the equal protection guarantee of the United States Constitution. But in that same year, the nation also saw the publication of a scientific paper that began with the words, “[w]e wish to suggest a structure for the salt of deoxyribose nucleic acid (D.N.A.).”¹³ The authors went on to describe that structure as a “double helix,” with two spiral chains coiled around a single axis, paired in such a way as to repair and communicate genetic information needed by all living cells. We refer, of course, to James Watson and Francis Crick’s discovery of the basic building block of life, the genetic code that enables organisms to replicate themselves generation after generation.

Two astonishing, world-transforming events in the same twelve-month period. As we write, celebrations are ringing out across the land for both. The double helix won the Nobel Prize for Watson and Crick. The question we pose is: Why not a Nobel Prize for the legal scholar or social scientist who figures out how *racial relations* replicate themselves, endlessly and ineluctably, generation after generation—the scholar who figures out why, fifty years after *Brown*, more Black children attend segregated schools than did then, or even, what made *Brown* necessary in the first place. Our Constitution and Declaration

10. See, e.g., NAT’L URBAN LEAGUE, THE STATE OF BLACK AMERICA 1998 app. II, tbl. 28 (Lee A. Daniels et al. eds., 1998).

11. See NAT’L URBAN LEAGUE, THE STATE OF BLACK AMERICA 2000 app. II (Lee A. Daniels et al. eds., 2000).

12. 347 U.S. 483 (1954).

13. J.D. Watson & F.H.C. Crick, *Molecular Structure of Nucleic Acids: A Structure for Deoxyribose Nucleic Acid*, 171 NATURE 737, 737 (1953).

of Independence declare freedom and equal rights as transcendent values. How *did* slavery, Jim Crow, and separate but equal accommodations come to share space in a nation dedicated to those lofty values?

One would think that this discovery would be just as important as learning how a cell on your nose knows to grow into a nose and not, say, an ear. After all, learning the basic mechanisms by which the people on the top and their children stay on the top would seem to be just as vital a piece of information as knowing how a nose turns into a nose. An old adage holds that the most valuable thing to man is man. What it means is that if forced to choose between a friend and an invention or tool, one should choose the friend every time. Social relations, networks, and knowledge determine what capital we are born with, where we go to school, what solidarity we can count on, what chances we have in life, and where we and our children are apt to wind up. As they say, it is all heredity and environment. Watson and Crick won a Nobel Prize for figuring out the secret of heredity. How about the other half—environment?

The legal scholar who has contributed most to this other kind of knowledge—the way racial reality perpetuates itself—is Derrick Bell, who has spoken at Howard University probably more than any other speaker, and written path-breaking articles on school desegregation,¹⁴ the price of racial remedies,¹⁵ interest-convergence,¹⁶ and the structure of legal thought¹⁷—all the while serving as an inspirational leader in the struggle for Black rights, especially those of Black women.¹⁸

14. See, e.g., *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* (Derrick A. Bell, Jr. ed., 1980).

15. See, e.g., Derrick A. Bell, Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3 (1979).

16. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter Bell, Jr., *Interest-Convergence*].

17. Derrick A. Bell, Jr., *Racial Realism*, 24 CONN. L. REV. 363 (1992).

18. See Memorandum from Derrick A. Bell, Jr., Law Professor, Harvard University School of Law, to the Appointments Committee, Harvard University School of Law (Feb. 4, 1990) (on file in the New York University Bobst Library in the Derrick A. Bell, Jr. Archive, correspondence file) (encouraging Harvard University School of Law to offer a permanent position to a Black female professor during her residence as a visiting faculty member, despite the law school's policy against such offers, to correct for the university's current lack of Black women on its permanent faculty.); Letter from Derrick A. Bell, Jr., Law Professor, Harvard University School of Law, to Harvard Law Faculty (April 1990) (on file in the New York University Bobst Library in the Derrick A. Bell, Jr. Archive, correspondence file) (announcing Bell's intention to take a protest leave of absence until Harvard hired its first female professor of color). Eventually, Harvard required him to relinquish his position. DERRICK A. BELL, JR., *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* 3-4 (2002). Derrick Bell has served as an inspiration to other minorities as well. He resigned his position as Dean of the University of

If anyone has contributed to our understanding of the role of law in shifting Black and brown fortunes and in setting the dismal homeostat that keeps things more or less the same year after year, it is that beaming law professor who teaches as a permanent visitor at New York University Law School, who wrote the 1985 *Harvard Law Review's* Foreword, *The Civil Rights Chronicles*,¹⁹ and several best-selling books.²⁰ He has White people's number—and maybe yours and mine too. An extremely acute observer, he has figured out how things work. He even writes about it with style and verve, and none of the dryness that afflicts most law review writing.

Why no Nobel Prize for Derrick Bell? He has contributed a body of social knowledge as vital as Watson and Crick's discoveries, indeed probably as vital as ninety-five percent of those inventors and academic entrepreneurs who constitute the marquee of intellectual side-shows that make up Big Science.

No, he will never win a Nobel Prize, you can bank on it, and probably not a MacArthur "genius" grant, either. Instead, glory, laud, and honor go to legal figures who *obscure* how power works, how law operates so that the haves always come out ahead, and how our system, even of race-remedies law, subjugates its supposed beneficiaries. Consider Herbert Wechsler, the author of a famous *Harvard Law Review* article²¹ that declared *Brown* unprincipled, and instead, advocated a color-blind, neutralist approach under which *Plessy v. Ferguson*²² would probably still be the law of the land. He received honors and plaudits for raising such a troubling question. You see, for a formalist like Wechsler, *Brown* traded the rights of Blacks to associate with Whites for the rights of Whites *not* to associate with Blacks, without adequate justification²³—never mind history, never mind the obvious symbolism of separate but equal Jim Crow laws.

Oregon School of Law when the faculty prevented him from offering a job to an Asian American woman who was ranked third on the list of candidates when the top two declined the offer. *Id.*

19. See Derrick A. Bell, Jr., *The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

20. E.g., DERRICK A. BELL, JR., AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); DERRICK A. BELL, JR., FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); .

21. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

22. 163 U.S. 537 (1896).

23. Wechsler, *supra* note 21, at 34.

For his pains, Wechsler won widespread recognition, and his article has been cited hundreds of times.²⁴ If courts insisted on the sort of neutral principle that Wechsler thought necessary—and that justified a racial remedy without mentioning or taking account of race—they would not find it, at least not easily. So, the law of equality would not advance, and school boards could continue to assign little Black and brown kids to separate schools. And that is what is convenient about formalist analysis—it allows you to freeze the law, hide narratives, such as the history of slavery, conceal the operation of official power, and maybe even, indirectly, kill little Black kids, all the while masking what you have done. Narrative violence, pure and simple.²⁵

So, the subtitle of this Essay is “OUR NO-BELL PRIZE AWARD SPEECH.” We call it that because the prize will never go to Derrick Bell or anyone like him. Society is simply uninterested in rewarding those who figure out its number—why social and class relations sustain themselves pretty much as they have always been. By a supreme irony, prizes, most lectureships, and awards go to formalists in the classroom, in the law reviews, and in the judiciary, who obscure how things happen, narrow the spotlight of inquiry, and reframe or never ask the big questions.²⁶ People who do this, and they are legion, should share a different, much smaller, award: the IGNO-BELL PRIZE. Because their number is too large for a footnote, we plan to set up a website informing all 4,000 of them of their award and where they can pick up their certificates.

In support of our bid for an alternative major prize for Derrick Bell and to honor his career and scholarship, this Essay summarizes some of his contributions to the understanding of racial replication, together with those of a few of his friends, including ourselves. A midjet, you see, standing on top of the shoulders of a giant, can occasionally see even farther than the giant. Part I explains how culture replicates itself. Part II considers a set of homeo-mechanisms having to do with interest-convergence (one of Bell’s signature themes) or the structure of legal thought, both of the conservative and the liberal

24. See Fred Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHL-KENT L. REV. 751, 760 (1996) (reporting that Weschler’s article is the second most-cited of all time).

25. You can even reason, as Daniel A. Farber and Suzanna Sherry do, that in attacking legal storytelling, narrative analysis, and critical race theory, you are striking a blow for rigor, knowledge, the truth, and good scholarship. DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997).

26. For discussion on formalism, see *infra* notes 47-59 and accompanying text.

variety. Part III explores differential racialization, including the part played by breakthrough legal decisions like *Brown*.

I. HOW DOES CULTURE REPLICATE ITSELF?: MEMO TO A COMMITTEE IN STOCKHOLM

A. The Structure of Social Reality

The structure of racial reality is a triple helix, consisting of Blacks, Latinos, and Asians, arrayed in an unending sequence—a little like the stripes on a barber's pole—with each transmitting information to the others in response to outside forces so that things seem to be happening, but the whole system remains in equilibrium. That structure, in turn, is part of a larger helix, with economic and cultural relations constituting the other strands. Economic relations replicate by means of the laws of surplus value, artificially stimulated consumer demands, colonialism, immigration policy, and a weak labor movement. Karl Marx, 100 years ago, knew as much about this strand as anybody,²⁷ although we must say, conservative Republicans seem to have figured out a few additional mechanisms of their own in recent years.²⁸ Culture replicates itself through ever-larger media conglomerates and the manipulation of public tastes. Andrew Ross, Judith Butler, Chon Noriega, and Spike Lee deserve baby NO-BELLS for their work in decoding *these* structures.²⁹ We have, in short, a triple helix within a triple helix of forces. The remainder of this Essay concerns itself with the racial strand, but it is worth noting that each of the strands—race, class, and culture—communicates with and limits the others, so that no one strand can be fully understood in isolation from the rest.

B. The Structure of Racial Reality

Racial reality in the United States consists of three large minority groups and a few smaller ones, in rough equilibrium vis-à-vis Whites. The mechanisms of that equilibrium are seven in number, the first four having to do with interest-convergence.

27. KARL MARX, *CAPITAL* (Samuel Moore & Edward Aveling trans., 1936) (1906).

28. For example, tax benefits for the wealthy; guest-worker programs for Mexican villagers; and cuts in social services.

29. See JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* (1997); CHON A. NORIEGA, *SHOT IN AMERICA: TELEVISION, THE STATE, AND THE RISE OF CHICANO CINEMA* (2000); ANDREW ROSS, *NO RESPECT: INTELLECTUALS AND POPULAR CULTURE* (1989); SPIKE LEE'S *DO THE RIGHT THING* (Mark A. Reid ed., 1997).

II. INTEREST-CONVERGENCE MECHANISMS

A. Mechanism One—Pitting Outgroups, Including Poor Whites, Against Each Other

If one examines the history of minority groups in the United States, one is struck at how one group is often gaining ground at the very time another is losing it. For example, between 1846 and 1848, the United States was fighting an aggressively imperialist war against Mexico, at the end of which it walked away with roughly one-half of that nation's territory.³⁰ To make matters worse, after the war ended with the Treaty of Guadalupe Hidalgo, federal officials looked the other way when crafty lawyers and crooked local administrators conspired with land-hungry Anglos in the Southwest to cheat the Mexicans who chose to remain in the U.S. of their ancestral lands guaranteed by that treaty.³¹ Yet only a few years after this happened, the North fought an equally bloody war against the South, ostensibly to free the slaves.³²

During Reconstruction, the country disbanded slavery, enacted the Fourteenth Amendment,³³ and wrote Black suffrage into the law.³⁴ But society's generosity turned out to be selective—in 1871, Congress passed the Indian Appropriations Act, providing that no Indian nation would be sovereign and capable of entering into further treaties with the United States.³⁵ Then, in 1879, California adopted a constitutional provision that made it a crime to employ Chinese workers.³⁶ Inspired perhaps by California's example, Congress, in 1882, enacted the Chinese Exclusion Act that the Supreme Court obligingly upheld in *Chae Chan Ping v. United States*.³⁷ And, just a few years later, the Dawes Act destroyed joint land tenure for Indians, resulting in the loss of nearly two-thirds of Indian land.³⁸ In 1913, California enacted the Alien Land Law under which aliens ineligible for naturalization could not lease land for more than three years, a measure that

30. Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283, 291 (2000) [hereinafter Delgado, *Toolkit*].

31. *Id.*

32. *Id.* The Civil War began in 1861. Lincoln issued the Emancipation Proclamation on January 1, 1863.

33. U.S. CONST. amend. XIV.

34. See JUAN F. PEREA ET AL., RACE AND RACES: CASES & RESOURCES FOR A DIVERSE AMERICA 131-41 (2000).

35. *Id.* at 208.

36. *Id.* at 376-77.

37. 130 U.S. 581 (1889).

38. PEREA ET AL., *supra* note 34, at 215, 665, 919-20.

devastated Japanese farming in that state.³⁹ Yet, during World War I, Congress *eased* immigration quotas for Mexicans who were needed to work on large farms in California and the West.⁴⁰

The history of minority groups in the U.S. thus demonstrates that one group gains ground at the expense of another's losing its tenuous grip. Oftentimes this does not seem to be accidental; rather, Whites have affirmatively pitted one minority group against another in the struggle for opportunities and rights. Here are four examples:

(1) Everyone knows how plantation owners treated house slaves slightly better than those in the fields, and even recruited some of them to spy on others.⁴¹ But less well known is that around 1705, when the slave population was growing, Virginia gave White servants, some of them indentured, more rights so that they would not be tempted to join forces with the slaves.⁴²

(2) Years later, after the Civil War, southern Whites clamored for Chinese labor to replace the slaves which they had lost to emancipation.⁴³ They succeeded in 1868 when the Burlingame Treaty with China accelerated immigration from that country.⁴⁴ Newly freed Black slaves were then recruited by the Army for the Buffalo Soldiers unit that put down Indian rebellions in the West.⁴⁵

(3) Meanwhile, the Chinese, many of whom lived in California, were the subject of a California Supreme Court case in which the court justified banning Chinese from testifying against Whites in criminal trials on the grounds that neither Blacks nor Native Americans had that right either.⁴⁶

(4) And, lest anyone think all this is ancient history, we need only remember that during California's Proposition 187 campaign to deny health benefits and education to children of undocumented Mexicans, proponents solicited Black votes by saying that Mexican workers would take away jobs that would normally go to Blacks.⁴⁷

39. *Id.* at 398-405.

40. *Id.* at 312-14.

41. *Id.* at 96-97.

42. *Id.*

43. Delgado, *Toolkit*, *supra* note 30, at 294.

44. PEREA ET AL., *supra* note 34, at 374, 382. How many of the Chinese wound up working in agriculture is an open question.

45. See MONROE LEE BILLINGTON, *NEW MEXICO'S BUFFALO SOLDIERS, 1866-1900* (1991).

46. *People v. Hall*, 4 Cal. 399 (1854).

47. PEREA ET AL., *supra* note 34, at 30, 49-50; Manning Marable, *Beyond Racial Identity Politics: Towards a Liberation Theory for Multicultural Democracy*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 448, 449-50 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000).

No group is immune from this elaborate dance, including poor Whites. As Derrick Bell has pointed out, one of the most important features of our system of White-over-Black exploitation is interest-convergence:⁴⁸ White elites arrange things so that Black gains come only when they will also advance White self-interest.⁴⁹ A corollary explains why working-class Whites cast their lot with elite Whites, when one would think that they would advance their interests more effectively by joining with Blacks and Latinos to challenge their common exploiters. This happens because elite Whites convey to their working-class counterparts the idea that Blacks covet their paltry prerogatives and that Whites are better off by maintaining a sharp separation between themselves and those at the true bottom of society.⁵⁰

So society arranges things so that minority groups exchange places on the triple helix spiral, always and endlessly, with one now up a little, and the others down and the groups trading places every now and then as society needs change. This is the first, and perhaps the most fundamental, way empowered groups keep racial relations replicating and in perfect equilibrium.⁵¹

B. Mechanism Two—Legal Formalism

Law plays an important role in the maintenance of our system of racial hierarchy, with certain groups on top and other ones at the bottom of the well. It does this by solidifying the hold of economic elites, but that is another Essay and another NO-BELL PRIZE. We focus instead on race law. That body of law through most of our history has meant discrimination law—a congeries of restrictive covenants, school assignment rules, Jim Crow laws, racist immigration statutes, alien land laws, Chinese Exclusion Acts, and anti-miscegenation laws that kept Black, brown, red, and yellow people down.⁵² Anti-discrimination law, which one might have thought an exception, does much the same thing, narrowing, regularizing, and limiting the pace of change, persuading us that all is well, and providing periodic opportunities for rejoicing—like 2004—so that newspaper editors and a multitude of liberals can persuade themselves that American society, while not per-

48. Bell, Jr., *Interest-Convergence*, *supra* note 16, at 523.

49. *See id.*

50. *See* DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 60-61, 63-64 (5th ed. Aspen Publishers 2004) (1973) (discussing the uses of history).

51. Bell saw one aspect of this, the seesaw relation between Whites and Blacks. Because his focus lay there, the broader matrix we describe may not have caught his attention.

52. *See* PEREA ET AL., *supra* note 34, at 98-129, 141-55, 179-219, 246-325, 367-97.

fect, still is the fairest, most non-racist, most inclusive society on earth, when it still has a very long way to go.⁵³

One way law does this is through formalism, which is ascendant right now.⁵⁴ By downplaying power, emotion, history, context, purpose, justice, and equity, in favor of text and precedent, formalism keeps a great deal of the messiness of life out of view.⁵⁵ For a formalist, a landlord can evict a poor single mother by giving three days notice and reciting a few boilerplate facts. An execution is just if it is formally correct—if the trial afforded the suspect all his rights. A war is formally just if Congress declares it or if the President gets that body to pass a resolution. Never mind that it is pre-emptive, the cause fabricated and the real objective to impose U.S. power on a weak, but resource-rich nation.

You can be a devotee of law and economics—a modern variety of formalism—and persuade yourself that efficiency is the chief criterion of any sensible set of laws, and that justice, fairness, or the past do not matter.⁵⁶ Economic narratives are legal, those others merely sentimental.

The formalist is, of course, color-blind in matters of race, so that laws that disadvantage Whites are just as suspect as ones that handicap Latinos, Blacks, and other minorities.⁵⁷ He is also color- and gender-blind in thinking that reasonable man standards, which select the favored group's perspective as the normative baseline for legal doctrine, are fair for everyone.⁵⁸ By concealing how power works, how history has contributed to persistent inequalities of wealth and power, and how the practical effect of affirmative action is radically different from that of a Jim Crow law intended to marginalize Black railroad passengers, the formalist assures that the pace of social and racial change is glacial.⁵⁹ The formalist can even persuade many of the gen-

53. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986); Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

54. See, e.g., JEAN STEFANCIC & RICHARD DELGADO, *PANTHERS AND PINSTripES: HOW LAWYERS LOSE THEIR WAY* (forthcoming 2004) [hereinafter STEFANCIC & DELGADO, *PANTHERS AND PINSTripES*].

55. *Id.*

56. See, e.g., Richard Delgado, *Rodrigo's Thirteenth Chronicle: Formalism and Its Discontents*, 95 MICH. L. REV. 1105 (1997).

57. See, e.g., STEFANCIC & DELGADO, *PANTHERS AND PINSTripES*, *supra* note 54.

58. See CYNTHIA LEE, *MURDER AND THE REASONABLE MAN* (2003).

59. STEFANCIC & DELGADO, *PANTHERS AND PINSTripES*, *supra* note 54.

eral public that blind justice is best, and anything else is judicial activism.⁶⁰

C. Mechanism Three—The Diversity Rationale for Affirmative Action

As formalism is to conservatives, the diversity rationale in constitutional law is to liberals—a mechanism that papers over a great deal of blood, pain, and death embodied in a 400-year history of racist oppression in favor of a cheerful, forward-looking approach to racial remedies.⁶¹ So, we are awarding a very large IGNO-BELL prize to a certain type of liberal. Permit us to explain:

One can justify affirmative action in two ways, one backward- the other forward-looking. A remedial rationale requires institutions that have discriminated against minorities to make them whole—to put them in the condition they would have enjoyed had the institution not discriminated against them. So that if an employer, for example, is shown to have discriminated against Blacks, it must give them an edge in hiring until the deficiency is made up. The law will tolerate, or even require, that degree of race-consciousness.⁶²

But in the university setting, a different justification—the diversity rationale—comes into play. It permits institutions to consider race in faculty hiring and student admissions in order to enable them to achieve a diverse intellectual community.⁶³

Now, many, many universities have perpetrated discrimination as pervasive and clear-cut as any you are apt to find in the employment sphere, including all-White admissions policies and fraternities, segregated dorms, Jewish quotas, and alumni preferences for children, all of

60. Conservatives often criticize the Warren Court as activist and engaged in blatant social engineering. Some liberals, too, have decried activist judging. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); see also STEFANCIC & DELGADO, PANTHERS AND PINSTripES, *supra* note 54 (discussing judicial activism and its opposite).

61. For a discussion on the diversity rationale, see *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

62. See Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decisionmaking in Higher Education*, 47 UCLA L. REV. 1521, 1525-31 (2000) [hereinafter Delgado & Stefancic, *California's Racial History*]; Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—and Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703, 710-14 (1999) [hereinafter Delgado & Stefancic, *Home-Grown*].

63. See Delgado & Stefancic, *Home-Grown*, *supra* note 62, at 710-13 (discussing and differentiating the two rationales).

whom just happen to be White.⁶⁴ Universities have also collaborated with agribusiness to drive small farmers and migrant workers out of business and away from lands they wish to acquire for themselves.⁶⁵ Expert academic witnesses have testified to the degraded condition of minority communities and the inability of their children to learn, thus inscribing a deeper stereotype in the minds of legislators, social workers, and teachers.⁶⁶ For many more examples of universities' complicity in imposing racial hierarchy, the reader may want to consult recent works about Colorado's and California's racial histories.⁶⁷

Despite, or perhaps because of, all this, universities, abetted by liberal lawyers and administrators, unerringly select the diversity rationale when conservatives challenge race-conscious admissions and hiring. It is easy to see why—the remedial rationale would require them to disclose much about their recent past that they would just as soon leave buried. The lives of great figures whose names grace campus buildings and statues, for example, may reveal a dark side—they might have been slaveowners, or merchants who profited from the slave trade, or leaders of raids against Indians, and so on.⁶⁸ Diversity emerges as a much safer rationale. With it, one simply makes a case that society would be better off with a few more Black or Latino engineers (which it would), and lets it go at that. The jaded White professor would get an edgy, ghetto-style answer to his standard Socratic question from time to time, and so on.

Not only is diversity a rather pallid, morally unimaginative way to approach campus integration, it suppresses stories about universities' own racism and discrimination that would be better aired and reckoned with. The diversity rationale, favored by liberals, kills off these stories, making them irrelevant, the province of a few hotheads who want to stir up trouble and are unwilling to let bygones be bygones.

D. Mechanism Four—Alternative Dispute Resolution

A related mechanism, much favored by a certain type of liberal, is Alternative Dispute Resolution (ADR). The liberal counterpart of formalism in legal process, ADR treats conflict as pathology, adjusting

64. See Delgado & Stefancic, *California's Racial History*, *supra* note 62, at 1579-98; Delgado & Stefancic, *Home-Grown*, *supra* note 62, at 793-807.

65. Delgado & Stefancic, *California's Racial History*, *supra* note 62, at 1592-1613.

66. *Id.*

67. See Delgado & Stefancic, *California's Racial History*, *supra* note 62, at 1525-31; Delgado & Stefancic, *Home-Grown*, *supra* note 62, at 710-14.

68. See, e.g., Delgado & Stefancic, *Home-Grown*, *supra* note 62, at 716-17.

disputants to their roles in life, and pretending that individual and class conflict are not inevitable and necessary parts of our system, which they are.⁶⁹ Nonformal chambers like mediation, arbitration, and consumer complaint panels magnify power differentials and increase the likelihood of a judgment based on race or status.⁷⁰ Courts kill stories—mediation kills dreams.

So, that is the first part of our memo to the Stockholm Committee, the first part of our review of the mechanisms of racial replication, and our case for a big prize for Derrick Bell who deserves, but is unlikely to receive one. The next part discusses mechanisms having to do with differential racialization.

III. SOCIAL CHANGE AS INJURY: MECHANISMS BASED ON DIFFERENTIAL RACIALIZATION

This part discusses additional means by which our legal and social system perpetuates race relations, with Whites on top and the others arranged below, sometimes changing positions slightly on the barber pole, but the shop owner being the one who brings home all the money. Once the basic structure is in place, it resists change, seeing it as a form of injury, just as the DNA in a human cell rushes to repair damage from a carcinogen.

In particular, we want to examine a cluster of mechanisms having to do with *differential racialization*.⁷¹ Readers will recognize that what we say here stands in close relation to some of Part I's themes. A veritable daisy chain of closely related mechanisms transmit information, unleashing change and backlash at just the right time, silently and outside of consciousness, just the way real DNA works.

Differential racialization means that racial minority groups in American society—Blacks, Latinos, Asians, and others—are racialized in different ways at different periods, in response to social needs.⁷² Since those needs change over time, so does a group's racial-

69. See generally Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

70. For a critique of Alternative Dispute Resolution, see, for example, *id.* at 1391-1400 and Richard Delgado, *Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391 (1997).

71. See, e.g., TOMAS ALMAGUER, *RACIAL FAULT LINES: THE ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* (1994); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1990s* (2d ed. 1994); PEREA ET AL., *supra* note 34 (discussing and comparing histories, experiences, and racialization of four large minority groups and Whites).

72. PEREA ET AL., *supra* note 34.

ization. Often the groups trade places—one that was racialized in one way, say as big and brutish with designs on White women, at one period, will take on a different assigned role and stereotype—say the singing, happy, carefree Latino or Black entertainer—in another.⁷³ Later, a different group may be assigned those roles.⁷⁴ Readers of Vine Deloria will recall how that feisty author, whose *Custer Died for Your Sins* sold thirteen million copies, analogized red, yellow, and brown people to different kinds of beasts doing different kinds of work for Whites.⁷⁵ Regardless of the metaphor we use to describe this process, the creative community falls into line, magically knowing when to produce scripts, stories, plots, movies, and cartoons of just the sort society needs.⁷⁶

Accepted today by all serious students of race, differential racialization also helps us make sense of how racial hierarchy *persists*, generation after generation. Although Omi, Winant, and other innovators seem not to have explored this aspect of it, differential racialization sheds light on interest-convergence, racial realism, and stasis. For, if racial minority groups are constructed in different ways in response to differing material and social needs, this will provide opportunities for the dominant group to manipulate them all to its advantage. And to the extent that minority groups internalize their constructions and begin to play their assigned roles, they will find it difficult to work together to challenge the establishment that oppresses them all.⁷⁷ Consider three ways this happens, through: (1) adroitly constructed racial binaries; (2) pet groups; and (3) liberal triumphalism and celebratory jurisprudence.

73. On the dominant images of four minority groups and their changing character over time, see Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992) [hereinafter Delgado & Stefancic, *Images of the Outsider*].

74. *Id.*

75. VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* 168-74 (1988) (writing that Indians are noble stags and Latinos are donkeys whose purpose is to perform manual labor). If Deloria were writing today, might he find that Asians' task is to operate and buy computers; Latinos' to perform domestic services; and Blacks' to entertain, shop, and consume?

76. Delgado & Stefancic, *Images of the Outsider*, *supra* note 73, at 1259-60, 1261-76.

77. For discussion of the many obstacles in the way of interminority coalitions, see Richard Delgado, *Linking Arms: Recent Books on Interracial Coalition as an Avenue of Social Reform*, 88 CORNELL L. REV. 855 (2003).

A. Mechanism Five—Racial Binaries

Most racial constructions are binary, with some outgroup defined with reference to what it is not—White.⁷⁸ Moreover, once in place, these binaries resist change or complication. Two, and only two, groups become constitutive of racial discourse.⁷⁹ Others enter into the national conversation only by analogizing themselves to one or the other of the two groups. In some regions, and in the minds of certain writers and legal figures, those groups are the White and the Black, but in other regions and in other disciplines, a different binary—the White and the brown, or men versus women, or White women versus White men—emerges as salient.⁸⁰

With everything rendered neatly dichotomous, one group's *racial* experience, for example vis-à-vis Whites, emerges as central. Other groups come in only insofar as they are able to draw a comparison between what happened to them and something that a statute or judicial opinion covers for the paradigmatic group.⁸¹ So, for example, in a system of antidiscrimination law that incorporates a Black/White binary, a Latino will be able to gain redress only by showing that what happened to him would be redressable if he were Black. And similarly for all the other dichotomies and binaries. If the law of sex discrimination is drawn up with the experiences of White women in mind, then a woman of color mistreated on account of her Black womanhood will find it difficult to gain relief.

To take a concrete example, a Latino whose boss tells him, "I can't stand all you weird non-Whites working here. You're fired.", *would* gain redress because a Black treated in that fashion would find a mountain of case law in his favor. But think of all the things that happen to Latinos, Filipinos, Asians, and Indians that would not be actionable if they happened to a Black—or that do not happen to Blacks at all.

Blacks are racialized on the basis of skin color, a history of slavery, and some particularly demeaning and undeserved stereotypes. Latinos, Filipinos, Asians, and Indians are racialized in some of those

78. E.g., OMI & WINANT, *supra* note 71; PEREA ET AL., *supra* note 34; Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) [hereinafter Delgado, *Fifteenth Chronicle*].

79. See Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997) [hereinafter Perea, *Black/White Binary*].

80. For discussion on the interplay between different binary conceptions of race, see Delgado, *Toolkit*, *supra* note 30.

81. Delgado, *Toolkit*, *supra* note 30; Perea, *Black/White Binary*, *supra* note 79.

ways; plus many that Blacks do not have to contend with, including conquest, accent discrimination, perceived foreignness, fear of engulfment, immigration status, ability to speak English,⁸² and a host of stereotypes that change over time, sometimes identical with those that society invests Blacks with but, sometimes, quite different—the greaser or model minority, for example.⁸³

Or consider the plight of a Black woman whose supervisor has it in for her. The supervisor, who gets along fine with Black men, dislikes Black women, believing them hard to get along with. He is glad to have Black men workers to talk with about sports and music. He also likes having White women around—they remind him of his mother and sisters, and he finds them calming and ornamental. So, he is not biased against all women, just ones of color.⁸⁴

Treated badly and denied opportunities for advancement, our Black woman decides to file suit. But because of the dichotomous nature of anti-discrimination law, she is unlikely to prevail. If she sues for racial discrimination, the employer can escape liability by showing that he is not biased against all Blacks, just Black women. And if she sues for sex-based discrimination—after all, the employer discriminates against her on account of her Black womanhood—she is apt to lose as well, since the employer can truthfully state that he is not biased against all women, and in fact hires lots of the White kind.⁸⁵

So by placing one group at the center of analysis and declaring its needs, problems, and troubles paradigmatic, binaries marginalize other groups, stirring up envy and resentment among them at the same time. Consider, for example, how a host of liberal writers like John Skrentny, Charles Krauthammer, Paul Brest, and Mari Matsuda today urge that we reserve an embattled policy—affirmative action—for one group, the one for whom it was ostensibly designed, and elimi-

82. See, e.g., Delgado, *Fifteenth Chronicle*, *supra* note 78, at 1183-84, 1195, 1198-99; Perea, *Black/White Binary*, *supra* note 79, at 1225.

83. See Delgado & Stefancic, *Images of the Outsider*, *supra* note 73, at 1270-75; see also STEVEN W. BENDER, *GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION* (2003); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993).

84. For discussion of intersectional categories, see RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2001); RICHARD DELGADO, *THE RODRIGO CHRONICLES* 106-34 (1995) [hereinafter DELGADO, *CHRONICLES*]; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

85. E.g., DELGADO, *CHRONICLES*, *supra* note 84; Harris, *supra* note 84.

nate it for all the others.⁸⁶ Society is beginning to suffer “compassion fatigue.” Why *not* save our energy for the narrowest possible affirmative action program, for the one group with the longest, most paradigmatic, most traumatic experience with racism?

B. Mechanism Six—Pet Groups

You may find little to complain of in that, particularly if the paradigm turns out to look like you. But note how binary thinking enables the dominant group to select a racial “pet” group, usually a small, non-threatening one, appointing its members to boards, commissions, personnel and human relations directorships, and so forth.⁸⁷ The majority gets to think of itself as fair and just, while sending the message to the other minority groups in the region that they had better not step out of line. For if the personnel director who fired you was a fellow minority—say, an Asian or Latino—how can you complain? It goes without saying that the identity of the pet group changes over time and from region to region. If, seduced by your place in the current binary, you neglect to seek solidarity with that smaller group, you can find this strategy wielded against you with devastating effect and by a member of a minority group, not your own, who has been waiting for just this opportunity.⁸⁸

C. Mechanism Seven—Triumphalism

A third aspect of binaries is racial triumphalism, of which a prime example is all those celebrations that ring out across the land every five years right about now.⁸⁹ The traditional view of *Brown* is that the case marked a great advance in race relations. But a prime tenet of Critical Race Theory—endorsed, intriguingly, by certain moderate conservatives—is that *Brown* did not come down when it did because of advancing social morality or an ethical breakthrough by Whites who woke up one day and realized, with a start, that forced separation of Black schoolchildren by race could scar them for life.⁹⁰ The

86. See Richard Delgado, *Locating Latinos in the Field of Civil Rights: The Case for a New Scholarly Engagement* (forthcoming 2004) (discussing liberal commentators who oppose affirmative action for non-Black minority groups) [hereinafter Delgado, *Locating Latinos*].

87. See Delgado, *Toolkit*, *supra* note 30, at 299-300.

88. *Id.*

89. See Freeman, *supra* note 53; Kennedy, *supra* note 53; Marshall, *supra* note 53.

90. See, e.g., MARY DUDZIAK, *COLD WAR CIVIL RIGHTS* (2002); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); Bell, Jr., *Interest-Convergence*, *supra* note 16.

NAACP, under Charles Hamilton Houston, had been litigating this point for years and making slow, painful progress, at best.

Brown and other civil rights breakthroughs came down when they did because elite groups realized that Cold War appearances required them.⁹¹ In the early 1950s, we had just won a monumental struggle against the original “axis of evil.” Hundreds of thousands of Black servicemen and women who had risked their lives in defense of democracy were now returning home, not at all ready to take their places in the old, demeaning racial order of “yes sir,” “no sir,” and shining shoes. For the first time in decades, the threat of racial disruption loomed.⁹² At the same time, we were in the early stages of a Cold War against the forces of international Communism, competing for the loyalties of the uncommitted Third World, much of which was Black, brown, and Asian. It would hardly have served America’s interests for the world press to continue to splash stories over the front page about Emmett Till murders, sheriffs with police dogs and cattle prods, and southern mobs beating peaceful demonstrators singing *We Shall Overcome*.⁹³

America’s self-interest required a breakthrough for Blacks; the Supreme Court obliged. But after *Brown*, little changed. The South went on doing what it had always done, while in the North, White families, faced with busing and integrated schools, moved to the suburbs in droves. Today, more Black schoolchildren attend dominantly minority schools than did in *Brown*’s day.⁹⁴

As with all civil rights breakthroughs, the intended beneficiaries can easily end up worse off. Skeptical officials resist the decree, look the other way, or seize on how the Court gave them the go-ahead to move forward with “all deliberate speed.”⁹⁵ The prevailing party can lose momentum, as their friends, the liberals, steal away, believing that society has solved *that* distasteful problem, and move on to some-

91. DUDZIAK, *supra* note 90; Bell, Jr., *Interest-Convergence*, *supra* note 16; Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369 (2002) [hereinafter Delgado, *African American Fortunes*].

92. Delgado, *African American Fortunes*, *supra* note 91, at 372-73.

93. Bell, Jr., *Interest-Convergence*, *supra* note 16; Delgado, *African American Fortunes*, *supra* note 91, at 372-73.

94. For discussion on the slight change that *Brown* produced, see ROSENBERG, *supra* note 90; Bell, Jr., *Interest-Convergence*, *supra* note 16; Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995) [hereinafter Delgado & Stefancic, *The Social Construction*].

95. See *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*) (specifying conditions for implementing the original decision).

thing else, such as saving the whales. The conservatives, in the meantime, are furious that the court system seems to have done something unprincipled, yet again, for those unworthy minorities, and redouble their resistance.⁹⁶ Triumphalism conceals all this in an orgy of celebration.

We do not agree with most Critical Race theorists that *Brown* changed nothing. By framing the issue as one of equal protection, the opinion drew attention to Blacks' dilemma in a way calculated to deepen empathy, at least in those capable of it. Imagine a White family going to a public swimming pool on a broiling hot day. With *Brown* on the books, the family is apt to think, "what a rotten thing that those poor Black families can't go to the pool to cool off, and we do." So, by framing the issue in equal protection terms, *Brown* initiated a national conversation about who gets what vis-à-vis whom, and that is clearly, unambiguously, to the good.

So, *Brown* left Blacks a little better off, and elite Whites a lot better off, at least in the short run. What about those other stripes on the barber's pole? And what about all Whites in the long run?

While *Brown* did a small amount of good for Blacks and a great deal for elite Whites, it set back the cause of Latinos considerably. And the reason has to do with that very equal protection rationale on which the opinion proceeded. For equal protection requires, as everyone knows, two groups, similarly situated with respect to a legislative classification, who receive different treatment under it.⁹⁷ Because for historical reasons, those two groups, in this country, are apt to be the Black and the White, *Brown* etched the Black/White binary of race a little deeper. After *Brown*, if you were Latino, you had to make out that your troubles were similar to those *Brown* remedied—ones in which a White family can do something, say, go swimming, that you cannot. If a court could visualize what happened to you happening to a Black—the other group in that binary—then you could hope for redress.

But much of the discrimination society visits on Latinos and Asians finds no exact counterpart in the experience of Whites or Blacks.⁹⁸ This left Latino litigators with exactly two choices. They

96. Cf. Delgado & Stefancic, *The Social Construction*, *supra* note 94, at 551-60, 567.

97. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1332-83 (3d ed. 1995).

98. See *supra* notes 79-80 and accompanying text.

could try to make out that their clients were White. Or, they could make out that they were Black, or close enough, anyway.

Mexican Americans in the Southwest, for a considerable period, tried the first approach. Deploying what came to be known as the “other White” strategy, Latino lawyers went before courts in the Southwest and demanded justice for their people—not because their treatment at the hands of Whites was degrading, but because it found no support in the law.⁹⁹ At that time, positive law in most states allowed for discrimination against and segregation of Blacks, some Asians, and in some states American Indians, but not Latinos.¹⁰⁰ Seizing on this, the lawyer would demand relief because separation of Latino children by race in school, while permissible for Blacks and those other groups, was not sanctified by law.¹⁰¹ Not a particularly ennobling position or calculated to endear you to Blacks and other minorities.¹⁰²

With the advent of Brown Power in the 1960s, Mexican American people cast aside the demeaning “other White” strategy in favor of empowerment.¹⁰³ But this time, their role models, slogans, and tactics were Black. Right on schedule, and just as one might predict from a group struggling to find its niche in post-Brown society, Latino activists and attorneys took a leaf—several leaves, actually—from the Black Civil Rights Movement, sitting in, chanting, raising their fists, wearing armbands, and singing group songs.¹⁰⁴

But the American public rejected the idea that Mexican Americans were situated similarly to Blacks, and were put off by the coattail riding aspects of the Brown Power movement. Traditional elements in the Latino community, too, were put off by the militancy of the new movement, which they saw as antithetical to their culture and traditions. The opportunity to forge an authentic Latino voice and radical-

99. See THE LATINO CONDITION 370 (Richard Delgado & Jean Stefancic eds., 1998); Steven H. Wilson, *Brown Over “Other White”: Mexican Americans’ Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 L. & HIST. REV. 145 (2003).

100. Wilson, *supra* note 99.

101. *Id.*

102. Among other things, the “other White” strategy backfired when, in the early days of school desegregation, authorities in Texas and other southwest states would assign Latino and Black children to the same school, so that the composition was roughly fifty-percent Latino and fifty-percent Black—and pronounce the school integrated.

103. See, e.g., RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (3d ed. 1988); IAN HANEY LOPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003) (both describing this period).

104. HANEY LOPEZ, *supra* note 103.

ism, faithful to that community's nature, was lost.¹⁰⁵ Latinos, then, if they understood their history, would find little to celebrate about *Brown*.

Eventually White folks paid a penalty too, but only in the long term. Following *Brown*, as we mentioned, a host of cities rapidly changed character as millions of disaffected and scared Whites moved to the suburbs, not wanting to have their children be part of a large social experiment. In Denver, for example, this happened in the wake of the *Keyes v. School District No. 1*¹⁰⁶ litigation that began in the late 1960s when school desegregation cases finally reached the North and West.¹⁰⁷

That case turned out to be tremendously contentious. While it was pending, forty-six school buses, and the home of the federal judge hearing the case were bombed.¹⁰⁸ The case went up and down on appeal several times, but the handwriting was on the wall. Long before the Supreme Court upheld the federal desegregation decree, tens of thousands of White families moved out.¹⁰⁹ Suburbs like Littleton, Arvada, and Boulder grew rapidly. Their schools, now full of the children of White-flight families, changed character.¹¹⁰

Social pressures increased as the new White, upper middle-class kids competed to see who could wear the best clothes, drive the biggest SUV, earn the highest grades, rack up the best SAT scores, and be elected captain of the football team or cheerleader squad. Kids who did not fit in—outcasts, weird kids, skinny intellectuals, goths—were teased mercilessly. Was it a surprise that years later a few of them exploded in deadly violence? The shooters in practically every serial school shooting case unleashed their deadly force in a suburban, White flight, all-White school like Columbine.¹¹¹

White families who sought the safety of numbers and homogeneous schools ironically ended up exposing their kids, a generation later, to deadly violence. Urban schools, like Berkeley or Santa Monica High School, that are fully integrated, almost never exhibit that de-

105. Delgado, *Locating Latinos*, *supra* note 86.

106. 396 U.S. 1250 (1969).

107. Richard Delgado, *White Interests and Civil Rights Realism: Rodrigo's Bittersweet Epiphany*, 101 MICH. L. REV. 1201, 1214-15 (2003).

108. STEPHEN J. LEONARD & THOMAS J. NOEL, DENVER: MINING CAMP TO METROPOLIS 380 (1990).

109. *Id.* at 378.

110. *Id.*

111. *Id.*

gree of pathology. Might the reason be that kids who are off the norm—theater groupies, budding rap stars, druggies, loners, serious writers, techies, and goths—can always find a group to hang out with in a school like that? Black nationalist kids can, if they want, hang out with kids of a similar persuasion, Latinos can find a Latino support group, a theater groupie a group of the likeminded, and so on. It turns out that, if you are a kid, negotiating that scary and vulnerable stage called adolescence, safety lies in diversity, not homogeneity—and danger in the opposite. Even White kids learned that they and their parents occupied a place on the barber's pole, too, and not always a safe or privileged one. Celebration for Whites then, was to this extent premature. Binaries, then, are not safe. Homogeneity is even less so. Legal decisions that enshrine either are little cause for celebration.

CONCLUSION

This Essay addressed how social relations, especially in the area of race, remain the same, year after year, with only minor changes in position. *Brown* set out to dismantle one aspect of that hierarchy—separate but equal school attendance laws. What about the rest of it?

Brown was decided fifty years ago. But that same year saw another celebrated event when James Watson and Francis Crick won a Nobel Prize for their discovery of the structure of DNA, the building block of life. But as important as the laws that govern heredity are, ones that govern social relations and expectations are just as important to the average citizen, since they determine much about how you are treated, your opportunity for upward mobility, and where you wind up. It would seem, then, that knowing how social relations and racial reality persist, year after year, would be just as useful as knowing how a cell on the surface of your nose knows to grow into a part of your nose and not something else, say, an ear or an appendix.

Unlike with cell lines and bioengineered plants, little financial incentive beckons for the social scientist or legal scholar who first renders a more-or-less complete account of the mechanisms by which racial reality perpetuates itself. Indeed, in *law* at least, prizes, awards, chairs, and honors tend to go to scholars who succeed in *concealing* how that happens.

In our discipline, the legal scholar who has done the most to name and unmask these mechanisms, and has even coined a name—

Racial Realism—to describe them, is Derrick Bell. But since the committee of eminent jurors that convenes in Stockholm every year around this time will almost certainly never award the prize to Bell—even though they could¹¹²— we renamed the award the NO-BELL Prize and proposed an alternative, even more impressive award for that genial author of the *Harvard Civil Rights Chronicles* and a host of wonderful books. Heredity accounts for quite a bit, as Watson and Crick knew. But the social milieu into which you are born—your environment—determines your fortunes just as decisively. Wouldn't it be good to know how this happens? Bell and a few of his friends have figured much of this out.

We described social reality as a triple helix, consisting of race, class, and culture, each governed by cross-cutting forces and laws. Beginning with the role of the legal system, we first addressed legal storytelling and story-killing. We described how law writes “in a field of pain and death,”¹¹³ and does so daily, regularly, and routinely, sometimes by killing actual human beings but at other times by suppressing their narratives or life stories—that is to say, everything that they deem most vital, most personal, about themselves. And it does this selectively—some stories routinely emerge mangled or rejected while others get through quite nicely. Then, focusing on race, we showed how society, with the law in constant attendance, maintains the three large racial minority groups in equilibrium—a bit like a triple helix or a barber's pole with three colors—succeeding and chasing each other in various designated ways, sometimes actively pitted against each other, but always and endlessly transmitting information and exchanging locations in a complex matrix with Whites always on top.

We showed how a narrow, formalistic conception of legal reasoning neatly conceals how this happens and limits inquiry to a few stereotyped issues, about which it makes a great fuss, excluding much more important ones, such as distributive justice, history, and who benefits and loses from the various rules.

We showed how liberals participate in this process when, for example, they choose a favorite constitutional narrative—diversity—over reparations in the debate over affirmative action. We awarded

112. Philosopher Bertrand Russell, for example, won the Nobel Prize for literature when it turned out that the Nobel bequest did not provide for one in his primary field. Would not Bell's imaginative, well-written chronicles and books be equally deserving?

113. Cover, *supra* note 1.

liberals a big IG-NOBELL prize for helping conceal this country's racial histories, as the diversity rationale does, as well as for promoting ADR. The liberal counterpart of formalism in legal process, ADR treats conflict as pathology, adjusting disputants to their roles and pretending that individual and class conflict is not an inevitable and necessary part of our system, which it is.

We then discussed a series of measures having to do with differential racialization, including racial binaries, pet groups, and civil rights triumphalism. Narrative destruction, formalism, the diversity rationale, differential racialization, binary thinking, and triumphalism—those are our candidates for the nucleotide bases in the structure of cultural DNA, the collection of forces that keep race relations more or less the same, with minor shifts in position, from decade to decade. Close readers of Derrick Bell will see his imprint on them all. Please make sure the Stockholm Committee hears about it from you.