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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

Richard Delgado*

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INTRODUCTION: IN WHICH I RUN INTO RODRIGO IN THE MIDST OF A
MADDENING QUANDARY

I was trying to print my boarding pass at the lone unoccupied terminal in the row of dedicated computers in the cavernous conference hotel and getting nowhere, when I heard a familiar voice from behind me. “Professor, are you having trouble?”

I looked behind, and, to my surprise, there stood my young friend Rodrigo, smiling broadly.¹ “I think I know what your trouble is,” he said, pointing at the computer. “The same thing happened to me this morning. Can I help?”

“I already put in all my flight data,” I said, a little sheepishly. “But when I get to the screen that says ‘Continue,’ it keeps sending me back to where I started. I’ve gone around the same loop five times.”

“Airline websites are like children,” he said. “Each one is a little different. Let me try something.” Click, click, click. His fingers flew over the keyboard, calling to mind an earlier occasion when I had been impressed by his technical virtuosity,² followed an instant later by a familiar whirring sound from the nearby printer.

“There,” he said, lifting my boarding pass from the tray. “I see you’re going back tonight. Too bad. I’m returning tomorrow morning. Otherwise, we might have ridden to the airport together.”

“What brings you here?” I asked. “Are you giving a paper? I didn’t see your name in the program.”

“I was a last-minute replacement,” he said. “My friend Laz chaired a panel on monopolies in the health-care system.³ I was a commentator.

¹ See generally Richard Delgado, *Rodrigo’s Chronicle*, 101 YALE L.J. 1357 (1992) [hereinafter *Chronicle*] (introducing Rodrigo). The son of an African American serviceman and an Italian mother, Rodrigo was born in the United States but raised in Italy, where his father served at a U.S. outpost there. *Id.* at 1357-59. Rodrigo is the half-brother of famed civil rights super-lawyer Geneva Crenshaw, a heroine figure created by Derrick Bell. See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 18 (1987). Rodrigo graduated from the small base high school, then attended an Italian university (“the oldest in the world, Professor”) and law school, graduating fourth in his class. Delgado, *Chronicle, supra*, at 1359. We meet when he sought me out, on his sister’s recommendation, on a return trip to the States to explore LL.M. programs in preparation for a career in law teaching. *Id.* Both he and his narrator and straight man, “the Professor,” are fictional characters, composites of persons I have known and not to be identified with any of them in particular.

² See Delgado, *Chronicle, supra* note 1, at 1370.

³ “Laz” is Rodrigo’s best friend on the faculty of his school, which is located in the state next to mine. See Richard Delgado, *Rodrigo’s Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1713-14 (1995) [hereinafter *Merit and Affirmative Action*] (introducing Laz, a conservative devotee of law-and-economics, but, like Rodrigo, a staunch anti-racist).

One of his speakers got sick and bailed out at the last minute. I was the only crit.”

“I’m glad we ran into each other,” I said. “I didn’t expect to see you so soon.”⁴ I tucked my boarding pass in my pocket. “I, too, almost didn’t come. All of my friends seem to be either retiring or dying. One just had a *festschrift* in his honor.⁵ You know what that means. Hardly anyone I know is here. The only people I run into are young folks around your age who are in a hurry to get to the next panel. They shake my hand, say how glad they are to see me, look at their watch, and move on.”⁶

“Well I, for one, am delighted to see you,” he said, “and have all the time in the world. In fact, something interesting happened at my panel that got me to thinking. I’d like to run it past you if you if you have a minute.”

“Of course,” I said. “What if we went outside and sat by the fountain. It was deserted a little earlier. We’d have the place to ourselves.”

“Great idea,” he said. “And if we get hungry, we can grab a bite from the little restaurant just inside. Public speaking always gives me an appetite.”

As we walked down the long hallway in the direction of the patio, I thought how lucky I had been when he looked me up, years ago, on a return trip to the States to investigate LL.M. programs in hopes of launching a career in law teaching.⁷ Over the years, we had gotten together at airports, conferences, and family trips discussing a myriad of topics including merit and affirmative action,⁸ the decline of the West,⁹ love,¹⁰ law and economics,¹¹ and postcolonial legal theory.¹²

⁴ We saw each other recently when Rodrigo dropped by my office at the end of a recruiting trip for his law school. See Richard Delgado, *Rodrigo’s Footnote: Multi-Group Oppression and a Theory of Judicial Review*, 51 UC DAVIS L. REV. ONLINE 1 (2017) [hereinafter *Footnote*] (discussing racial subordination in the age of Donald Trump).

⁵ A *festschrift* is an event or symposium honoring a person or career, often on the occasion of his or her retirement. See, e.g., Rachel F. Moran, *Festschrift in Honor of Angela Harris*, *Angela Harris: The Person, The Teacher, The Scholar*, 102 CALIF. L. REV. 1015 (2014).

⁶ “The Professor” is a senior professor of color teaching at a well-regarded public law school, whose specialty is race and civil rights.

⁷ See Delgado, *Chronicle*, *supra* note 1, at 1359 (explaining his return).

⁸ Delgado, *Merit and Affirmative Action*, *supra* note 3.

⁹ Delgado, *Chronicle*, *supra* note 1, at 1366-77.

¹⁰ Richard Delgado, *Rodrigo’s Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CALIF. L. REV. 387, 392-415 (1993) [hereinafter *Third Chronicle*].

¹¹ Richard Delgado, *Rodrigo’s Second Chronicle: The Economics and Politics of Race*,

We discussed the role of intersectionality in feminist theory¹³ and the possibility of reforming capitalism through law.¹⁴ I had gotten several law review articles out of our meetings, as had he.

“Here we are,” I said, indicating a semi-circular bench with padded cushions surrounding a quiet fountain in the shaded garden. As expected, the area was deserted.

“Romanesque,” he said indicating the fountain, which was spouting discreetly just behind the sitting area. “It reminds me of Italy.”¹⁵

We seated ourselves on the comfortable cushions. “Tell me what happened at your panel,” I said. “By the way, that waiter over there caught my eye just now. He probably plans to come and take our orders soon.”

I. IN WHICH I LEARN WHAT HAPPENED AT RODRIGO’S PANEL

“The panel was full of antitrust scholars,” he began, looking at me animatedly, “many from Laz’s division at work.¹⁶ They were addressing the problem of high medical costs and trying to figure out if monopolies, like the AMA, together with licensing requirements that make it hard for foreign doctors to qualify and high regulatory standards for new drugs, were responsible. During the discussion period, a member of the audience asked why Obamacare and Medicaid, which promised to bring down medical costs, were so unpopular with the public and many governors of red states.”¹⁷

91 MICH. L. REV. 1183, 1195-98 (1993) [hereinafter *Second Chronicle*].

¹² Richard Delgado, *Rodrigo’s Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1691, 1695-1718 (2007).

¹³ Twice, actually. Richard Delgado, *Rodrigo’s Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247, 1261-65 (2011) [hereinafter *Rodrigo’s Reconsideration*]; Richard Delgado, *Rodrigo’s Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 648-52 (1993).

¹⁴ Richard Delgado, *Rodrigo’s Equation: Race, Capitalism, and the Search for Reform*, 49 WAKE FOREST L. REV. 87 (2014).

¹⁵ See Delgado, *Chronicle*, *supra* note 1, at 1359-60 (describing his early years in that country).

¹⁶ See Delgado, *Footnote*, *supra* note 4, at 6-7 (describing Laz’s new job). One of my purposes in writing as I have done is to show readers what intellectual interchange between intellectuals of color looks like.

¹⁷ “Obamacare” is the popular name for the Patient Protection and Affordable Care Act. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. Medicaid provides low-cost medical services for the poor. *Medicaid Expansion and What It Means for You*, USA.GOV, <https://www.healthcare.gov/medicaid-chip/medicaid-expansion-and-you/> (last visited Dec. 27, 2018). Both programs have drawn criticism. See, e.g., Abby Goodnough,

“Did any of the panelists have an answer?”

“Not really. Most of them were liberals and seemed a little put off by the question. The questioner seemed conservative or maybe libertarian. He said that most of the people he knew wanted the government to stay out of medical care and leave it to patients and their doctors to work things out. He suggested that this approach had never been tried.”¹⁸

“Sometimes sick people do get better by themselves,” I said. “One of my colleagues goes to a non-Western practitioner whenever he can. But when I hurt my ankle last month, I was glad to see my regular physician and have an MRI.”¹⁹

“I was about to ask,” he said. “You’re walking much better. I gather you were able to put away that clumsy walker?”²⁰

“I was,” I said. “In fact, I returned it to the medical supply company and donated it to the next user. After the two of us went on that march, I healed practically overnight. Maybe the crowd spirit inspired me. I ended up needing the gadget for just a few days.”

“We all could use more crowd spirit,” he said. “Even if at times it works in the other direction, which is where the debate over Obamacare comes in. Would you like to hear my latest theory?”

Kentucky Rushes to Remake Medicaid as Other States Prepare to Follow, N.Y. TIMES (Feb. 10, 2018), <https://www.nytimes.com/2018/02/10/health/kentucky-medicaid-work-requirement.html> (describing one cash-strapped state’s insistence on restricting a federal program that provides low-cost medical services for the poor); Abby Goodnough, *As Some Got Free Health Care Gwen Got Squeezed: An Obamacare Dilemma*, N.Y. TIMES (Feb. 19, 2018), <https://www.nytimes.com/2018/02/19/health/obamacare-premiums-medicaid.html> [hereinafter *Some Got Free Health Care*] (quoting a disenchanted citizen: “It seems to me that people who earn nothing and contribute nothing get everything for free”); see also Jesmyn Ward, *Racism Is “Built into the Very Bones” of Mississippi*, ATLANTIC (Mar. 1, 2018), <https://www.theatlantic.com/magazine/archive/2018/02/jesmyn-ward-mississippi/552500/> (same).

¹⁸ See Jared Bernstein & Hannah Katch, *Medicaid is an Effective, Efficient Program, Highly Valued by its Beneficiaries. And Yet, Republicans are Relentlessly Trying to Cut it*, WASH. POST (Jan. 17, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/01/17/medicaid-is-an-effective-efficient-program-highly-valued-by-its-beneficiaries-and-yet-republicans-are-relentlessly-trying-to-cut-it/?utm_term=.a1a53cf33471. Concerning libertarianism, which values small government and individual liberty, see David Boaz, *Key Concepts of Libertarianism*, CATO INST. (Jan. 1, 1999), <https://www.cato.org/publications/commentary/key-concepts-libertarianism>.

¹⁹ The professor is usually fit as a fiddle. But in Delgado, *Footnote*, *supra* note 4, at 3-4, the reader learns of a recent mishap while jogging in the park that laid him low.

²⁰ See *id.* at 3-4 (explaining the Professor’s embarrassment over having to use a walker [doctor’s orders]).

A. *The Loneliness of the Long Distance Runner: In Which Rodrigo Explains Why Opposition to Obamacare Is Difficult to Explain in Terms of Classical Economic and Political Theory*

"I certainly would," I said. "I too have been puzzling about the fate of the Affordable Care Act.²¹ Teresa and I are nearing retirement and hoping that Medicare and Social Security will be there for us after we're through. All my friends are worried, too."

"As might we all. When I saw you last month you were nursing that ankle injury, cursing your fate, and wondering if you'd ever walk normally again, much less run. But speaking of running, I wonder if you've seen the classic British movie, *The Loneliness of a Long-Distance Runner*."²²

"Maybe. A long time ago. I gather you think it has something to do with the controversy over medical financing?"

"I do. Tell me if the story starts to sound familiar. In a classic British film, Tom Courtenay plays the part of Colin, a working-class juvenile delinquent who has a love-hate relationship with the authorities of the school for wayward youth to which he has been committed. The viewer learns that Colin is in the slammer for burgling a bakery and is the product of a chaotic working-class family, poorly funded schools, and indifferent teachers."²³

"The young fellow displays a romantic streak, however, illustrated by his love of long-distance running in the woods and trails of the school for delinquent boys under the tutelage of its track coach, "Mr. Governor" (played by Michael Redgrave) whose upper lip is stiff in the tradition of his class and who is very British looking. The Governor takes a liking to Colin, whom he sees as not only redeemable and with a pure spirit, despite his gangster background and manners, but like himself at an early stage of life. The youth is also a talented runner, with a lean build and strong lungs."²⁴

"It sounds familiar. I may have seen it a long time ago. As I recall, the movie follows the boy's adventures as he tries to stay out of

²¹ See, e.g., Patricia Cohen, *Deep in Trump Country, a Big Stake in Health Care*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/interactive/2017/10/16/business/economy/trump-obamacare-arkansas.html> (noting that many of America's poorest citizens are dependent on government sponsored health care, but nevertheless are calling for its abolition).

²² THE LONELINESS OF A LONG-DISTANCE RUNNER (Woodfall Film Productions 1962).

²³ *Id.* (depicting his lower-class bad boy attitude).

²⁴ *Id.* (depicting the Governor as an ambitious upward climber eager to make his mark as a coach of wayward youth).

trouble in school, while training alone on long, meditative romps through the forests of the reform school, which seems to have a considerable stake in its running programs.”²⁵

“Perhaps in order to keep its young troublemakers tired and blissed out,” Rodrigo said.

“A well-known tactic adults deploy with young teenagers,” I said. “I could have used some of that in my own youth.”

“I was that way, too. It drove my parents crazy until I settled down. They were sure I’d get in trouble with the Italian authorities and get deported back to America. At any rate, led by Colin, the ragged team improves its performance with every workout, building up to a climactic battle with the team from Ranley, a nearby private school for upper-class boys with good haircuts, classy uniforms, and well nourished, filled out bodies. As you see during the warm-up to the race, their bearing is as British as Mr. Governor’s, and they are well trained, ruddy-faced, fit, and fast.”

“So the movie has a class element,” I added, “One that must have resonated with you after that panel on medical costs.”

“You read my mind.²⁶ I love brainstorming with you, Professor. For someone your age, you pick up on things pretty fast.”

“Never mind the backhanded compliment. Some of us old-timers do try to keep up with our reading, as you know,” I said, a little archly. “Please go on.”

“I’m sorry. No insult intended. You’re sharp as a tack for someone of any age. I wish my own colleagues were as good at critical analysis as you. Some of them don’t want to talk about race or class at all. They go silent and act offended if I even try to raise them, as though I were trying to pick a fight or renew some old rivalry that they thought dead and long forgotten.

“Anyway, the other team looks down on the ruffians from the reform school and expect to beat them handily, since they enjoy better training and nutrition, not to mention snazzier uniforms and more expensive shoes.”

“Now I remember,” I said. “But as the race unfolds, it turns out that they had not reckoned with their opponents’ underdog determination, particularly Colin’s, who is tenaciously hanging onto the tail of their leading runner. As the finishing line approaches, the young jailbird

²⁵ *Id.* The school’s authorities, particularly the Governor, are eager to demonstrate the excellence of its program, thereby impressing the state officials who control its budget. *Id.*

²⁶ Rodrigo and the Professor have a mentor-protégé relationship harkening back to their earliest encounters. See Delgado, *Chronicle*, *supra* note 1.

surges ahead. The crowd goes wild. But I don't remember what happens next."

"Why, it's the film's dramatic moment. Shortly before the finish line, Colin, breathing hard, comes to a dead stop. The upper-class runner surges past to win the race. The Governor, who had been cheering wildly, is thunderstruck. The film ends with Colin sent to work in the reformatory machine shop. He threw the race and now must pay."

"Now I remember. Vindicated, but punished for his self-defeating behavior. Every viewer who has ever been a Bad Boy in his youth will understand why Colin let the other team win. Governor-types will understand, too, but draw the opposite lesson: Keep tighter reins on the boys so they are not tempted to misbehave."

B. *"Throwing The Race": Are All of Us, at Times, Like Colin?*

"Growing up in a poor family, I know the behavior only too well," I added. "Sometimes we don't want our team to win, especially if we don't really like the coach or teacher.²⁷ It's hard to explain to someone who has never been oppressed. But you think that the boy's behavior helps explain why so many working-class people voted for Trump and against Obamacare?"

"I do. I start with a theory about human emotion and incentives — about striving and the opposite, laying back.²⁸ And I think, Professor," he said, leaning forward with an intense expression on his youthful face, "I think I have identified a serious problem with classical economics and political theory, one that has been little explored on this side of the Atlantic."²⁹

"And is the reason because we're all cheerful optimists who believe our system is perfect or nearly so?"

"Yes, but also because political and economic theory has almost always been created by highly educated men who like to strive and win."³⁰

"Not always," I said. "I can think of a few times when the feminists have advanced a different approach."

"Me, too," he said. "I bet we're thinking of the same people."³¹

²⁷ See *supra* notes 22–26 and accompanying text.

²⁸ See *infra* notes 38–60 and accompanying text (Rodrigo at this point supplies the mandatory map of the rest of the Article.).

²⁹ See *infra* notes 54–58 and accompanying text.

³⁰ See *infra* notes 131–50 and accompanying text (discussing the role of race and class in Rodrigo's scheme).

³¹ See *infra* notes 38–47, 49–52 and accompanying text (discussing feminist

“I hope we get into that,” I said. “But before you start, what got you to thinking about political theory, British bad-boy runners, and their relationship?”

1. The Obamacare Outcome: In Which Rodrigo Lays Out His New Theory

“It was the Obamacare outcome. I couldn’t understand why many of our fellow citizens, particularly ones from dirt-poor states or regions, demanded that their representatives in Congress vote it down.”³²

“Or repeal it, once it passed.”³³

“Right. Some of the same states also opted not to participate in Medicaid expansion, even though many of their citizens were poor

authors).

³² See Ronald Brownstein, *Will Blue-Collar Whites Change their Minds about Obamacare*, ATLANTIC (Jan. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/01/blue-collar-whites-obamacare/512159/> (discussing Urban Institute and Kaiser Family Foundation studies of working-class attitudes toward government relief measures, including Obamacare); Paul Krugman, *Obamacare Rage in Retrospect*, N.Y. TIMES (Aug. 4, 2017), <https://www.nytimes.com/2017/08/04/opinion/obamacare-rage-in-retrospect.html?ref=opinion&r=1> [hereinafter *Obamacare Rage*] (discussing how many poor people rejected Obamacare even though they benefitted from it); Diane Ravitch, *Big Money Rules*, N.Y. REV. BOOKS (Dec. 7, 2017), <https://www.nybooks.com/articles/2017/12/07/big-money-rules/> (noting that “people of modest means who depend on government-funded health care and Social Security or other supplements to their income continue to vote for candidates who promise to privatize or get rid of those very programs Why do people who are poor vote for politicians who promise to cut corporate taxes?”); see also Jason DeParle, *Why Do People Who Need Help from the Government Hate It So Much?*, N.Y. TIMES (Sept. 19, 2016), <https://www.nytimes.com/2016/09/25/books/review/strangers-in-their-own-land-arlie-russell-hochschild.html> [hereinafter *Need Help*] (reviewing ARLIE HOCHSCHILD, *STRANGERS IN THEIR OWN LAND* (2016) and noting that many conservatives, especially in the Tea Party, detest welfare and other forms of government regulation, believing that these go to benefit blacks, immigrants, and minorities who are lazy, do not deserve it, and are “cutting in line”). On the general divide between the “white, struggling aggrieved” and “a nonwhite ‘them,’” see Eduardo Porter, *Whites’ Unease Shadows the Politics of a More Diverse America*, N.Y. TIMES (May 23, 2018), <https://www.nytimes.com/2018/05/22/business/economy/trump-election-ethnic-diverse-whites.html>; see also Noah Zatz, *Thinking Intersectionally about Race and Class in the Trump Era*, L. & POLIT. ECON. (Nov. 13, 2017), <https://lpeblog.org/2017/11/13/thinking-intersectionally-about-race-and-class-in-the-trump-era/>. On working-class attitudes and struggles, see *About*, CTR. FOR WORKING-CLASS STUD., <http://cwcs.yasu.edu/about> [hereinafter YOUNGSTOWN CTR.].

³³ See generally Edmund Haislmaier et al., *A Plan to Repeal and Replace Obamacare*, HERITAGE FOUND. (Feb. 9, 2017), <https://www.heritage.org/health-care-reform/report/plan-repeal-and-replace-obamacare> (discussing the case for repealing and replacing).

and relied on the program to see doctors for a sick kid or to get an insulin shot for a diabetic relative.”³⁴

“Baffling,” I said. “Tell me more.”

“Then I started to think about a certain Seattle entrepreneur,³⁵ law school hiring, and certain mystifying decisions that lots of good law schools make year after year.”³⁶

“This I can’t wait to hear, although I hope you’ll be careful if you end up writing about hiring. I don’t want you jeopardizing your chances of a lateral move some day. It just puts powerful members of appointments committees on notice that you are a potential troublemaker, like young Colin.”

“You’re always looking after my best interest, Professor. I’m grateful for your help over the years and promise I won’t be too outspoken about the faculty-hiring part.”

“Here comes the waiter,” I said. “Why don’t we give him our orders? I’m eager to hear your thoughts about our feminist friends and your take on the Obamacare vote.”

“What would you gentlemen like?” the friendly waiter asked. I noticed that he looked Middle Eastern and noted, once again, how often service people referred to diners like Rodrigo and me as “gentlemen.” To tell the truth, it put me a little on edge, but I could tell he was merely following orders. Besides, he was smiling, so I instead told him what I wanted — a Middle Eastern salad with feta

³⁴ See Editorial, *This Trump Administration Health-Care Rule Would Return Us to the Bad Old Days*, WASH. POST (Feb. 25, 2018), https://www.washingtonpost.com/opinions/this-trump-administration-health-care-rule-would-return-us-to-the-bad-old-days/2018/02/25/c33997e4-1735-11e8-8b08-027a6ccb38eb_story.html?utm_term=.283248e37e20 [hereinafter *Health-Care Rule*] (noting that many features of Trump’s health care policy would hurt the poor but that it is nevertheless very popular with Republicans); see also Christina A. Cassidy, *Pro-Trump States Most Affected by His Health Care Decision*, BOSTON GLOBE (Oct. 14, 2017), <https://www.bostonglobe.com/news/nation/2017/10/14/pro-trump-states-most-affected-his-health-care-decision/gW6tNNvjJLeHau6ZYTWLP/story.html> (same); DeParle, *Need Help*, *supra* note 32 (noting that a retired Louisiana chemical worker who was seriously injured on the job became an environmentalist, but although he distrusts the chemical companies, “he distrusts the federal government more, because it spends his tax money on people who ‘lazed around days and partied at night’”); Jim Newell, *They Never Really Hated Obamacare*, SLATE (July 28, 2017, 5:52 PM), http://www.slate.com/articles/news_and_politics/politics/2017/07/republicans_never_really_hated_obamacare.html.

³⁵ Chris Isidore, *Gravity Payments CEO Takes 90 Percent Pay Cut to Give His Workers Huge Raise*, CNN BUS. (Apr. 15, 2015, 2:17 PM ET), <http://money.cnn.com/2015/04/14/news/companies/ceo-pay-cuts-pay-increases/index.html>.

³⁶ See *infra* notes 97–101 and accompanying text (Rodrigo here provides a map of the ensuing portion of the article.).

cheese. Rodrigo placed his order (“A steak tartare for me, with pureed beets on the side”).

As the waiter wrote down our orders and departed, Rodrigo said, “Giannina and I love beets, and we’ve decided I can take an occasional holiday from our usual vegetarian diet. Namely, I can eat animal products when I’m by myself and she doesn’t have to watch the blood come out of the meat.”³⁷

“I’ll keep quiet about it,” I said. “I don’t want to get you in trouble at home. What do you have to say about American scholarship on self-denial, abnegation, and the Obamacare vote?”

2. Feminist Legal Theory

“As you may know, Professor, feminists have long been examining the role of certain counter-intuitive emotions in understanding human behavior. Critical legal studies, too. Robin West, for example analyzes sadomasochism in love and romance, which is much more common than you might think, and uses it — along with many other examples — to expose a flaw in the scholarship of the law and economics movement, which at the time was ascendant in the academy.”³⁸

“This occurred in an argument she had with Richard Posner, did it not?”

“It did. Their argument went on for a long time.³⁹ She shows that the classic ideal of citizens as interest-maximizing actors trading goods and services, all to the betterment of society, is an inadequate account of human nature and a masculine social construction.⁴⁰ In certain types of romantic relationship, for example, one partner will willingly undergo pain, humiliation, or even rejection — and return for more.”⁴¹

³⁷ See Delgado, *Third Chronicle*, *supra* note 10, at 402 (This chronicle introduces “Giannina,” Rodrigo’s partner and the love of his life. A published poet and playwright, Giannina went to law school and now practices at a major public interest organization.).

³⁸ Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449, 1452 (1986) [hereinafter *Submission*] (noting fundamental disagreements with Posner and his view of human nature); see also DeParle, *Need Help*, *supra* note 32 (noting that some frustrated blue-collar workers joined the Tea Party in order to oppose welfare for the poor because this served their “emotional self-interest” offering a “giddy release” from years of frustration).

³⁹ See *infra* notes 40–42 and accompanying text.

⁴⁰ West, *Submission*, *supra* note 38, at 1449–54.

⁴¹ E.g., Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 390–91 (1985) [hereinafter *Autonomy*] (noting that the two are in fundamental

“Right. For her, law and economics’ view of human nature overlooks certain impulses that might be considered self-defeating, including masochism, impulse, romance, spite, *ressentiment*, thrill-seeking, and other human motivations that do not aim at maximizing happiness, but something else entirely.⁴² As I recall, she used certain literary texts to fortify her point.”

“She did. Using the novels and short stories of Franz Kafka, she demonstrates the fallacy of some of Posner’s key assumptions.⁴³ Sometimes, lovers will cling to an unsatisfying relationship. Long-distance runners will sometimes “throw the race.” Merchants will sometimes discriminate even after it becomes clear that they are losing out on profits.”⁴⁴

“Gary Becker pointed this out, I believe. He thought the practice was self-correcting, since merchants who do not discriminate would make more money and drive out their discriminatory competitors.”⁴⁵

“Indeed. All Kafka’s characters and actions are ‘recognizable.’ Everyone immediately realizes that they are like people we have known, or like ourselves at certain times.⁴⁶ Law and economists — some of them anyway — have a simplistic theory of human motivation.⁴⁷ The Governor thought that Colin only wanted to win. Instead, he wanted to submit to the dictates of his gang ethic even

disagreement over the role and function of consent in human relations); West, *Submission*, *supra* note 38, at 1454; Robin West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149, 191 (2000) (noting her disagreement with a number of fellow feminists); *see also* E. L. JAMES, FIFTY SHADES OF GREY 165-71 (2011) (describing such a short-term relationship).

⁴² *See* West, *Autonomy*, *supra* note 41, at 391 (discussing the role of irrational forces and motivations).

⁴³ *Id.* at 386-403 (discussing how the worlds of Richard Posner and ordinary people are very different).

⁴⁴ *See generally* GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971) (discussing the origin and function of the taste for discrimination).

⁴⁵ *Id.* at 35-37.

⁴⁶ West, *Autonomy*, *supra* note 41, at 387.

⁴⁷ *See id.* at 384 (“[W]hen individuals consent to transactions, they often do so because of a desire to submit to authority, and not to maximize well-being or autonomy. Thus, . . . Posner’s identification of consent as the moral justification of wealth maximization rests on an inadequate view of human motivation.”); *see also* DeParle, *Need Help*, *supra* note 32 (DeParle cited an interview with a white Christian of modest means who protested welfare for people of color. While wishing them well, he had “waited long, worked hard, ‘and the line is barely moving.’” And for him the reason is that those people were cutting in line — blacks, immigrants, refugees, who reaped sympathy, affirmative action, and welfare checks, even though they were idle.).

more. In his juvenile mind, it represented the stronger force, the real authority.”⁴⁸

“That’s certainly true of him, at least on that occasion. But not all scholars have taken such a dark view of human nature. As I’m sure you know, Martha Fineman and others emphasize the role of vulnerability, not vigorous competition of the kind that some men love.⁴⁹ Although these scholars differ from West and her paradoxical view of human nature, they also offer a much reduced role for competition and the drive to be first. Instead they assert that we should take time out from our pursuit of fame, glory, and money to lift up those who are going nowhere fast and need help.”⁵⁰

“In other words, those who are at a vulnerable point in their lives right now and need a boost.”⁵¹

“As I myself was when I was struggling with that computer, and you came and helped me out.”⁵²

“Or as Colin was doing when he stopped running and let the other team win. He was showing solidarity with the underdogs of the world, the gritty factory hands and two-bit thieves who could run well, but could also dream and could throw themselves against the authority of tyrants like The Governor.”⁵³

3. Marketplace Theories and Their Limits

“Both lines of feminist scholarship, then, point out flaws in marketplace theory. But they do more than merely show that the market could use an occasional dose of love and compassion. If I understand you correctly, Rodrigo, they show that voting and individual choice will not produce the best outcomes merely by leaving people to their own devices. That’s why marketplace philosophies tend to find favor among those who can most readily imagine themselves among life’s winners. They love the competition, because, like the Governor, they expect to win.”

⁴⁸ See *supra* notes 22–26 and accompanying text.

⁴⁹ Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEM. 1-2 (2008) [hereinafter *Anchoring*]; Martha Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 255-56 (2010) [hereinafter *Responsive State*].

⁵⁰ Fineman, *Anchoring*, *supra* note 49, at 12-13; Fineman, *Responsive State*, *supra* note 49, at 273-75.

⁵¹ Fineman, *Anchoring*, *supra* note 49, at 12-13; Fineman, *Responsive State*, *supra* note 49, at 273-75.

⁵² See *supra* notes 1–4 and accompanying text (describing the incident).

⁵³ See *supra* notes 22–25 and accompanying text; *infra* text accompanying note 131.

“You captured my point exactly.”

“But we both remember that he received a shock,” I continued, “courtesy of his prize pupil.⁵⁴ So conventional economics, based on competition and survival of the fittest, does a good job of explaining behavior for the hyper-competitive set. But it’s apt to work less well for coal miners in West Virginia,⁵⁵ certain lovers,⁵⁶ and many of the vulnerable.⁵⁷ And it does not explain many types of self-defeating behavior, like that of our renegade runner.”⁵⁸

Rodrigo nodded, then added: “It also begins to explain why many blue-collar Americans voted against Obamacare and similar programs that would have helped them and others like them.⁵⁹ Basically, some people, perhaps because of frequent mistreatment at the hands of parents and society, become inured to loss and deprivation. Still others learn to like it when others suffer, even if it means they are likely to experience it too because of a common mechanism of some sort.”⁶⁰

“Oh, here’s our food.” The waiter pulled up two folding chairs and a rolling table and set them up next to where we were sitting. “Right here in front of the fountain, okay for you two gentlemen?”

We both nodded and I cautioned the waiter that he need not refer to us as “gentlemen.” “We’re here for the lawyers’ convention. Half the group are mean as all get out. The other half are social misfits like the two of us. Neither group is what you’d call ‘gentlemen.’”

The waiter doubled over with laughter. “I had a funny feeling about your crowd. After two days, some of the other waiters and I were

⁵⁴ See *supra* notes 22–26 (describing how the principal character, Colin, “throws the race”).

⁵⁵ See *infra* notes 84, 100, 156 (discussing common attitudes and behavior among this group). See generally J.D. VANCE, *HILLBILLY ELEGY* (2016) (describing a fiercely proud Appalachian culture that for the most part detests welfare, loathes Obama, makes bad choices, and remains trapped in poverty).

⁵⁶ See West, *Autonomy*, *supra* note 41, at 391; West, *Submission*, *supra* note 38, at 1455–56.

⁵⁷ See *supra* notes 49–52.

⁵⁸ See *supra* notes 22–25 and accompanying text (describing the adventures of “Colin,” the anti-hero youth in *LONELINESS OF A LONG DISTANCE RUNNER*).

⁵⁹ See DeParle, *Need Help*, *supra* note 32 (noting that the rolls of the largest federal welfare programs have dropped drastically since the Clinton-era cuts, yet “reverse class anger is more potent than ever”); see also Diana C. Mutz, *Status Threat, Not Economic Hardship, Explains the 2016 Presidential Vote*, *PROC. NAT. ACAD. SCI.*, at E4330 (Apr. 23, 2018), <https://www.pnas.org/content/pnas/early/2018/04/18/1718155115.full.pdf> (noting that “status threat” — the fear of the rise of minorities and the loss of dominance — rather than worries over economic losses and jobs — explains much of Trump’s support).

⁶⁰ See *infra* Part III (discussing a number of such mechanisms).

starting to sort them into two groups. We're all immigrants, and half of us have Ph.D.s from back home. Figuring out the tourists is our pastime. Just don't tell our boss."

"Don't worry," Rodrigo said. "And thanks for the nice set-up. We were just planning the next revolution, and this rare steak will get my juices flowing."

The waiter laughed again, told us to let him know if we needed anything, and disappeared back inside.

"Nice fellow," I said. "In two generations, his grandchildren will be mayors, Congressmen, and CEOs of big companies. Where were we?"

"Enjoy your salad. In a minute, I'll give you parts two and three of my thesis, starting with voting against self-interest,⁶¹ a certain businessman who defied convention,⁶² and faculty hiring."⁶³

We were both silent for a few minutes as, by tacit agreement, we dived into our food. Then Rodrigo looked up:

C. Adam Smith and the Conventional Underpinnings of Law and Economics

"Let's begin with a bit of theory," he said. "Neither conventional politics nor economics makes much provision for life's losers, especially those who seem not to try very hard. Except for a skimpy safety net, we offer them very little. If the sick, the halt, the weak, and the needy fare poorly in our competitive free-market system, the response is, basically, a shrug."

"So be it, we seem to say. Life will always have its winners and losers. We just hope that we will never find ourselves in the latter group."

"Right," he agreed. "For thinkers like these, a bare minimum of welfare services — much lower than other countries⁶⁴ — will keep the losers from starving, which is all we owe them. And with those about whom Robin West writes . . ."

"Not just her. Kafka, too," I interjected.

⁶¹ See *infra* notes 69 & 71, Part II.A and accompanying text. The following passage provides a map of the next section of the article.

⁶² See *infra* notes 87–93 and accompanying text.

⁶³ See *infra* Part II.C.

⁶⁴ On how the United States' safety net of welfare services compares to those of other developed nations, see Taylor Kate Brown, *How US Welfare Compares Around the Globe*, BBC NEWS (Aug. 26, 2016), <http://www.bbc.com/news/world-us-canada-37159686> [hereinafter *US Welfare*] (noting that the United States lags behind most of the advanced countries in providing assistance for the poor).

“Right. If we worry about these neurotic types at all, we can blame the changing job market, automation, outsourcing, the decline in manufacturing jobs, or the high level of self-destructive behavior among certain types of people.⁶⁵ Even these, we say, can, if they want, band together and vote for representatives who will defend their interests. Masochists United.”

“The rest can clamor for Congress to provide poor-houses of a less Dickensian nature,” I added.⁶⁶ “And with the deeply neurotic who bring about their own troubles, better therapists. But I gather you think the political problem is deeper than that?”

“I do. Folks like that are much more numerous than anyone seems to think. Many of them voted for Trump.⁶⁷ Not only does our system give little thought to their needs, it does so for many ordinary working-class people as well. Like the youthful Colin, they are basically normal people who at times act against their own interest for reasons that strike others as perverse. We ignore their predicament at our peril, for our fates are connected with theirs in complex ways. Even Colin’s teammates needed to know what was motivating him. The Governor did, too. Everyone needed to know about this side of his character, but didn’t until it came out at the finish line.”⁶⁸

“And you think you know what was motivating him?”

“I do. It’s very similar to the behavior we see from some of our working-class brothers and sisters who detest Obamacare and

⁶⁵ See *supra* note 41 and accompanying text (discussing sado-masochism); *infra* notes 86, 118, 128, and accompanying text (same).

⁶⁶ Charles Dickens wrote several novels about the mistreatment of the poor, for example, *A CHRISTMAS CAROL* (Hodder and Stoughton 1911) (1843) and *OLIVER TWIST* (Charles Scribner’s Sons 1905) (1837-39). The term “Dickensian” has come to mean, among other things, abject poverty and poor social conditions. *Poverty and the Poor*, DICKENS & VICTORIAN CITY, <http://dickens.port.ac.uk/poverty/> (last visited Feb. 20, 2019).

⁶⁷ See Mutz, *supra* note 59, at E4330-31 (describing this incongruity); see also Adam Hochschild, *Ku Klux Klambakes*, N.Y. REV. BOOKS 16-17 (Dec. 7, 2017), <https://www.nybooks.com/articles/2017/12/07/ku-klux-klambakes/> [hereinafter *Klambakes*] (positing that the Trump movement “heavy on ethnic hatred and imagined conspiracies” resulted from supporters feeling threatened by “stagnating or declining wages and the rapid automation and globalization” making them doubt job security); Christina A. Cassidy & Meghan Hoyer, *Pro-Trump States Most Affected by His Health Care Decision*, ASSOCIATED PRESS (Oct. 14, 2017), <https://apnews.com/cd3fb39ebc2d47a8a3c636283eeae4fc> (“Nearly 70 percent of those benefiting from so-called cost-sharing subsidies live in states Trump won last November An estimated 4 million people were benefiting from the cost-sharing payments in the 30 states Trump carried Of the 10 states with the highest percentage of consumers benefiting from cost-sharing, all but one — Massachusetts — went for Trump.”).

⁶⁸ See *supra* notes 22–27 and accompanying text.

Medicaid.⁶⁹ Human nature includes a very common quirk that classical theorists, and even their feminist critics, did allow for — namely the operation of spite, schadenfreude, and clannishness of various kinds, especially racism.⁷⁰ This oversight is no small error, any more than the quirks I mentioned are the products of a rare neglected childhood. The behavior is widespread — just look at the latest election — and casts doubt, as we shall see, on one of the basic principles of liberal capitalism as a mode of social organization.⁷¹

“You mean Adam Smith and his followers, who posited that the pursuit of individual self-interest would yield an efficient, prosperous society as marketplace forces tap individual initiative in powerful ways?” I asked.

⁶⁹ See Brownstein, *supra* note 32; Rick Newman, *If Trump Knives Obamacare, He'll Hurt His Supporters the Most*, YAHOO FIN. (Aug. 3, 2017), <https://finance.yahoo.com/news/trump-knives-obamacare-hell-hurt-supporters-185742474.html>; see also Haislmaier et al., *supra* note 33 and accompanying text; DeParle, *Need Help*, *supra* note 32 (noting that many poor people resent federal aid, including needed health care, out of the belief that it goes to shirkers, slackers, blacks, and immigrants who are “cutting in line”); Abby Goodnough, *As Some Got Free Health Care*, *supra* note 17 (noting that many Republican states plan to require Medicaid recipients to work or suffer expulsion from the program); see also *Deep in Trump Country*, *supra* note 21 (noting that loss of the Medicaid program would cost poor states and neighborhoods dearly). On working-class attitudes and convictions, see generally YOUNGSTOWN CTR., *supra* note 32.

⁷⁰ See, e.g., Michelle Ye Hee Lee, *President Trump's Claim about Immigrants 'Immediately' Collecting 'Welfare'*, WASH. POST (Aug. 4, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/08/04/president-trumps-claim-about-immigrants-immediately-collecting-welfare/?utm_term=.4abfb80f2ad2&wpisrc=nl_politics&wpmm=1 (explaining that the Reforming American Immigration for Strong Employment (“RAISE”) Act will prevent immigrants from collecting welfare immediately upon entering the United States, how the act will influence immigration levels over the next decade, and which groups in particular will be effected).

⁷¹ People often do not act rationally. See Krugman, *Obamacare Rage*, *supra* note 32; (explaining that some people believe lies about Obamacare because of “identity politics and affinity fraud”). See generally JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012) (explaining that people are basically emotional actors, not rational agents who invariably pursue and maximize self-interest); Brian Rathbun, Evgeniia Iakhnis, & Kathleen E. Powers, *This New Poll Shows that Populism Doesn't Stem from People's Economic Distress*, WASH. POST (Oct. 19, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/19/this-new-poll-shows-that-populism-doesnt-stem-from-economic-distress/?utm_term=.6dca451d0442 (explaining that populism does not originate in the pocketbook and is not “the cry of the financially forgotten.” Instead, it is the product of perceptions of how different groups are doing in the new economy, relative to one's own group, and the desire not to want other groups to catch up to one's own).

“Exactly. Classical theory, exemplified by Jefferson and Madison in politics, and Adam Smith in economics,⁷² holds that democracy works best if citizens elect legislators whom they believe will enact programs of interest to them. And this is true of the marketplace of products and services, as well. The theory of free-market capitalism holds that everything works best the more we leave people alone to advance their own self-interest. Then, both individuals and societies will flourish. We’ll get the best out of everybody.”⁷³

“You’re saying that if Citizen A wants one thing and Citizen B wants another, they can organize to elect legislators who will back the kinds of programs they would like. If the legislators disagree on a program — for example, Obamacare — they will negotiate or try to recruit other, uncommitted legislators to their cause. If they can’t work it out, their constituents can replace them at the next election.

“Or so democratic theory holds,”⁷⁴ he said with a nod. “We vote our preferences and aim to elect representatives who will advance our self-interest. Farmers want more subsidies and lower taxes on land that they need to leave fallow for a season to regenerate. City dwellers want more bridges, subways, and police services. And so on.”

“But you think that this does not always happen,” I said. “And your panel with Laz drove this point home.”

“It did, at least with regard to national medical insurance. And the reason is that under certain circumstances, citizens will vote against measures that would benefit them and their families, because they know that these programs will also benefit groups that they do not like.⁷⁵ Robin West noted that in certain kinds of intimate

⁷² See generally RICHARD POSNER, *THE ECONOMICS OF JUSTICE* 60-87 (1981) (discussing the ethics of economic wealth maximization); ADAM SMITH, *THE WEALTH OF NATIONS* (Bantam Classics 2003) [hereinafter *THE WEALTH OF NATIONS*].

⁷³ See Brown, *US Welfare*, *supra* note 64; see also JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 312 (Dover Publications, Inc. 2007) (1780) (explaining and defending this equation in the context of ethics).

⁷⁴ A few political theorists have tried to reconcile classical theory with the reality that people often value and desire incongruous goals. See, e.g., Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 *VA. L. REV.* 1809, 1810-12 (2017) (noting that citizens often prize moral values, including immigration, diversity, the environment, and the survival of the dolphins, and not just gains, profits, and other tangible items); see also GEORGE A. AKERLOF & ROBERT J. SHILLER, *PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION AND DECEPTION* 74-75 (2017) (noting that politicians learn to manipulate voters’ weaknesses, including our tendency to guard our relative position, and that clever marketers do the same).

⁷⁵ See, e.g., *supra* notes 69–72 and accompanying text; *infra* notes 78–86 and accompanying text (giving examples and noting the role of *resentment* in group action); see also Ravitch, *supra* note 32 (noting that some politicians “have cynically

relationships, one partner will willingly undergo pain, humiliation, and even constant rejection, and return for more. We don't always act in our own best interest."⁷⁶

I nodded, not because I knew anything about neurotic relationships. "I'm pretty much a straight arrow," I said, "when it comes to love and romance. But I can understand that this may easily happen among certain people. And being a former runner, I can see how young Colin rebelled against his domineering coach."⁷⁷ Like him, I felt that running should be an expression of freedom, not tyranny.

"But enough about me," I said. "You think that behavior of this kind constitutes a failure in economic and political theory. But isn't it comparatively rare, the proverbial exception that proves the rule?" I was determined to push my young protégé as hard as I could.

"Quite the contrary," he said. "It points out a serious problem. It holds true not only for a few long distance runners like Colin. Human beings will often vote against a measure that they realize would help them and their families, if they believe that their enemies would prosper from it."⁷⁸

"That's sobering. Tell me more."

"Basically, we don't always want what's in our best interest. Our representatives in Congress sense this and act accordingly. And it happens often enough to raise a doubt about one of the basic premises

played on the resentments of many citizens, purposefully deepening antagonism toward government programs that benefit unspecified 'others.' Many people are losing their economic security while others are getting government handouts. Why should others get pensions? Why should others get health insurance?"); see also Editorial Board, Opinion, *Americans Are Starting to Suffer from Trump's Health-Care Sabotage*, WASH. POST (May 6, 2018), https://www.washingtonpost.com/opinions/americans-are-starting-to-suffer-from-trumps-health-care-sabotage/2018/05/06/c60fb6fa-4fb2-11e8-b725-92c89fe3ca4c_story.html?utm_term=.057234472b13 (noting that even without repeal, the administration's measures to discourage people from enrolling in the Affordable Care Act ("ACA") and Medicaid programs have decreased enlistment). On this behavior in individual, romantic relationships, see, e.g., Neal Burton, *The Psychology of SadoMasochism*, PSYCHOL. TODAY (Aug. 17, 2014), <https://www.psychologytoday.com/us/blog/hide-and-peek/201408/the-psychology-sadomasochism>.

⁷⁶ See West, *Autonomy*, *supra* note 41, at 397-99 (giving the example of Franz Kafka's *The Trial*). On class-based rage over the medical-care controversy, see Paul Krugman, *Obamacare Rage*, *supra* note 32.

⁷⁷ See *supra* notes 22-27 and accompanying text.

⁷⁸ See generally ARLIE HOCHSCHILD, *STRANGERS IN THEIR OWN LAND* (2016) [hereinafter *STRANGERS*] (describing the anger of working-class people, some in the Tea Party, who oppose federal help if it will also go to others whom they see as "cutting in line" or on the dole, and oppose environmental regulation for much the same reason as well as generalized distrust of big government); Brownstein, *supra* note 32 (same); DeParle, *Need Help*, *supra* note 32 (same).

of free-market thought. Citizens will sometimes not want things that they know would benefit them, if they know that others — whom they dislike — will get them too. We all end up worse off.”

“A hitch in the idea of the *summum bonum*,” I said. “And the reason why this happens has to do with racism and classism?”

“Sometimes. Those two forces account for quite a lot of the self-defeating behavior I have been describing.⁷⁹ If working-class whites, for example, will sometimes reject social programs, such as more humane prisons or low-cost medical insurance, because they realize that black people and Latinos will benefit from them too, then neither minorities nor whites will live in the kind of society they say they want. This is a serious flaw with colorblind politics. If you just sum up all the votes and not notice who is voting against a measure like Medicaid, and why, you’ll never come to terms with the underlying cause.”

II. “I DON’T WANT IT IF YOU ARE GOING TO GET IT, TOO”

“I think I could use a few examples.”

A. *Voting Against Obamacare*

“Sure. We’ve already mentioned one. After Obama left office, his successor and the Republican Congress made many attempts at repealing Obamacare — The Affordable Care Act — often coming very close. The repeal effort was very popular among Donald Trump’s base, including many low-income whites who had been benefitting greatly from it.⁸⁰ These voters, who were acting very much against their own

⁷⁹ See *infra* Part II (giving examples of such self-defeating behavior); see also HAIDT, *supra* note 71 (explaining that much human behavior is not rational — aimed at wealth-maximization — but emotional in nature); Mutz, *supra* note 59, at E4330 (discussing status anxiety); Burton, *supra* note 75 (describing the behavior known as sadomasochism). On working-class views, see YOUNGSTOWN CTR., *supra* note 32.

⁸⁰ Brownstein, *supra* note 32 (citing studies demonstrating blue-collar whites oppose Obamacare); DeParle, *Need Help*, *supra* note 32 (same); Thomas L. Friedman, *Folks, We’re Home Alone*, N.Y. TIMES (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/opinion/globalization-trump-american-progress.html> (noting that many of Trump’s base are so drunk on Fox News that they “don’t understand they’ll be the ones most hurt” by transformation of the health system). See generally HOCHSCHILD, STRANGERS, *supra* note 78 (describing intense opposition among very poor people in Louisiana to governmental regulation and welfare, even though they are the ones who stood most to benefit from them); Adam Serwer, *The Cruelty is the Point*, ATLANTIC (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104/> (positing that much of Trump’s domestic policies are motivated by cruelty, and that some of his base find them appealing for just this reason).

interest, gave a number of explanations for their behavior. Some said that they didn't like big government and wanted no part in it."⁸¹

"Even if some of them were surviving on Social Security or federal disability payments," I said. "I read this somewhere and remember wondering about it."

"My students told me about some who had been going to the neighborhood low-cost clinic for years, courtesy of federal or state funding," he continued. "Still others opposed the state Medicaid program, which would have cost their state practically nothing and provided federal support for health care for themselves and their families."⁸²

"And their reasons were essentially the same as with Obamacare?" I asked.

"Yes. They didn't like being too closely associated with governmental handouts, at least ones they associated with loafers and welfare leeches."⁸³

"This sounds like Colin in his race against the Ranley team. He threw the race because he didn't want his school's authorities, whom he despised, getting credit for his victory."

"So he ended up in the machine shop, fixing widgets," I said. "Like those poor people in certain regions who hate the idea of being dependent on the government for medical care."⁸⁴

⁸¹ See, e.g., E.J. Dionne Jr., *Don't Buy the Spin. Government Works*, WASH. POST (Jan. 21, 2018), https://www.washingtonpost.com/opinions/dont-buy-the-spin-government-works/2018/01/21/5af06d9e-fd5d-11e7-8f66-2df0b94bb98a_story.html?utm_term=.4009bde68bd4.

⁸² See Anna Beahm, *Alabama Joins Lawsuit Against the Affordable Care Act*, AL.COM (Apr. 28, 2018), http://www.al.com/news/index.ssf/2018/04/alabama_joins_lawsuit_against.html#incart_river_mobile_index (discussing Alabama's opposition of Obamacare); *Health-Care Rule*, *supra* note 34 (discussing the proposed "disastrous [healthcare] rule that would promote even more turmoil in health insurance markets and harm some extremely vulnerable people"); Newman, *supra* note 69.

⁸³ Paul Krugman, *Know-Nothings for the 21st Century*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/opinion/trump-american-values.html> (noting a common conservative strategy "to narrow regional disparities, not by bringing the lagging regions up, but by cutting the growing regions down," and listing attacks on education, immigration, and social services as aimed at advancing this goal); see Eduardo Porter, *Whites' Unease Shadows the Politics of a More Diverse America*, N.Y. TIMES (May 22, 2018), <https://www.nytimes.com/2018/05/22/business/economy/trump-election-ethnic-diverse-whites.html> (noting that increasingly "America [is] divided between 'us' — white, struggling and aggrieved — and a nonwhite 'them'").

⁸⁴ See HOCHSCHILD, STRANGERS, *supra* note 78, at 255-56 (noting the same disdain for recipients of government largesse); *Health-Care Rule*, *supra* note 34 (noting that President Trump's base opposes health care provided by the government); Newman, *supra* note 69; see also Porter, *supra* note 32 (discussing how poor whites often take

“The very prospect reminds working-class whites of poor blacks or the whites who live in trailers and shacks down in the holler. They don’t want to be like them.”

“So they end up with nothing at all, like Colin but for a different reason.”

“If they had voted in their self-interest, everyone in their region would have been better off. They would have been healthier and their kids more prepared for school and active play.”⁸⁵

“That’s the way democracy is supposed to work. People, through their legislators, opt for programs that benefit them and, indirectly, for society as a whole.”⁸⁶

“But it doesn’t always work out that way. Your simple mechanism, a close relative of spite, masochism, and *ressentiment*, lies at the bottom of much of it, you said. But you had a couple of other examples, I think.”

“I did, but here comes our waiter again.”

It was indeed the waiter, the same one. “Would you gentlemen — excuse me, men — like some dessert?” he inquired, his order form in hand. “Here’s a menu.”

We scanned it and looked up at each other. “That flan looks good,” I said. “My doctor said I could have anything I want that’s not too high in calories or fat.”

“Our chef is the best,” the waiter said. “He doesn’t load anything up with bad ingredients. I’ve had the flan myself, and it’s delicious.”

“The same for me,” Rodrigo said. The waiter departed.

B. *Relative Position in a Seattle Start-Up*

He returned quickly, two bowls of our confection in hand. After we took a few bites of the smooth, delicately spiced custard, Rodrigo looked up to see if I were ready for more examples. I nodded.

“I came across a second example the other day. It arose when a Seattle entrepreneur who owned a successful tech company decided to

conservative positions on government welfare programs, including medical care because they dislike big government or associate big government with aid given to minorities); Zatz, *supra* note 32.

⁸⁵ Cf. *US Health System Ranks Last Among Eleven Countries on Measures of Access, Equity, Quality, Efficiency, and Healthy Lives*, COMMONWEALTH FUND (June 16, 2014), <http://www.commonwealthfund.org/publications/press-releases/2014/jun/us-health-system-ranks-last>.

⁸⁶ See, e.g., *THE POLITICS OF ELECTORAL SYSTEMS* 3 (Michael Gallagher & Paul Mitchell eds., 2005) (positing that electoral systems are vital cornerstones of free government because they connect citizen preferences to legislative action).

increase the base salary of all his employees to \$70,000.⁸⁷ The new salary applied to everyone, file clerks, secretaries, messengers, and janitors, who previously had received much less. When asked his reason, the young billionaire explained that he was doing so as an act of Christian charity and because he believed that this was the minimum amount that a family needed to live comfortably — to buy a well-made car, to afford a decent house or apartment, and to take vacations together once a year.⁸⁸

“I think I remember reading about that. Like your mountain folks who railed against Obamacare and refused it, he was acting against self-interest, at least as commonly understood. He could have paid them less and made an even tidier profit at the end of the year.”

“How did his experiment work out?”

“At first, very well. The low-level employees were very happy with their new salaries. But his competitor companies did not follow suit, even though they realized that the new salary scale had been very popular with his workers, who had more babies and bought more houses.⁸⁹ With a lower turn-over rate, he spent less money retraining new workers and was able to keep his staff working for him longer.”⁹⁰

I must have raised my eyebrows in surprise, for he went on: “But something unexpected happened. His top tech workers, who had been making more — sometimes much more — than \$70,000, objected that their less highly trained fellows were now making nearly as much as they did.⁹¹ Formerly, the file clerks and receptionists had earned perhaps half the salary of a computer engineer. Now they were making ninety percent as much and could afford to live in the same neighborhood as the techies who started out at, say, \$90,000. They could drive the same model cars, wear upscale clothes, move into the same neighborhood.”⁹²

⁸⁷ See Isidore, *supra* note 35 (discussing this incident and reactions to it).

⁸⁸ See *id.*; see also Patricia Cohen, *Seattle Company Copes with Backlash on \$70,000 Minimum Wage*, SEATTLE TIMES (Jan. 25, 2016, 3:51 PM), <https://www.seattletimes.com/seattle-news/seattle-company-cope-with-backlash-on-70000-minimum-wage/> [hereinafter *Seattle Company Copes*].

⁸⁹ See Gaby Hinsliff, *This CEO Took a Pay Cut to Give Employees \$70,000 a Year. Now He's Battling Amazon.*, HUFFPOST.COM (May 19, 2018, 8:00 AM ET), https://www.huffingtonpost.com/entry/dan-price-minimum-wage_us_5afd3d8ee4b06a3fb50dcf28.

⁹⁰ Paul Keegan, *Here's What Really Happened at that Company That Set a \$70,000 Minimum Wage*, INC. (Nov. 2015), <https://www.inc.com/magazine/201511/paul-keegan/does-more-pay-mean-more-growth.html>.

⁹¹ See Cohen, *Seattle Company Copes*, *supra* note 88.

⁹² See *id.*

“I think I can see their complaint,” I said. “The outward measures of success that differentiated the highly-educated computer specialist from the file clerk were now much less visible. Equality — or something like it — ruled. The highly educated tech specialists earned just as much as they had before. But they felt less happy about themselves because the underlings, whom they had been in the habit of looking down on, were now able to live well, too.”⁹³

“Sad, isn’t it? he said. “Bourdieu⁹⁴ and Nietzsche⁹⁵ describe something similar. They call it *ressentiment*.⁹⁶ Bourdieu also describes something called “habitus.”⁹⁷ But they haven’t applied these concepts to modern-day struggles the way I want to.”

C. Law School Hiring: Picking the Best and Brightest?

“I assume you’ll get to that later. But you mentioned a third example. Was it law school hiring?”

“It was, and I remember your cautioning me to be careful.”

“Somehow I doubt that you will. But I’m eager to hear.”

“You know me better than I do myself. But tell me if you’ve noticed this at your school. During the prime recruitment months of November, December, and January, many law schools go through an annual rite of considering aspiring law professors to fill any slots that

⁹³ See *id.*

⁹⁴ See, e.g., Keijo Rahkonen, *Bourdieu and Nietzsche: Taste as a Struggle*, in LEGACY OF PIERRE BOURDIEU: CRITICAL ESSAYS 125, 125-26 (Simon Susen & Bryan S. Turner eds., 2012).

⁹⁵ See *id.* at 134-38 (comparing the two authors on taste, social capital, and *ressentiment*).

⁹⁶ See *Ressentiment*, OXFORD REFERENCE, <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100416129> (last visited Jan. 18, 2019).

⁹⁷ See PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 10-22, 72 (Richard Nice trans., Cambridge Univ. Press 1977) (explaining his use of the term); see also PIERRE BOURDIEU, PASCALIAN MEDITATIONS 11 (Richard Nice trans., Stanford Univ. Press 2000) (describing how habitus is formed “gradually, progressively and imperceptibly . . . [and therefore] passes for the most part unnoticed”). See generally STEPHANIE FETTA, SHAMING INTO BROWN: SOMATIC TRANSACTIONS OF RACE IN LATINA/O LITERATURE ch. 2 (2018) (on how racists marginalize and “deanimate” their targets through hard looks, body language, a suspicious demeanor, and selective inattention); David Brooks, *Getting Radical About Inequality*, N.Y. TIMES (July 18, 2017), <https://www.nytimes.com/2017/07/18/opinion/inequality-pierre-bourdieu.html> [hereinafter *Getting Radical*] (explaining Bourdieu’s concept of “habitus [as] a body of conscious and tacit knowledge of how to travel through the world, which gives rise to mannerisms, tastes, opinions and conversational style . . . [it is] an intuitive feel for the social game . . . the sort of thing you get inculcated with unconsciously, by growing up in a certain sort of family or by sharing a sensibility with a certain group of friends).

have opened up owing to retirements, deaths, or the departure of a colleague to another law school.”⁹⁸

“A little later in the season,” I said, “these same schools conduct a second round of hiring, usually in January and February.⁹⁹ They may conduct lateral hiring around this time, too. Sometimes minorities squeak through then. My school hired me that way.”

“And with either type of recruitment,” he continued, “I’ve observed a pattern in those who get offers.” He paused for a second to lick the last morsel of flan from the top of its small bowl. “That was good. Almost as good as my mother’s recipe.”

“Mine, too,” I said. “But if it’s *ressentiment*, I’m eager to hear how it enters into faculty hiring, not just the behavior of poor people in the South or coal miners in West Virginia who don’t want the blacks to get welfare and cleave to Tea Party principles for support.¹⁰⁰”

“It does,” he said. “I bet you’ve noticed that the candidates who receive offers end up looking very much like those whom the school has hired all along and who now staff the school — or, a little lower in quality, very rarely better. As though by instinct, each faculty member gravitates toward candidates who are very much like himself or herself, but not better, not more stellar, quicker of mind or lip, and with no more publications than the in-house professor had compiled at a similar point in his or her career.”

“When, by chance,” he continued, “as sometimes happens, the appointments committee brings in a candidate who is markedly better — smarter, more creative, harder working, a better teacher and publisher — than the average faculty member at the school, the faculty will often find reasons to vote him or her down. The candidate is smart, they concede, but flashy — not deep. She is promising, but not really attached to this region (Northwest, Northeast, South, Mountain West, etc.) and is likely to leave after just a few years. The person is impressive, we admit, but not a good fit. We want candidates, we say, who are thoughtful, deliberate, like John, our favorite colleague, a man

⁹⁸ See Delgado, *Chronicle*, *supra* note 1, at 1361-63; see also Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2418-35 (1989) (describing the hiring ritual at a law school from various perspectives, including that of a student, a candidate, and a tenured professor).

⁹⁹ See Delgado, *Chronicle*, *supra* note 1, at 1361-63 (describing the second round of hiring that proceeds under relaxed criteria).

¹⁰⁰ See *supra* Part II.A; see also HOCHSCHILD, *STRANGERS*, *supra* note 78 (book-length exposition of this attachment on the part of poor residents of Louisiana); DeParle, *Need Help*, *supra* note 32 (reviewing the same).

of few words, who teaches extra classes and serves on many committees without complaining. A good citizen.”

“This is, indeed, likely to get you into trouble,” I said. “So, please be careful where you discuss it. Zip your lip. That isn’t to say that I don’t find it fascinating, so please go on. Your ideas have the ring of truth, at least based on my experience at a few schools. But not all, by any means.”

“Perhaps,” he conceded. “But where it does happen, the faculty becomes a little worse, a little less intellectual, every hiring cycle. It turns out that most faculties want good candidates, but ones that will enable them to continue to feel good about themselves. They care, in short, about the law school’s position in the hierarchy of U.S. News & World Report.¹⁰¹ But they care about their own relative position at least as much. If they are currently the tenth best faculty member at a law school ranked number 62, they want candidates who will help the school climb to number 61, if possible. But ideally, they want a candidate who will be the 11th best candidate at that school, not the second or third, for that would drop them down to number 12. And the dean might not give them as big a raise next year or that long-sought sabbatical. The dean would favor the sterling newcomer instead.”

“You’re saying that many people care mainly about their relative position in a group, which they may well do.¹⁰² But that group often is in a hierarchy of its own, is it not?”

¹⁰¹ 2019 Best Law Schools, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-graduate-schools/top-law-schools> (last visited Feb. 18, 2019). On the frenzy that rankings generate, see Ben Taylor, *Why Law School Rankings Matter More Than Other Rankings*, FORBES (Aug. 14, 2014, 12:19 PM), <https://www.forbes.com/sites/bentaylor/2014/08/14/why-law-school-rankings-matter-more-than-any-other-education-rankings/#17115c912ddd>; see also David Lat, *The U.S. News Law School Rankings Are Out!*, ABOVE THE L. (Mar. 12, 2012, 11:47 PM), <https://abovethelaw.com/2012/03/the-u-s-news-law-school-rankings-are-out-2/> (describing the furor surrounding this annual event). Brian Leiter publishes a periodic ranking of law professors by citation counts in various categories that many in the law school world watch closely. See Brian Leiter, *Links to All the “Most Cited” Law Faculty Lists, 2013-2017*, BRIAN LEITER’S L. SCH. REP. (Jan. 12, 2019), <https://leiterlawschool.typepad.com/>.

¹⁰² On the concept of relative position, see, e.g., Richard McAdams, *Relative Preferences*, 102 YALE L.J. 1, 3-5 (1992) [hereinafter *Preferences*]; Rathbun, Iakhnis & Powers, *supra* note 71 (noting that people care more about whether the upper class are extending their lead than they do about their own fortunes. Relative position is what most people care about. “[P]opulism reflects concerns about how different groups are faring in the modern economy” and includes many “who believe that the working class is doing much worse as a whole relative to 30 years ago” or “who think the wealthy are doing better. . . . Populists are concerned that the working class is struggling but that the rich are flourishing.”).

“True. Individuals in a group do better if they compete for a higher position. But groups do better if their members cooperate with each other. As with a soccer team — or even Colin’s cross-country squad — the group will do better if the members cooperate, even if doing so requires some of them to subordinate their own performance to that of the group. With a law faculty, if these efforts, group and individual, are out of balance, after a few years the provost will come along and point out that the law school as a whole has been slipping. It’s now ranked number 72, when a few years ago, it was number 62. The provost asks them to be more careful in their hiring, and to work harder to improve their visibility.”

“The provost ends up having a different relative ranking in mind. And in that one, the law school is doing poorly.”

“It’s a metaphor for something larger,” my young protégé said, pushing his dessert dish aside and looking up decisively. “A system that tolerates many people voting for sub-optimal laws because good ones will simply enable their enemies — groups they don’t like — to flourish, will result in the country’s dropping in the United Nations measure of social flourishing. Its GDP will drop, too.”

“The U.N. had us only 11th last time, as I recall,” he said.¹⁰³

“Maybe the country needs a better provost,” I commented.

“Or a citizenry that sees equality and solidarity as important values.”¹⁰⁴

“Didn’t we talk about this during our first meeting?” I asked.¹⁰⁵

¹⁰³ See UNITED NATIONS, INTERNATIONAL HUMAN DEVELOPMENT INDICATORS: 2018 STATISTICAL UPDATE (2018) (ranking the United States 13th in the human development category); see also U.S. NEWS & WORLD REP., BEST COUNTRIES 2018, at 2 (2018), <https://media.beam.usnews.com/ce/e7/fdca61cb496da027ab53bef37a24/171110-best-countries-overall-rankings-2018.pdf> (ranking the United States 17th overall on quality of life). Minority communities in the U.S. fare even more poorly. See UNITED NATIONS, HUMAN DEVELOPMENT REPORT 2001 15, 141-42 (2001) (providing human development indexes for African Americans and Hispanic Americans that would place them forty-sixth and sixty-eighth in the world, respectively). Perhaps the reason lies in extreme poverty. See Premilla Nadasen, *Extreme Poverty Returns to America*, WASH. POST (Dec. 21, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/12/21/extreme-poverty-returns-to-america/?noredirect=on&utm_term=.12dad1a5146e (noting that a U.N. special rapporteur on extreme poverty and human rights concluded an inspection tour of the United States and documented “homelessness, unsafe sanitation and sewage disposal practices, as well as police surveillance, criminalization and harassment of the poor. The rise in poverty . . . disproportionately affects people of color and women, but also large swatches of white Americans . . . [all] shockingly at odds with [the country’s] immense wealth and its founding commitment to human rights.”).

¹⁰⁴ See *infra* Part IV (discussing solidarity as a means of escaping the predicament that Rodrigo describes).

¹⁰⁵ See Delgado, *Chronicle*, *supra* note 1, at 1370-73 (in which the two discuss

“We did. The third one, too.¹⁰⁶ But I’m glad I ran into you at the computer this morning. You’ve helped me clarify my ideas. Professor, you’re my best mentor and foil.”

“Especially for an old timer, you said.¹⁰⁷ But I’d like your thoughts on two things: First, how we got into our current dilemma, and, second, what we can do about it.”

III. IN WHICH RODRIGO EXPLAINS HOW SOME PEOPLE OPT AGAINST THEIR APPARENT SELF-INTEREST

“I have some ideas,” he said with the insouciant air that I found so appealing and had since our earliest meetings. “Borrowing from French sociologist Pierre Bourdieu,¹⁰⁸ I think I can show how, in the eyes of some Euro-Americans, blacks — to take one example — simply don’t fit in. Being unloved, they draw the disdain of many average Americans when they seem to be receiving unearned benefits.”¹⁰⁹

“He’s a well-respected sociologist,” I remarked. “Some consider him the top one in the world.¹¹⁰ I’ll be interested to hear this part.”

“A second force is rising inequality. As society becomes increasingly unequal, people start to identify mainly with their own very small group, and ignore what is happening with the whole.¹¹¹ As with Colin in his epic race,¹¹² the temptation to take a dive strengthens, if that is

reasons for the country’s recent downturn).

¹⁰⁶ See Delgado, *Third Chronicle*, *supra* note 10, at 413-15.

¹⁰⁷ See *supra* notes 26–27 and accompanying text (for the passage to which the Professor refers).

¹⁰⁸ See *supra* notes 94, 97 and accompanying text.

¹⁰⁹ The two friends discussed love and care earlier in their relationship. See Delgado, *Third Chronicle*, *supra* note 10, at 397-404. The two build on their analysis in the following discussion.

¹¹⁰ See, e.g., Brooks, *Getting Radical*, *supra* note 97 (describing Bourdieu as “perhaps the world’s most influential sociologist within the academy, and largely unknown outside of it”).

¹¹¹ On “lifeboat ethics” and the rise of nativism, see Garrett Hardin, *Lifeboat Ethics: The Case Against Helping the Poor*, *PSYCHOL. TODAY* (1974); Uri Friedman, *What Is a Nativist? And Is Donald Trump One?*, *ATLANTIC* (Apr. 11, 2017), <https://www.theatlantic.com/international/archive/2017/04/what-is-nativist-trump/521355/>. On the way frequent elections encourage an us-or-them attitude in which winning is all, and in which citizens develop a bias in favor of their own group and a bias against members of the opposing group or party, see Lilliana Mason, *Trump’s ‘Winning’ is America’s Losing*, *N.Y. TIMES* (June 7, 2018), <https://www.nytimes.com/2018/06/06/opinion/trump-winning-america-.html>.

¹¹² See *supra* notes 22–27 and accompanying text.

what one thinks will make himself feel better; never mind the consequences for one's team."

"That stands to reason, too, although I'm looking forward to how you spell it out — and of course what to do about it."

"It goes along with race-neutral, color-blind attitudes toward race,"¹¹³ he said. "With these, the poor in our own group strike us as deserving; those in the other group don't."¹¹⁴ When I nodded, he added: "A new racial-dominance theory shows how this happens. We feel better when we're on top, dominating others."¹¹⁵

"Don't some people simply dislike governmental interference?" I caviled. "Maybe it has nothing to do with dominance."

"You're right. I was just coming to that. Our new friends, the libertarians, dislike big government."¹¹⁶ They associate Medicare, Medicaid, Obamacare, and other programs with governmental meddling, telling us what we can and can't do."¹¹⁷

"Earlier you mentioned sado-masochism and other similar behaviors."¹¹⁸ Are events like the Obamacare vote, which otherwise seem irrational, understandable in light of those motivations?"

"Yes. We sometimes simply get a charge out of making other people feel bad."

"This I want to hear. But I think our waiter is coming."

¹¹³ On the notion that we are living in a post-racial era, see Jonathan Capehart, *The Fallacy of a 'Post-Racial' Society*, WASH. POST (Dec. 29, 2014), https://www.washingtonpost.com/blogs/post-partisan/wp/2014/12/29/the-fallacy-of-a-post-racial-society/?utm_term=.d15a2466b044 (attributing the myth of such a society to the election of Barack Obama).

¹¹⁴ On the poor and the deserving poor, see Paul Krugman, *Trump's War on the Poor*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/26/opinion/trumps-war-poor.html>; *infra* notes 176–83 and accompanying text.

¹¹⁵ See JIM SIDANIUS & FELICIA PRATTO, *SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION* (1999); see also Michael Tesler, *To Many Americans, Being Patriotic Means Being White*, WASH. POST (Oct. 13, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/13/is-white-resentment-about-the-nfl-protests-about-race-or-patriotism-or-both/> (noting that nationality and ethnicity are linked because whites, having power, use it to define the prototypical citizen as an American and in their own image).

¹¹⁶ See Doug Bandow, *Standing for Individual Liberty and Limited Government: Ron and Rand Paul*, FORBES (May 30, 2011, 10:02 PM), <https://www.forbes.com/sites/dougbandow/2011/05/30/standing-for-individual-liberty-and-limited-government-ron-and-rand-paul/#7e5f28327164> (noting Senator Rand Paul's defense of "individual liberty and limited government"); Boaz, *supra* note 18.

¹¹⁷ See Bandow, *supra* note 116 (describing libertarianism).

¹¹⁸ See *supra* notes 36, 43 and accompanying text; *infra* note 128 and accompanying text.

The friendly waiter was indeed coming. He expertly removed the dishes from our table, whipped out his note pad, and asked if we'd like coffee or tea. Rodrigo chose cappuccino with frothed milk; I, chamomile tea. ("I need to sleep well before my flight tomorrow.")

"We have a few minutes before he returns," I said. "Why don't we start? I'd love to hear what you think about how all these decisions against self-interest happen. Some of it sounds counter-intuitive. But you say it happens time and again. Why?"

"I know three reasons," he said. "Let's go over them one by one. I have a second panel that starts in about thirty minutes. I'm sure we can finish by then."

A. *The First Reason: Poorly Understood Forces*

"People sometimes opt against their own best interest," he began. "As mentioned, one reason has to do with dark, poorly understood forces.¹¹⁹ Sometimes we want to lose, as Colin did.¹²⁰ Other times, we want others to lose, even if we go down, too.¹²¹ Still other times, we devalue other people for no good reason, simply because they are unlike us, so that we act against them even if it hurts us or our profit line."¹²²

"Racism and classism, right?"

"Exactly. They both are economically inefficient, as Gary Becker points out.¹²³ But people keep on performing them, even if there's nothing in it for them. They lose customers or friends, but keep doing

¹¹⁹ See *supra* notes 36, 43 and accompanying text; see also DeParle, *supra* note 32 (reviewing a recent book describing how poor residents of Louisiana acted against their seeming best interest by rejecting federal services).

¹²⁰ See *supra* notes 22–27 and accompanying text.

¹²¹ See *supra* notes 25–27, 70–71 and accompanying text (noting a number of examples, including Colin's epic race); see also ENRICO MORETTI, *THE NEW GEOGRAPHY OF JOBS* 24, 41, 161 (2017) (noting that in many areas in decline, the residents envy the city dwellers who work in high tech, information-based jobs that pay well and do not require hard physical labor, yet are unwilling to move to cities that offer more opportunity); Brooks, *Getting Radical*, *supra* note 97 ("Every minute or hour, in ways we're not even conscious of, we as individuals and members of our class are competing for dominance and respect. We seek to topple those who have higher standing . . . and we seek to wall off those who are down below Most groups conceal their naked power grabs under a veil of intellectual or aesthetic purity. Bourdieu used the phrase 'symbolic violence' to suggest how vicious this competition can get").

¹²² See also Delgado, *Second Chronicle*, *supra* note 11, at 1189-93. See generally SIDANIUS & PRATTO, *supra* note 115, at 61-102 (explaining this mechanism).

¹²³ See generally BECKER, *supra* note 44, at 35-37.

it anyway.¹²⁴ If they own a business or shop, they lose much of the pool from whom they can hire.¹²⁵ Or if they're in the business of selling things, they lose customers by giving them the impression that they are unwelcome."¹²⁶

"What about Colin?"

"For him, the motivating force was class. He didn't want his team's upper-class coach to bask in glory. So, he lost on purpose. He also deprived the ritzy upper-class private school of the knowledge that they earned their victory fair and square. He stopped in his tracks."¹²⁷

"And in sex and romance?"

"I don't know much about that from personal experience," he began. (I nodded that I did not, either). "But Marquis de Sade and, as we mentioned, in our field Robin West write about that."¹²⁸

"Ah yes, masochism," I said, grimacing a little. "I much prefer Martha Fineman's interpretation of human action. Taking care of those who are vulnerable and in need of assistance.¹²⁹ Like your helping me at that computer terminal this morning.¹³⁰ We notice who are young or helpless and come to their aid even though it costs us."

¹²⁴ *Id.*; see also Richard McAdams, *Cooperation and Conflict*, 108 HARV. L. REV. 1003, 1034 (1995).

¹²⁵ BECKER, *supra* note 44, at 35-37; McAdams, *supra* note 124, at 1034.

¹²⁶ Alexandra Olsen & Joseph Pisani, *Police Release 911 Call as Starbucks Says It Will Close More Than 8,000 Stores for Racial-Bias Training*, CHI. TRIB. (Apr. 17, 2018, 5:47 PM), <https://www.chicagotribune.com/business/national/ct-starbucks-racial-bias-education-20180417-story.html>.

¹²⁷ See *supra* notes 26-27 and accompanying text; *infra* note 128 and accompanying text. Colin thereby hurt himself — he not only lost out on glory, he suffered the indignity of being assigned to the machine shop — as well as hurt his coach, whom he despised, by depriving him of the chance to bask in victory over the upper-class school.

¹²⁸ See Paul Krugman, *Dollars, Cents and Republican Sadism*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/opinion/dollars-cents-republican-sadism.html> (asking, "But is it really about the money? No, it's about the cruelty. . . . Inflicting pain is the point."); Serwer, *supra* note 80 (noting that "President Trump and his supporters find community by rejoicing in the suffering of those they hate and fear"); *supra* notes 41-44, 56 and accompanying text; see also Roger Ebert, *Before Night Falls*, ROGEREBERT.COM (Feb. 2, 2001), <https://www.rogerebert.com/reviews/before-night-falls-2001> (commenting on the opposite impulse — masochism — and noting that some people willfully aim to be miserable and believe that their suffering is a source of creative energy and stating, "standing outside convention, taunting the authorities, inhabiting impossible lives, they wrote at all").

¹²⁹ See *supra* notes 49-53 and accompanying text.

¹³⁰ See *supra* notes 1-3 and accompanying text.

B. Reason Number Two: Race and Class

“But a moment ago,” I continued, “you mentioned race and class. You and I know how the one operates. Tell me how you see the other.”

“Sure. Colin’s taking a dive was an example. He couldn’t stand his upper-class coach, much less the haughty runners from the private school. So, he acted accordingly.¹³¹ And innumerable studies show how both race and class played large roles in getting Trump elected and enabling him to roll back many of Obama’s programs with the enthusiastic support of his followers.”¹³²

“His base.”¹³³

“Exactly. They saw this and similar programs as associated with Obama, a black man. And they saw the programs as aimed at benefitting people like him.”¹³⁴

“Even though many of the programs benefitted them just as much.”

“The two forces, race and class, worked together. His base, especially working-class white males in rural areas or depressed rust-belt factory towns, ended up opposing Obamacare and Medicaid in part because ‘those people’ would be getting it.”¹³⁵

“Even if it was their own lifeline or that of their friends and family,” I said.¹³⁶

“They didn’t want it if so-called lazy black people or illegal immigrants could end up getting it, too,”¹³⁷ he pointed out. “And this

¹³¹ See *supra* notes 24–27 and accompanying text.

¹³² See, e.g., Mutz, *supra* note 59, at E4330-31 (discussing this seeming movement against self-interest).

¹³³ On his base (cadre of loyal supporters), see Derek Thompson, *Who are Donald Trump’s Supporters, Really?*, ATLANTIC (Mar. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/03/who-are-donald-trumps-supporters-really/471714/>.

¹³⁴ See *supra* notes 27–34 and accompanying text (explaining the nature of this opposition); see also Adam M. Enders & Jamil S. Scott, *White Racial Resentment Has Been Gaining Political Power for Decades*, WASH. POST (Jan. 15, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/01/15/white-racial-resentment-has-been-gaining-political-power-for-decades/?utm_term=.1b554a93440a (noting that voters often try to discern what racial group will benefit from a political measure and vote accordingly, and that presidents, particularly Donald Trump, often whip up racial sentiment to consolidate their gains).

¹³⁵ See Enders & Scott, *supra* note 134; Paul Krugman, *The Plot Against Health Care*, N.Y. TIMES, May 31, 2018, at A25 (noting that “opponents of a stronger safety net [attempt to convince] white voters that new programs will benefit only Those People”).

¹³⁶ See Brooks, *Getting Radical*, *supra* note 97 (noting that we want to topple the high and mighty, and wall off those from below).

¹³⁷ See *Obamacare Rage*, *supra* note 32; see also Olga Khazan, *Racial Resentment Can*

shows a flaw in classical political and economic theory. According to it, this should not happen. We should all be interest-maximizing actors, at least most of the time.”¹³⁸

“You mentioned Pierre Bourdieu.”

“Oh, yes. He writes how people acquire, early in life, a host of behaviors, propensities, preferences, and styles that are almost unalterable and mark the person throughout his or her life.¹³⁹ For example, an educated, not very racist person, can observe a minority colleague for thirty seconds and decide that the colleague is not on his level. The black may be his superior, intellectually, and have a world-wide reputation. But a few habits or mannerisms will give him away.¹⁴⁰ He is not one of them, not part of the charmed circle.¹⁴¹ He bites his fingernails, wears an unstylish suit, laughs too easily. Or doesn’t meet a person’s glance directly and firmly.”

“Another person’s habitus — way of meeting the world — is often easily detectable.”¹⁴² I’ve seen this sort with blue-collar whites who have few advantages, but work hard in school, get good grades and rise to become professors.”¹⁴³

Motivate Opposition to Welfare, ATLANTIC (June 5, 2018), <https://www.theatlantic.com/science/archive/2018/06/racial-resentment-motivates-opposition-to-welfare/562010/> (describing a series of experiments that showed that when whites feel threatened, they oppose governmental assistance to minorities). See generally FETTA, *supra* note 97, at 189-95 (noting how the “Ugly Laws” and ones aimed at excluding cripples and the deformed from public spaces enable a superior group to communicate disgust and contempt toward those considered unworthy of being seen); RICHARD RODRIGUEZ, *BROWN: THE LAST DISCOVERY OF AMERICA* (2002) (noting that brown skin accomplishes much the same thing).

¹³⁸ See generally SMITH, *THE WEALTH OF NATIONS*, *supra* note 72 (positing classical theories of law and government as concerned with maximizing individual and group interests); POSNER, *supra* note 72 (same).

¹³⁹ See *supra* notes 108–10 and accompanying text.

¹⁴⁰ See Brooks, *Getting Radical*, *supra* note 97 (noting how tastes, mannerisms, and lifestyle preferences give us away).

¹⁴¹ See generally THIS FINE PLACE SO FAR FROM HOME: VOICES OF ACADEMICS FROM THE WORKING CLASS (C. L. Barney Dews & Carolyn Leste Law eds., 1995) [hereinafter THIS FINE PLACE] (detailing stories of the trials of upwardly mobile people from the working class).

¹⁴² See David Brooks, *How We Are Ruining America*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/opinion/how-we-are-ruining-america.html> [hereinafter *How We Are Ruining America*] (citing the example of a working-class interviewee whom he took to lunch and attributing the other person’s discomfort to her working-class preferences and tastes).

¹⁴³ See generally THIS FINE PLACE, *supra* note 141 (describing the troubles of first-generation university professors from humble origins).

“They are never comfortable at faculty parties or, at faculty meetings, during the part devoted to repartee and joking. If they can, they go home early.”¹⁴⁴

“Bourdieu is an astute observer.¹⁴⁵ I felt a little uncomfortable right now, as you explained his work. Even though I have an international reputation and have published books along with the best of them, I always get the feeling, with a certain type of colleague, that they are looking at me a little too appraisingly, sizing me up, noticing my clothes and manner of speaking and holding myself.¹⁴⁶ After thirty seconds, their facial expression hardens. Sometimes they cross their arms.¹⁴⁷ Their body posture radiates skepticism.¹⁴⁸ When I choose white wine at parties, I do so in case they are watching, even though I much prefer red.”¹⁴⁹

“So do most of my Italian friends. Even those who have Principe or Principessa in front of their names.”¹⁵⁰

C. Reason Number Three: Defending Relative Position

“Other times we act that way — forfeiting our own best interest by expending a lot of energy keeping other people down — because we want to preserve our position relative to them. We buy pointless

¹⁴⁴ See FETTA, *supra* note 97, at 284 (“After all, if you get me to feel ashamed of myself, I will hold myself down.”). See generally THIS FINE PLACE, *supra* note 141.

¹⁴⁵ See *supra* notes 108, 110 and accompanying text (describing his worldwide reputation).

¹⁴⁶ See generally THIS FINE PLACE, *supra* note 141. On aversive racism, a cold, detached, judgmental attitude toward disfavored minorities, see generally JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY (1984); Samuel L. Gaertner & John F. Dovidio, The Aversive Form of Racism, in PREJUDICE, DISCRIMINATION AND RACISM 61, 61-89 (Samuel L. Gaertner & John F. Dovidio eds., 1986).

¹⁴⁷ See *supra* note 146. Sometimes, in situations like the one the Professor describes, both parties are uncomfortable. See *How We Are Ruining America*, *supra* note 142 (describing David Brooks’ lunch appointment with a working-class interviewee); see also FETTA, *supra* note 97, at 40 (“[I]t is not guilt but shame that structures and maintains U.S. race relations . . . [t]he racialized . . . are irrevocably shamed into social stigma and cannot simply choose to change.”); *id.* at 47-50 (discussing defensive postures of the victim’s soma and noting how this comes about through hard looks, body posture, averted eyes, inattention, and techniques of “deanimation” on the part of the racist, and that both the victimizer and the victim are often unconscious of the transactions that bring about this result).

¹⁴⁸ FETTA, *supra* note 97, at 52.

¹⁴⁹ The Professor is a renowned civil rights scholar of humble origins.

¹⁵⁰ See Delgado, *Chronicle*, *supra* note 1, at 1357-59 (explaining how Rodrigo was born in the United States but spent his early years in Italy where his father, a black serviceman, was assigned to a U.S. outpost).

luxuries in order to signal to others that we are living an upscale life.¹⁵¹ The luxuries don't make us better off, but poorer. A sturdy handbag, or even a good counterfeit, is just as good as one bearing the Gucci label.¹⁵² But it would not separate us from the crowd.¹⁵³ And you said that this mechanism lies behind some instances of faculty hiring, too."

"Yes, and that's my mechanism number three. We want to keep up with the Joneses. We can achieve this in one of two ways. Making sure that they stay down, while we remain where we've been all along, is one way of doing it."

"And that's why many law faculties fail to improve, even in a strong hiring market when they easily could."

"And you have a theory for why this happens?"

"I do. Imagine a faculty that contains a constitutional law scholar who is an A-minus in that field. He's not among the top ones nationally, but at his school he's the cock of the walk. He has a number of colleagues who also teach constitutional law, but he's better, more prominent, with a better publication record, than all of them."

"I know what you're going to say. This professor and his closest friends vote against a candidate who promises to be an A-level constitutional scholar.¹⁵⁴ Hiring that candidate would improve the school's position but hurt that of the professor in question. His yearly raises will be lower, because the dean will favor the newcomer. The newcomer will appear in the newspaper, maybe the same one that formerly asked the old-time professor for an opinion. The professor will find reasons to support a different candidate, insisting, for example that a candidate in a different field, say trusts and estates, could help the school even more and could easily turn out to be an A-plus scholar."

"I've seen this sort of thing," I said. "Sometimes they'll pretend to be acting heroically, forfeiting a chance to strengthen their own department."

"But the real object is to preserve their relative position."

¹⁵¹ See generally Katya Assaf, *Buying Goods and Doing Good: Trademarks and Social Competition*, 67 ALA. L. REV. 979 (2016) (analyzing the faults of a consumerist culture).

¹⁵² See *id.* at 988, 1002, 1002 & n.165 (explaining that luxury goods are status-enhancing goods and status signifiers).

¹⁵³ See *id.* at 981, 986.

¹⁵⁴ See *supra* notes 99–103 and accompanying text.

“Relative, that is, in terms of local criteria. Their national ranking in their field stays the same. They are still A-minus or B-plus professors.”

“Exactly. And the same mechanism explains why Colin threw the race. He ended up not in the winner’s circle, being crowned with a laurel wreath, but in the machine shop, fixing small gadgets. And the reason is that he did not want his coach to gain status and recognition.”¹⁵⁵

“He didn’t want the adults to get to crow and celebrate their victory over sherry that evening in the faculty room. And I gather you think that the same general mechanism explains the Obamacare vote?”

“I do. The poor white coal miners in West Virginia can console themselves that at least the blacks would not benefit and be better off.”¹⁵⁶

“A few legal scholars have written about this, have they not?”

“Yes. Particularly Richard McAdams. In an article entitled “Relative Preferences”¹⁵⁷ he points out how people sometimes want others worse off and will strive to bring that about.¹⁵⁸ In fact, he says it’s the premise of advertising that if you buy a certain product, you will be conspicuously happier and better off than your neighbors.¹⁵⁹ He points out that we often labor to gain the admiration of others, even if doing so does not make us happier or more contented.¹⁶⁰ He notes that

¹⁵⁵ See *supra* notes 24–27 and accompanying text.

¹⁵⁶ See generally Paul Krugman, *Let Them Eat Trump Steaks*, N.Y. TIMES, May 10, 2018, at A27 (noting that “[Trump] really hates the idea of people receiving ‘welfare’ . . . and he wants to eliminate such programs wherever possible,” even though they enable poor children to receive much-needed nutritional support); DeParle, *Need Help*, *supra* note 32; Ted Genoways, *Farmers Voted Heavily for Trump. But His Trade Policies Are Terrible for Them*, WASH. POST (Oct. 24, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/10/24/farmers-voted-heavily-for-trump-but-his-trade-policies-are-terrible-for-them/?utm_term=.c9639e7913dc (noting that “Trump . . . has proposed slashing . . . lifesaving supports — and other federal programs that have been critical to rural communities” and that “farmers are soon going to face an existential crisis: Do they remain loyal to the political party that has defined their identities for decades . . . or do they make a political change to save . . . their very way of life?”); Declan Walsh, *Alienated and Angry, Coal Miners See Trump as Their Only Choice*, N.Y. TIMES (Aug. 19, 2016), <https://www.nytimes.com/2016/08/20/world/americas/alienated-and-angry-coal-miners-see-donald-trump-as-their-only-choice.html> (explaining white coal miners’ views of the 2016 presidential candidates and the racial tensions that are present in parts of West Virginia).

¹⁵⁷ McAdams, *Preferences*, *supra* note 102; see also Richard H. McAdams, *Epstein on His Own Grounds*, 31 SAN DIEGO L. REV. 241 (1994).

¹⁵⁸ See McAdams, *Preferences*, *supra* note 102, at 3.

¹⁵⁹ See *id.* at 4 n.8; see also Assaf, *supra* note 151, at 989-90.

¹⁶⁰ See, e.g., McAdams, *Preferences*, *supra* note 102, at 9-10.

Adam Smith, in the *Theory of Moral Sentiments*¹⁶¹ and *Wealth of Nations*¹⁶² took note of this impulse, but considered it an aberration.¹⁶³ John Stuart Mill¹⁶⁴ and Thorsten Veblen¹⁶⁵ took it more seriously.”

“You think that these writers were onto something and that envy and spite are not mere personal weaknesses, but signs of something deeper.”¹⁶⁶

“I do. The desire to preserve one’s relative position is an irritating and hard-to-explain incongruity — a flaw in classical political theory.¹⁶⁷ Many people simply care more about their relative position than they do about their absolute income or wellbeing.¹⁶⁸ They do so especially when the people who threaten to close the gap between

¹⁶¹ ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 50-51 (D.D. Raphael & A.L. Macfie eds., Oxford Univ. Press 1976) (1759) [hereinafter *THEORY OF MORAL SENTIMENTS*].

¹⁶² SMITH, *THE WEALTH OF NATIONS*, *supra* note 72, at 235.

¹⁶³ SMITH, *THEORY OF MORAL SENTIMENTS*, *supra* note 161, at 50-51; see McAdams, *Preferences*, *supra* note 102, at 10-11 (discussing *THEORY OF MORAL SENTIMENTS*, *supra* note 161).

¹⁶⁴ JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 819 (J. M. Robson ed., Univ. of Toronto Press 1965) (1848).

¹⁶⁵ THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 26-34 (Viking Press 1931) (1899).

¹⁶⁶ See McAdams, *Preferences*, *supra* note 102, at 13-14, 17 (noting that today few scholars discuss relative preferences, at most devoting a small amount of attention to envy, as though the drive to preserve relative position were a minor force, limited to wasteful spending on “positional goods” like luxury cars).

¹⁶⁷ See, e.g., Douglas Dowland, *How Academe Breeds Resentment*, *CHRON. HIGHER EDUC.* (Feb. 4, 2018), <https://www.chronicle.com/article/How-Academe-Breeds-Resentment/242394> (noting how academe is a hive of upward and downward comparison and resentment).

¹⁶⁸ See McAdams, *Preferences*, *supra* note 102, at 67-69 (noting that Robert Frank and others write that many people care more about their relative income than the absolute kind); *supra* notes 99-103 and accompanying text (discussing relative position). Even large groups may sometimes act in the same manner. A few Southern states, for example opposed Obamacare or Medicaid expansion, not merely for themselves, but for other states, too. In other words, they opposed liberal states opting for these measures and sued to deny these benefits to anybody, not just their own citizens. See Anna Beahm, *Alabama Joins Lawsuit Against the Affordable Care Act*, *AL.COM* (Apr. 28, 2018), https://www.al.com/news/index.ssf/2018/04/alabama_joins_lawsuit_against.html#incart_river_mobile_index; see also Leada Gore, *Only 1 State Has Majority that Oppose Same-Sex Marriage, Poll Shows*, *AL.COM* (May 3, 2018), https://www.al.com/news/index.ssf/2018/05/only_1_state_has_majority_that.html (noting that Alabama residents oppose same-sex marriage, not merely for themselves and each other; they oppose anyone, anywhere from enjoying that benefit); Brendan Kerby, *Though Alabama Has Few DACA Recipients, State Joined Legal Challenge*, *YELLOWHAMMER NEWS*, <https://yellowhammernews.com/though-alabama-has-few-daca-recipients-state-joined-legal-challenge/> (last visited Feb. 16, 2019) (same).

themselves and their own group are people that the first group disdains.¹⁶⁹ Then, they will vote against measures that could aid both of them.”

“Is this not a little like Leon Festinger’s social comparison theory, itself a close relative of cognitive dissonance?” I asked.¹⁷⁰

“It is. Seeing our rivals rise, particularly if they seem to do so effortlessly, without the same grueling work that we do, strikes us as outrageous.¹⁷¹ We feel that if this is going to happen, it shouldn’t come about so easily.”¹⁷²

“So we try to prevent it.”

“Right. Colin threw his race because he couldn’t stand the idea of The Governor preening himself over the team’s victory — even if Colin’s team-mates would be better off for the win.”¹⁷³

“And with national health care, if we help another group be healthy and vigorous, they may beat us at various competitions that we are used to winning.¹⁷⁴ If we lower the status and wellbeing of other groups, we can win and believe it was a fair fight. Our victory was deserved and was sweet.”

“And your point is that investments in relative position are socially wasteful?”

“They are. They make both groups worse off.¹⁷⁵ The marketplace requires measures to avoid this kind of behavior. We can’t leave

¹⁶⁹ See Sarah Brown, *In a Region with Few College Degrees, People Pin Their Hopes on Trump*, CHRON. HIGHER EDUC. (Jan. 12, 2018), <https://www.chronicle.com/article/In-a-Region-With-Few-College/242226> [hereinafter *Few College Degrees*] (noting that “the prevalence of government aid is making . . . local farmers and truckers who often work 12-hour days, angry. They are pleased to hear Mr. Trump say he believes the monthly checks [that the welfare recipients receive] make it too easy not to work”).

¹⁷⁰ See McAdams, *Preferences*, *supra* note 102, at 31, 66-67 (discussing Festinger’s notion of social comparison, a close relative of cognitive dissonance); see also Dowland, *supra* note 167 (noting that Nietzsche warned his readers of the operation of *resentiment*).

¹⁷¹ See, e.g., *supra* Part II.B (describing the reaction among his employees of a structural change in the company’s pay scale instituted by a warm-hearted CEO); *supra* note 35 and accompanying text.

¹⁷² McAdams, *Preferences*, *supra* note 102, at 46, 96 & 103 (noting that people value being in a high-status group that is high earning, healthy, high achieving, and long-lived, and consequently, some of us derive satisfaction from lowering the status and well-being of other groups, thus enabling us to feel superior to them).

¹⁷³ See *supra* notes 24–27 and accompanying text.

¹⁷⁴ See *supra* notes 84–85 and accompanying text (noting that universal health care can help poor children be healthier and more active).

¹⁷⁵ One group feels downcast, because they were unable to keep up with their neighbors. Yet, their neighbors are worse off, too, because they made a showy but expensive investment or purchase that they could ill afford. See Assaf, *supra* note 151,

people alone, secure that they will act to advance their own position, making society better off at the same time.”

D. *Reason Number Four: The Poor and the Deserving-Poor*

“And your final reason has to do with the poor and the deserving poor, I think you said.”¹⁷⁶

“Yes. And this is the last of my mechanisms for explaining the incongruity we have been analyzing. It seems that many of our brothers and sisters, especially those of humble origins, despise others who are poor.”¹⁷⁷

“That’s paradoxical, isn’t it? Why should people despise members of their own social class?”

“You have to look harder at the notion of class,” he said. “And at race, too. In fact, you may have to look at both of them at the same time.”

“You and I discussed intersectionality once.¹⁷⁸ Is that what you mean? If I recall correctly, we didn’t think it held much promise in times like these when nativism and feelings against minorities run high.”

“True. The concept can serve as an evasion and still does.¹⁷⁹ But you need to combine the two in order to understand the opposition to Obamacare, Medicaid expansion, food stamps, and other forms of welfare.”

“Do you mean that black women and other intersectional groups are at special risk of being cut out of the safety net?”

“That is indeed happening,” he said. “But it’s the social forces that combine in intersectional fashion, not the persons themselves, for example by having a mixed identity of some sort.”

at 988-89; see also McAdams, *Preferences*, *supra* note 102, at 104 (“Laws setting minimum levels of safety [and] health . . . [can] limit wasteful investment in competitive consumption.”).

¹⁷⁶ See Khiara M. Bridges, *The Deserving Poor, The Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1096-97 (2017) (noting an irrationality in our notion of the undeserving poor).

¹⁷⁷ *Id.*; see also Zatz, *supra* note 32 (noting that poor white people tend to think that they and members of their group are the deserving poor, while others are not); *supra* note 114 and accompanying text (same).

¹⁷⁸ See generally Delgado, *Rodrigo’s Reconsideration*, *supra* note 13 (analyzing the emergence of intersectionality in the body of scholarship known as Critical Race Theory).

¹⁷⁹ *Id.* at 1281-82 (noting that, in difficult times calling for solidarity and resistance, intersectionality can divert attention from more urgent challenges).

“You mean animus toward minorities, welfare recipients, and people living on the edge?”

“Exactly. First take the population of poor people. The ones that need and should, logically, favor governmental programs offering help for themselves or their children when they are sick or addicted to drugs and in need of treatment.”

“I see. And then, within that group, you break things down into subgroups, such as the black poor and the white poor.”

“Exactly. Working-class whites don’t want them receiving governmental benefits because their image of the black person on welfare is that of the moocher, who could work but doesn’t.”¹⁸⁰

“The big black buck of Internet fame who uses food stamps to buy T-bone steak in the supermarket check-out line.¹⁸¹ Every conservative, welfare-hating radio host says he has seen one.”

“So the counterpart group strikes us as undeserving poor. Women who have baby after baby, supposedly to increase the monthly welfare check.¹⁸² Losers who could work, but prefer not too, waiting for the perfect job to come their way.”

“Poor whites could use programs like the ones we’ve been discussing. But they don’t want the blacks — whom they consider wastrels — getting them. So they vote against the programs and urge their representative or governor to do so as well. Both groups, whites and black, contain poor people. But one group considers themselves deserving poor and their adversaries not so.¹⁸³ Small farmers and truckers, who often work hard ten-hour days but do not make much money, often resent welfare recipients for this reason.”¹⁸⁴

¹⁸⁰ See *supra* notes 34, 176 and accompanying text; see also DeParle, *Need Help*, *supra* note 32 (describing how a retired Louisiana chemical worker who was seriously injured on the job became an environmentalist, but although he now distrusts the chemical companies, he distrusts the federal government “more, because it spends his tax money on people who ‘lazed around days and partied at night’” — in short, who were moochers).

¹⁸¹ See DeParle, *Need Help*, *supra* note 32 (discussing an informant who told her that she had seen people drive their children in Lexuses to Head Start. “If people refuse to work, we should let them starve,” she said).

¹⁸² See DeParle, *Need Help*, *supra* note 32 (quoting a small-town mayor: “I don’t like the government paying unwed mothers to have a lot of kids, and I don’t go for affirmative action”).

¹⁸³ See *supra* notes 114, 176, 182 and accompanying text (discussing the cleavage between those considered the deserving poor (people like us) and the undeserving poor (who are, often, people of different races or ethnicities from our own)); see also Bridges, *supra* note 176, at 1096-97 (same).

¹⁸⁴ See Brown, *Few College Degrees*, *supra* note 169 (discussing how many people who live in regions with a low average level of education resent welfare recipients who

“Political and economic theory holds that there should be no one like that, or, at the most, very few,” I said. “But they live, talk, and vote in sufficient numbers to change the results of elections. The situation is sub-optimal for everybody. It’s bad for society at large, because it results in forfeiting social programs that could enable much of the population to flourish. And it’s especially bad for outsiders who end up being outvoted time and again because the rest of the population thinks they are undeserving. But what’s your solution? What do we need to do to change things?”

IV. SOLIDARITY: IN WHICH RODRIGO EXPLAINS HIS SOLUTION TO RESENTMENT IN POLITICAL THEORY AND IN DAILY LIFE

Rodrigo took a final sip of his cappuccino, while I stole a glance at the waiter’s station behind the window separating us from the main hotel. Seeing no one there, I looked back. For the first time in our conversation, I detected a tentative expression on my companion’s face.

“We need a new political and economic theory,” he began. “The one we have is based on false premises. It assumes that everyone wants the best for himself and his friends and family. It also assumes that if we all try our best to do that, it will make for a better, richer society.”¹⁸⁵

“And you believe you have shown that this is not so,” I said. “Literature,¹⁸⁶ you said, as well as recent experience suggest that we sometimes do not seek our own wellbeing, particularly if we suspect that accomplishing it will make our enemies — people we don’t like — better off too.”¹⁸⁷

“And don’t overlook the pathological behavior that some scholars have noted,” he added. “Sometimes people will deny themselves freedom, pleasure, or a life of dignity if someone they love or admire exacts this denial as a condition of their relationship.”¹⁸⁸

“Either form of behavior renders everyone worse off. Perhaps that’s why socialistic societies like certain ones in Europe or Scandinavia

they think should be required to find work).

¹⁸⁵ See *supra* notes 71–74 and accompanying text.

¹⁸⁶ See *supra* notes 41–79 and accompanying text (discussing Franz Kafka).

¹⁸⁷ See *supra* Part II.

¹⁸⁸ See West, *Autonomy*, *supra* note 41, at 398–99 (describing an example of willing, but degrading, submission to authority); West, *Submission*, *supra* note 38, at 1451–54 (same).

rank higher than we do in measures of quality of life and human flourishing and happiness.”¹⁸⁹

“So I offer solidarity as an initial step toward solving the problem,” Rodrigo said.¹⁹⁰ “And your example of those more socialized societies gives me further reason for thinking that solidarity is a useful aim for our times. In societies like the ones you mentioned, the citizenry, through their government, do not tolerate laws and rules that make some people unhappy and poor, merely because a different group wants them to be that way and derives perverse pleasure from it. If people want to play dominance games in private, as in their bedrooms, they let them do it. But they do not let them get away with it in the public sphere. Many go out of their way to make things better for the Roma and recent immigrants, not worse. No one is permitted to deny others access to necessary social goods merely because they dislike the recipients.”¹⁹¹

“So encouraging greater solidarity among groups and enlarging everyone’s powers of identification are ways to counter behavior that is self-defeating and that interferes with overall happiness?” I asked.

“Yes. You and I once discussed love, Professor. I know it sounds peculiar for two men, like us, to decide upon loving, respectful relationships as a solution to greed and self-centeredness. But I don’t see a better avenue, at least right now. Simple measures to increase solidarity and cross-group identification, like integrating the early school grades and classrooms,¹⁹² or increasing diversity in the media,¹⁹³ would be a start. And as mentioned they’d be in everyone’s best interest.”

“I agree. Measures like these would counter each of the forces you mentioned, including nativism — fear of outsiders — and

¹⁸⁹ See, e.g., *supra* notes 102–04 and accompanying text.

¹⁹⁰ Compare Rodrigo’s suggestion, with Leticia M. Saucedo, *The Legacy of the Immigrant Workplace: Lessons for the 21st Century Economy*, 40 T. JEFFERSON L. REV. 1, 20–21 (2017) (proposing a similar approach to workplace law in the gig economy and in the field of immigration law and enforcement); see also Dowland, *supra* note 167 (deploying Nietzsche’s theory of resentment to explain solidarity-wrecking displays of injured pride over decisions regarding job conditions, class assignments, and appointments).

¹⁹¹ See Dowland, *supra* note 167 (suggesting solidarity as a solution).

¹⁹² See Aaron Williams & Armand Emamdjomeh, *America Is More Diverse than Ever — But Still Segregated*, WASH. POST (May 10, 2018), https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities/?utm_term=.76410e41928e (providing current segregation statistics of U.S. cities).

¹⁹³ See, e.g., NAT’L HISP. MEDIA COAL., <http://www.nhmc.org/> (last visited Feb. 15, 2019).

ressentiment, wishing ill for others. They would dampen the impulse to keep up with the Joneses because the Joneses would be part of our group, instead of people we need to beat at every step of the way. People might demonstrate less of the pathological behavior you described. Relationships built on humiliation and the infliction of pain would subside. I can't prove this but think it stands to reason. As they say, the government is the great teacher."¹⁹⁴

Rodrigo looked pensive for a moment, then added, "But how do we get there? That's the rub."

"A UCLA history professor recently urged reading as a solution. Perhaps they work together," I said.¹⁹⁵

"You mean Lynn Hunt's 'Inventing Human Rights,' he said, "in which she observes how the rise of fiction, especially novels, led to advances in rights for new groups, including women, debtors, natives, and the outcast."¹⁹⁶ Novels like those of Charles Dickens attracted a wide audience because of how they portrayed the human feelings and sorrows of children, women, and the working class."¹⁹⁷

"People don't read as much anymore," I said. "They use smart phones and the social media to get their information."

"That could easily slow progress," he conceded. "As Cass Sunstein warned."¹⁹⁸

"Still, many of the millennial generation — our students — are different," I pointed out. "They are marching for immigrant rights. They want to end the spread of guns. They don't mind gay people getting married."

"I agree," he said. "And it's heartwarming. I have students like that. Perhaps globalization and the threat of climate change are making everyone more concerned for their neighbors and how we are all faring."

The waiter materialized unseen, check in hand. "Are you men finished?"

We both nodded. I got out my wallet and handed over my credit card.

¹⁹⁴ *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

¹⁹⁵ See generally LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2007).

¹⁹⁶ *Id.* at 34, 42.

¹⁹⁷ See *id.* at 40.

¹⁹⁸ See generally CASS SUNSTEIN, *REPUBLIC.COM* (2001) (discussing how the Internet may cause people to interact in echo chambers online, leading to a more polarized society).

“Have a great rest of your stay at our hotel,” he said. “And please give my regards to Lynn Hunt, if you see her. I’m writing my dissertation on her work right now.”

Rodrigo and I looked at each other as he retraced his steps to the cashier’s station. “Maybe there’s hope for the world,” I said. “I was thinking of retiring next year. Maybe I’ll stick around a little longer.”

“I hope you do,” he said. “I would miss you. And consider: Maybe that waiter, or someone like him, will be one of our students one day.”

“I hope so. Come to think of it, I think I’ll follow you to that next panel and see who’s there.”
