

2003

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Recommended Citation

Richard Delgado, *White Interests and Civil Rights Realism: Rodrigo's Bittersweet Epiphany*, 101 MICH. L. REV. 1201 (2003).
Available at: <https://repository.law.umich.edu/mlr/vol101/iss5/4>

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WHITE INTERESTS AND CIVIL RIGHTS REALISM: RODRIGO'S BITTERSWEET EPIPHANY

Richard Delgado*

INTRODUCTION: IN WHICH RODRIGO LAYS THE FOUNDATION FOR HIS ASTONISHING THESIS

I had just settled down, taken off my tie, and was about to go over the two-page handout entitled "Information for Wedding Parties" that the minister of the small church had handed me minutes earlier, when I heard a knock and familiar voice from the other side of the anteroom door.

"Professor?"

"Rodrigo!"¹ I exclaimed. "Come on in."

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1. See Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) [hereinafter Delgado, *Rodrigo's Chronicle*], introducing my interlocutor and alter ego, Rodrigo. The son of an African-American serviceman and Italian mother, Rodrigo was born in the United States but raised in Italy when his father was assigned to a U.S. outpost there. Rodrigo graduated from high school at the base school, then attended an Italian university and law school on government scholarships, graduating second in his class. When the reader meets him, he has returned to the United States to investigate graduate law (LL.M.) programs. At the suggestion of his sister, famed U.S. civil rights lawyer Geneva Crenshaw, see DERRICK BELL, *AND WE ARE NOT SAVED* 7 (1992), he seeks out "the professor" for career advice. Despite their age difference, the two become good friends, discussing affirmative action and the decline of the West (Delgado, *Rodrigo's Chronicle*, *supra*), law and economics (Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993)), love (Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993)), legal rules (Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993)), the critique of normativity (Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993)), relations between men and women (Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993)), Enlightenment political theory (Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994)), black crime (Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears — On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994)), narrative jurisprudence (Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995) (final chronicle in first cycle and final chapter of RICHARD DELGADO, *THE RODRIGO CHRONICLES* (1995))), the rule of law (Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994)), affirmative action (Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995) [hereinafter Delgado, *Rodrigo's Tenth Chronicle*]), clinical theory (Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy*

Seconds later, the familiar lanky figure of my smiling friend strode into the little room that the pastor had generously allowed me to use before the walk-through. "I'm glad you're here. We wondered if you would make it."

"Wouldn't miss it for the world," my young friend replied, shaking my hand warmly. "The flight was late. Giannina took a separate cab to the hotel, which is just down the street from her mom's place.² I was going to drop her off, but time was running short. Is everyone else here?"

"Everyone but the organist. We're waiting for a replacement. She should be here any minute now."

"What's that you're reading — the guest list?"

"No, instructions for the wedding party. They tell you where to stand, when to speak, that sort of thing. There's a section in here for you, too."

"Uh-oh, then I'd better read up. What happened to the organist?"

"I just learned about it yesterday. At first she said she didn't know any black or Italian music. When we explained that we hadn't requested anything like that, she said she still didn't feel comfortable. Most mixed race marriages don't last, she said. Nothing we could say dissuaded her, not even that we're both in our seventies, widowed, and our first marriages were happy and lasted thirty years."

"You're joking, right?" Rodrigo said. "I guess you never know where attitudes like that are going to crop up. Just the other day, something similar happened to Giannina and me in a restaurant, and I'm much lighter looking than you."

"It's funny how strong the social aversion to interracial marriage remains years after the abolition of formal laws against it,"³ I said. "Did we talk about this once before?"⁴

and False Empathy, 84 CAL. L. REV. 61 (1996)), legal formalism (Richard Delgado, *Rodrigo's Twelfth Chronicle: Legal Formalism*, 95 MICH. L. REV. 1105 (1997)); the problem of desperately poor border settlements, (Richard Delgado, *Rodrigo's Thirteenth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997)), interracial indifference (Richard Delgado, *Rodrigo's Remonstrance: Love and Despair in an Age of Indifference — Should Humans Have Standing?*, 88 GEO. L.J. 263 (2000) [hereinafter Delgado, *Rodrigo's Remonstrance*]), and many other topics over the next few years. During this period, the brash, talented Rodrigo earns his LL.M. degree and embarks on his first teaching position. The professor meets Rodrigo's friend and soul mate "Giannina," a playwright, now a law student at a school near Rodrigo's, and her mother, Teresa; he also learns that Rodrigo's father's family immigrated to America via the Caribbean. His father Lorenzo looks black and identifies as such, but speaks perfect Spanish.

2. See Delgado, *Rodrigo's Remonstrance*, *supra* note 1, at 266 (introducing Teresa, Giannina's widowed mother, with whom the professor, a dignified, elderly gent, is immediately smitten).

3. See RICHARD DELGADO, *JUSTICE AT WAR* 97-101 (2003); Randall Kennedy, *How Are We Doing with Loving?: Race, Law, and Inter-marriage*, 77 B.U. L. REV. 815 (1997).

4. DELGADO, *supra* note 3, at 92-104.

“Way back when,” Rodrigo said. “We identified two views, including a materialist view that restraints on interracial marriage and romance are necessary to facilitate exploitation, since the offspring of those marriages would be of indeterminate race.”⁵

“Like you,” I said, with a smile.

“Right. Hard to figure. Someone looks at me and can’t tell whether I’m white or not.⁶ The sort of person to seat at a good table in a restaurant or near the back. This makes everyone uncomfortable. Then, we talked about a competing view, which holds that the taboo against interracial intimacy is a product of deep psychoanalytic forces and fears.”⁷

“Right. The one places profits and material advantage at the center of our system of racial hierarchy. Then, the prohibition against intermarriage is just a means to an end.”⁸

“Instrumental, a way of assuring a nice clear racial line, so we can know whom to exploit,”⁹ Rodrigo added. “The other view, by contrast, says that the aversion to racial touching, mixture, and intimacy, is central to, and lies at the very core of, our system of white supremacy.”¹⁰

“For this view, our whole system of school and housing segregation is a means to an end — keeping little black and white school kids from getting too friendly.”¹¹ After a pause, I added, “And the organist incident reminded you of all this?”

“It did,” Rodrigo said. “But now, reflecting on some books on race I read the other day, I think I see a way to go deeper. Maybe I’ll run the idea past you later at Teresa’s. Is someone at the door?”

A discreet knock was followed by the door’s opening to reveal the jovial face of the minister who, two days hence, would preside at my wedding to the beautiful widow Teresa. “How are you two doing?” he asked.

“Fine. I’ve been going over my marching orders. May I introduce my young friend and colleague, Rodrigo?”

“How do you do?” the minister said. Then, turning to me: “The substitute organist just arrived. She’s in my study selecting music with Teresa. Are you ready?”

5. DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 328-33 (4th ed. 2000) (setting out the two views); DELGADO, *supra* note 3, at 92-104.

6. Rodrigo, the son of an African-American father and an Italian mother, is of indeterminate race. See Delgado, *Rodrigo’s Chronicle*, *supra* note 1, at 1357-70.

7. BELL, *supra* note 5, at 333-36; DELGADO, *supra* note 3, at 102-04.

8. That is, preventing intermarriage is a means to the goal of maintaining white material supremacy.

9. See BELL, *supra* note 5, at 328-33; DELGADO, *supra* note 3, at 102-04.

10. See, e.g., BELL, *supra* note 5, at 331-33 (citing psychoanalytic theorists).

11. *Id.* at 328-33; DELGADO, *supra* note 3, at 92-104.

As we walked back to the wedding chapel, Rodrigo and the minister talked about a period in U.S. history in which my young protégé was intensely interested. It appeared that the minister, as a seminarian, had ridden one of the original freedom buses and marched with Martin Luther King in Selma, Alabama.¹²

The walk-through itself lasted less than five minutes. "You'll all do fine," the minister said. "Call me if you have any questions. You, too, Teresa."

"We'll see you in two days, then," I said, shaking his hand, then fishing in my breast pocket for the checks I had written out ahead of time. "This is for you, and this one for the organist."

I. CIVIL RIGHTS AND THE WHITE COMFORT ZONE

An hour later, I was seated in Teresa's comfortable living room while she performed a last-minute operation in her kitchen and we both waited for the arrival of the two young people. After a few minutes spent in reverie, I heard a car door slam outside and voices on the steps.

"Hi, folks. We're here." Rodrigo's cheerful voice gave way to Giannina's tall figure, followed by a toddler holding a teddy bear and sucking his thumb.

The toddler took his thumb out of his mouth long enough to say, "Hi, Grandpa." I wondered briefly who had taught him to say that, then the kitchen door opened. Teresa entered, wearing a simple dress cut from an elegant Italian material that took my breath away, tray full of beverages and cookies in hand, and motioned that we should all make ourselves comfortable. Rodrigo picked up little Gustavo, held him up for Teresa and me to greet, and then walked into the bedroom, closing the door.

"We brought his favorite educational video, but I'm guessing he'll be asleep in ten minutes," said Giannina. "It's past his naptime, and he was starting to nod in the car on the way over."

"What do you have there?" I asked, pointing to a bookbag she had deposited on the living room table next to the tray with our refreshments.

"Some books Rodrigo scooped up at the last minute. Something to do with what you two were talking about earlier. I'll let him explain that himself."

As though by magic, Rodrigo emerged from the bedroom door. "He's on the bed, watching Barney. I bet he'll be out cold in a couple of minutes. First, he wanted to see your bathroom, Teresa." Giannina gave a knowing smile, and when Teresa and I must have looked blank,

12. See generally JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965* (1988).

she explained, "He's learning self-control right now, if you know what I mean. Wherever we go, he wants to see the toilet."

"And how the seat goes up and down," Rodrigo added, "and his portable potty fits snugly. When I showed him, he seemed very reassured."

"If he falls asleep, that'll give us at least an hour," Giannina said. "The professor just asked what all these books were about."

"Oh," Rodrigo replied, "some recent books on race I'm thinking of assigning next term."

I turned my head sideways and squinted at some of the titles. "You've got David Cole's *No Equal Justice*¹³ and Randall Robinson's *The Debt*,¹⁴ which figures prominently in the reparations debate. And I see you have" — I indicated a hefty volume with familiar looking writing on the front — "Perea, Delgado, Harris, and Wildman's *Race and Races*,¹⁵ which was just reviewed by five writers in the *California Law Review*.¹⁶ And that last one looks like" — Rodrigo obligingly rotated a bright yellow volume for me — "yes, I guessed it. *The Miner's Canary*,¹⁷ by Lani Guinier and Gerald Torres."

"And I bet you're going to tell us what these diverse volumes have in common," Teresa said, picking up the tray and motioning that I should start it circulating. "Try these cookies. Gus baked them himself yesterday."

Rodrigo looked at me quizzically, muttered something about my hidden talents, and said, "I've actually got a few others outside. Books, I mean. Including one for the two of you. But they all do have something in common. And it has to do with what Gus and I were talking about earlier: whiteness and white transparency,¹⁸ but in a radically new guise."

13. DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999) (showing how the criminal justice system discriminates against minorities and the poor).

14. RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000) (documenting the case for reparations by demonstrating systematic subjugation and material exploitation of African Americans).

15. JUAN PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (2000) (tracing the legal history of all major groups of color, and whites, in the United States).

16. See Kathryn Abrams, *Race and Races: Constructing a New Legal Actor*, 89 CAL. L. REV. 1589 (2001); Anthony V. Alfieri, *Teaching the Law of Race*, 89 CAL. L. REV. 1605 (2001); Margalynne Armstrong, *Teaching by the Book*, 89 CAL. L. REV. 1625 (2001); Robert A. Williams, Jr., *Do You Believe in the Rule of Law?* 89 CAL. L. REV. 1633 (2001); Eric K. Yamamoto, *Teaching Race through Law: "Resources for a Diverse America,"* 89 CAL. L. REV. 1641 (2001).

17. LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002).

18. See, e.g., PEREA ET AL., *supra* note 15, at 455-89 (discussing white transparency).

"I'd better explain," I said. Rodrigo tiptoed over to the bedroom, opened the door, and peered inside, as I recounted to the two women what our conversation at the church had been about.

"Sound asleep," he said upon his return, putting his thumb to his lips. "And he went to the bathroom before turning in, just as we taught him to do."

"We're all anxious to hear this mysterious idea," Giannina said. Then looking at the two of us: "I tried to get him to tell me earlier as he was collecting those books before our trip. But he said he was still working through it."

"I was," said Rodrigo. "But now that I've mulled it over, I'd like to run my thesis past you. It doesn't have to do with race and romance specifically, but with broader realms of discourse and action. It's a more generalized thesis that helps unify diverse phenomena."

Out of the corner of my eye I saw both Teresa and Giannina smiling knowingly. My young protégé was never short of a new thesis, I thought, or shy about sharing it with us.

"I, for one, would love to hear," I said. "Why don't we pick up our drinks and head into the study? It's more comfortable."

"And we're less apt to wake the baby," Giannina added, picking up her teacup and leading the way.

A. *In Which Rodrigo Explains the Point of Civil Rights Law*

We all settled down in the comfortable, wood-paneled room, Teresa and I looked up expectantly, and Rodrigo began:

"Have the three of you noticed how uncomfortable some of our white friends are with discussing, or even using the word, 'racism' these days?"

"I have," Giannina said. "Just the other day my reading group was talking about one of those books." She pointed to the pile Rodrigo had lined up next to his place on the coffee table. "A new member kept asking whether the authors were not, as she put it, obsessed with race. She was surprised when none of us agreed with her."

"It's almost as though race and racism have replaced the 'N' word as the one no one dares speak any more,"¹⁹ Teresa added. "The other day in my environmental organization, we were discussing environ-

19. On hate speech, see, for example, RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* (1997); MARI MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT* (1993); and Richard Delgado, *Words that Wound: A Tort Action for Civil Lawsuits, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

mental racism.²⁰ One of the volunteers questioned the term. If biohazards and toxic dumps are disproportionately placed in minority communities, this need not bespeak racism, she insisted. It could just be the luck of the draw. Or simple economics. That's where the land is cheapest and the zoning laws laxest. So companies with toxic materials to dispose of naturally gravitate there. It's not that they dislike black or brown people; they just like their profits more."

"Reminds me of something the Professor and I were discussing at one of our first meetings," Rodrigo interjected. "About appointments committees and how some law schools never seem to hire blacks or Latinos."²¹

"Right," I chimed in. "One comes along with excellent credentials. He gives a great job talk. The students like him. But he isn't hired because two members of the appointments committee think he lacks a creative mind. Next month, a Latina comes along who has written fifty law review articles and ten prize-winning books. But she isn't hired because some of the appointments-committee members think she has a chip on her shoulder."²²

"It's always something," Giannina added. "And if you have the temerity to posit that it's the appointments committee's discomfort with the prospect of having a black or Latino colleague . . ."

"Unless, of course, the candidate is one of those happen-to-be blacks who want to be thought of as individuals more than they want to identify with their community," I added.²³

"Right," Rodrigo said. "Their number is growing. Which brings me to my point. The whole purpose of civil rights law and discourse today is not the improvement in circumstances for outgroups of color."

"It isn't?" I said, taking the bait. "What is it then?"

"It occurred to me while reading these books," Rodrigo gestured. "Each one of which, in its way, assumes just that. Namely, that the point of civil rights is to make matters better for blacks.²⁴ It's not. It's to make things better for whites."

20. *E.g.*, LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001).

21. *See* Delgado, *Rodrigo's Chronicle*, *supra* note 1, at 1361-64.

22. *See id.*; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2418-35 (1989).

23. On disidentification, see, for example, Ian Haney-Lopez, *Community Ties, Race, and Faculty Hiring: The Case for Professors Who Don't Think White*, RECONSTRUCTION, 1991, at 46.

24. In other words, the structure of the authors' argument is: X is happening, therefore it is terrible and must be fixed — as opposed to the other interpretation: X is happening; good, that is just the way things are supposed to be. *See, e.g.*, JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994); VINCENT HARDING, THERE IS A RIVER: THE BLACK

“You mean to keep them comfortable?” I said. “To protect them from hearing the ‘R’ word too often? From having to adjust to a new black or brown colleague who might force them, come tenure time, to read things they are unfamiliar with? To insulate them from hearing uncomfortable questions at faculty meetings, such as, ‘Why don’t we have more minority students? Why don’t we get rid of the LSAT?’²⁵ That sort of thing.”

“Exactly,” Rodrigo replied. “Many of us make the mistake of thinking civil rights is for blacks and Latinos and Indians and Asians. It may have been so originally. . . .”

“In the sixties,”²⁶ his wife said.

“Yes, although recent scholarship has shown that the advances of that remarkable decade were not so much the product of a mass conversion, or moral insight, on the part of Americans of majority race . . .”²⁷

“Who woke up one day, shook their heads, and, en masse, said, ‘By golly, Martin Luther King is right. Blacks are humans, too. And as members of the human community are due certain civil rights, like not being lynched and being able to vote or eat in a restaurant,’” said Teresa, picking up and circulating the platter once more. “There’s plenty more in the kitchen if we finish these.”

“Exactly,” Rodrigo went on. “Instead, those heady breakthroughs, which include *Brown v. Board of Education* . . .”²⁸

“And the 1964 Civil Rights Act,”²⁹ Giannina added.

“Right. Much of this came about because of interest convergence.³⁰ White elites realized that, for the first time, their own self- and class-interest required breakthroughs for blacks to preserve both domestic peace and international appearances.”³¹

“We were then in the early stages of a Cold War with atheistic, monolithic Communism,” Teresa interjected. “I was reading about

STRUGGLE FOR FREEDOM IN AMERICA (1981); MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM* (1995); *supra* notes 13-15.

25. *E.g.*, Lani Guinier, *The Pigment Perplex*, AM. LAW., Aug. 2002, at 8.

26. *See, e.g.*, GREENBERG, *supra* note 24; HARDING, *supra* note 24.

27. *See, e.g.*, MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

28. 347 U.S. 483 (1954).

29. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e (2000)).

30. *See* DUDZIAK, *supra* note 27; Bell, *supra* note 27; Richard Delgado, *Explaining the Rise and Fall of African American Fortunes — Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 371 (2002) (book review) [hereinafter Delgado, *Rise and Fall*].

31. *See* DUDZIAK, *supra* note 27; Bell, *supra* note 27.

this the other day in a book by Mary Dudziak.³² She developed Bell's thesis. Our competition with the Soviet Union for the loyalties of the uncommitted Third World . . . ”

“Most of which was black, brown, or Asian,” Rodrigo pointed out.

“Precisely,” his mother-in-law continued. “That competition required that we soft-pedal some of the usual cruelties we inflicted on blacks.³³ The world press had the nasty habit of splashing reports of lynchings,³⁴ the Emmitt Till murder,³⁵ and Southern sheriffs with cattle prods and police dogs all over the front pages.³⁶ Eventually, the State Department and President prevailed on the judiciary to give blacks a few, largely symbolic, victories.”³⁷

“And if I remember right,” Giannina continued, “Mary Dudziak proved what Bell merely postulated, with memos, letters, and other material from files and archives.”³⁸

Rodrigo nodded, and after a short silence, Giannina said. “And I gather, Rodrigo, that you believe something like this is still going on today?”

“Exactly,” Rodrigo replied. “And if the three of you are interested, I think I can prove it.”

“As Professor Duziak did in her article and book,” Teresa said, picking up the empty tray and heading for the kitchen. “This I want to hear. Talk about something else for a minute. I'll be right back.”

She disappeared into the kitchen, Rodrigo adjusted the books for a minute, then said: “They're not bad books. They just assume that pointing out a problem, like a lot of blacks in prison,³⁹ is enough to get the rest of the citizenry to take it seriously.⁴⁰ I think it's almost exactly the opposite of that. Oh, good, here's Mom.”

Teresa set down the tray, this time laden with fruit, and said, “Where were we?”

“Rodrigo was going to prove that civil rights, silently and without anyone announcing it, has taken a 180-degree shift. Most of us keep trying to advance things under the old paradigm, which had as its objective the advancement of black interests. Each of those books, he was saying, falls prey to that misconception. Each author believes that pointing out black misery, poverty, injustice, and so on, is enough to

32. DUDZIAK, *supra* note 27.

33. *E.g.*, Delgado, *Rise and Fall*, *supra* note 30, at 371-75.

34. *Id.* at 371-72.

35. *Id.* at 372.

36. *Id.* at 372-74.

37. *Id.* at 372-76.

38. *E.g.*, DUDZIAK, *supra* note 27, at 43, 77, 80.

39. *See* COLE, *supra* note 13; MAUER & HULING, *supra* note 24.

40. *See supra* note 24 and accompanying text.

get society to say, ‘That’s terrible. That goes against our civil rights ideals. We must do something about that.’ Instead, it’s pretty nearly the opposite,” I looked up at Rodrigo. “He was going to give us his evidence.”

1. *Rodrigo’s First Kind of Evidence: White Material Interests and Black Fortunes*

“My evidence falls into three categories. The first kind is material self-interest. Many whites simply won’t allow black advances to threaten their own physical and economic well-being.⁴¹ The other kinds are psychic comfort⁴² and discourse categories.⁴³ With discourse, they adopt rules, which they never state, like the one we mentioned, forbidding use of the ‘R’ word. What if we covered the material ones first?”

When we all nodded and leaned forward, Rodrigo continued: “We all know that, throughout history, whites have subordinated blacks and other people of color in order to advance their own economic self interest.”⁴⁴

“Or at least not endanger it,” Giannina interjected. “My reading group was discussing the Bell article⁴⁵ and Dudziak book⁴⁶ the other day.”

“There’s, of course, slavery, which conferred a great economic benefit on the South,”⁴⁷ Rodrigo began. “And remember all those other practices, such as Chinese coolie labor,⁴⁸ the Bracero Program,⁴⁹ and Alien Land Laws⁵⁰ that cut down on the competition from expert Japanese farmers.”

“That book over there” — Giannina leaned over and picked up the Perea volume resting next to her husband — “lists dozens of examples in which the dominant group instituted practices and laws to promote their own well-being at the expense of blacks, Latinos,

41. See *infra* notes 44-67 and accompanying text; *supra* notes 20, 24 (citing sources).

42. See *infra* Part II.

43. See *infra* Part III.

44. E.g., BELL, *supra* note 5; PEREA ET AL., *supra* note 15, at 91-428.

45. Bell, *supra* note 27.

46. See DUDZIAK, *supra* note 27.

47. JOHN HOPE FRANKLIN & ALFRED A. ROSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS (7th ed. 1994).

48. E.g., PEREA ET AL., *supra* note 15, at 369-76. See generally RON TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (1989).

49. See PEREA ET AL., *supra* note 15, at 312, 314-16, 320.

50. *Id.* at 398-405; see also Richard Delgado, *Derrick Bell’s Toolkit: Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283, 292 (2000) [hereinafter Delgado, *Bell’s Toolkit*].

Asians, and Indians.⁵¹ It's amazing how the authors managed to remain optimistic and hold onto the idea that civil rights is aimed at boosting the well-being of folks of color.⁵² Maybe they couldn't get their minds around the idea that it is really about subjugating those very people and advancing the interests of whites."

"But wait a second, you two," I interjected. "You still have to do two things. You need to show that economic subjugation goes on today, not just in those earlier periods, and that a majority of whites hold to it, not just a few diehard supremacists. We all know many whites who are sympathetic to black causes, or are indifferent — who don't care much one way or the other — and also whites who courageously protest economic injustice, for example at World Trade Organization and International Monetary Fund meetings. Plus, you also have to show how maintaining white material supremacy is the whole point of civil rights, and not just a limitation that clicks in at some point."⁵³

"I see what you mean," Rodrigo replied, frowning his brow. "Okay, consider affirmative action, for example, under direct assault just as minority populations are growing to the point where the occasional person of color getting into a fine university is threatening to become, not exactly a flood, but at least a trickle.⁵⁴ So, for the first time, we're seeing widespread pressures to eliminate that paltry avenue of upward mobility.⁵⁵ Consider also the growing pressure to curtail immigration,⁵⁶ limit welfare,⁵⁷ and dissolve desegregation decrees,⁵⁸ just as populations of color are beginning to gain on whites numerically and increase voting power in many states."⁵⁹

51. See PEREA ET. AL., *supra* note 15, at 91-428.

52. *E.g.*, *id.* at 3-4, 1091-154.

53. That is, maintaining white supremacy is the main objective of civil rights law, not just an unspoken competing interest that takes over when supremacy is seriously threatened by black or brown advances. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1999).

54. See, e.g., CHARLES R. LAWRENCE & MARI J. MATSUDA, *WE WON'T GO BACK! MAKING THE CASE FOR AFFIRMATIVE ACTION* (1997).

55. *E.g.*, TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE* (1996); RICHARD KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996).

56. *E.g.*, LAURENCE AUSTEN, *THE PATH TO NATIONAL SUICIDE: AN ESSAY ON IMMIGRATION AND MULTICULTURALISM* (1990).

57. See JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS CHANGED AMERICA'S SOCIAL AGENDA* 82-95 (1996).

58. See, e.g., *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305 (4th Cir. 2001); *People Who Care v. Rockford Bd. of Educ.*, 246 F.3d 1073 (7th Cir. 2001); *NAACP v. Duval County Sch.*, 273 F.3d 960 (11th Cir. 2001).

59. On the growth in minority numbers and what this portends, see Amitai Etzioni, *The Monochrome Society*, HERITAGE SOC'Y POL'Y REV., Feb./Mar. 2001, at 53.

"You're right about that, at least," I conceded. "Some whites do seem to feel discomfited by the thought that a tiny handful of us are getting ahead. Yet, a recent book by Oliver and Shapiro shows that black wealth, at least, is negligible.⁶⁰ The average black family has a net worth of zero,⁶¹ and the number of black millionaires, outside entertainment and sports, can practically be counted on the fingers of one hand."⁶²

"True," Rodrigo said. "Perhaps it seems unnatural that any of us at all hold good jobs, professional degrees, and designs on houses in the better neighborhoods. But you posed a second question. Oh, yes, it was whether this reluctance did not simply click in as a limit."

"Right," Teresa said. "Gus pointed out that civil rights might still intend the betterment of blacks' condition. Latinos', too. But society loses its nerve, diminishes its fervor, as soon as this goal begins to threaten white self-interest. Up to that point, it's fine. If we could help blacks and Latinos advance without any cost to ourselves, we'd do so. We love them, truly. We just love ourselves more."

a. The Unseen Limit on White Beneficence. "Well put," Rodrigo said with a smile. "And I don't think I can prove this conclusively without resort to my other forms of evidence, comfort level and discourse. But for now, let me pose a hypothetical: suppose society could, without any cost to itself, enrich the African-American population. A powerful extraterrestrial force lands and offers this country any amount of money, with the stipulation that it be used only for African Americans.⁶³ We could ask them for a trillion dollars, a billion dollars, five dollars, any figure we wanted.⁶⁴ The only people who could vote would be whites. What do you think the answer would be?"

"If it were put to a referendum?" Giannina asked.

"Right," said Rodrigo.

"And the wealth of whites would stay the same?" Teresa asked. I began smiling involuntarily as I got a glimpse of where the young firebrand was going.

"I think Rodrigo's point is that it would be quite a modest figure," I said. "Whites simply don't like seeing black millionaires like O. J.

60. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995).

61. *Id.* at 97. Net worth means assets minus debts. Many black families have a negative net worth — more debts than assets. *Id.*

62. See William Raspberry, *Inheriting Wealth*, WASH. POST, Aug. 10, 1998, at A17.

63. Compare this hypothetical with Derrick Bell, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393 (1990) (posing Chronicle of the Space Traders).

64. Compare this request with ANDREW HACKER, *TWO NATIONS: ONE BLACK, ONE WHITE: SEPARATE, HOSTILE, UNEQUAL* 31-32 (1992) (positing that the average white American would demand one million dollars a year in damages for the injury of being changed into a black).

Simpson driving limousines or rap stars living in palatial homes. So, even though the indirect effects of having every black be very wealthy might benefit whites . . .”⁶⁵

“Who could profit by getting jobs in the service sector, shining shoes for blacks, serving as their chauffeurs, valets, investment advisers, and so on,” Teresa said, smiling and clapping her hands together.

“Even though it would cost them nothing and, in many cases, benefit them, they’d vote against a large allotment,” Rodrigo concluded. “The whole point of civil rights law is to strike just the right balance of racism in society.⁶⁶ Not too much, for that would be destabilizing — Blacks might revolt. Nor too little — that would forfeit important material and psychic advantages. Civil rights serves as a homeostat, assuring that society contains exactly the right amount of racism.”⁶⁷

“To maintain the economic security of whites and keep blacks and other groups of color poor and marginalized,” I said. “I suppose you have made at least a plausible case, Rodrigo, on material grounds. Your review of history strikes me as generally accurate. And your summary of contemporary actions and attitudes simply adds force. But I’m still troubled by my original objection. I don’t see why the purpose of civil rights has to be the maintenance of white economic well-being and black penury. The one might simply be a limitation on the other. I guess I need more evidence.”

II. RODRIGO’S SECOND FORM OF EVIDENCE: CIVIL RIGHTS AS A MECHANISM TO PROTECT WHITE PSYCHIC WELL-BEING AND COMFORT

“I’ll see what I can do,” Rodrigo said. “And for this, we need to turn to a different set of considerations — namely, factors designed to preserve the white comfort level.”

“Comfort level?” said Giannina. “You mean like that couple in the restaurant the other day. The one that obviously didn’t feel comfortable sitting next to a stylishly dressed interracial couple?”

“Yes,” Rodrigo replied. “Multiply that by a thousand. And extend it to things that matter, like finding a neighborhood to live in.”

65. See BELL, *supra* note 5, at 11-12, 63-67, 206, 257 (observing that working-class whites, who otherwise might be expected to unite with blacks against the capitalists and factory owners that oppress them both, decline to do so because they derive psychic benefits from imagining themselves as better than blacks).

66. See Richard Delgado, *Playing Favorites*, 74 TEXAS L. REV. 1223, 1224 (1996).

67. *Id.*

“You mean white flight, insurance redlining, housing segregation, that sort of thing?”⁶⁸ I asked.

“Exactly,” Rodrigo replied. “Look what happened in the wake of the housing decrees of the 1970s. Whites simply moved out of the cities into the suburbs.⁶⁹ After a neighborhood becomes more than a few percent black, whites start to leave.⁷⁰ And once it starts, the process accelerates. The same is true of schools.”⁷¹

“That reminds me of something we talked about in my reading group,” Giannina said. “Namely the case of Denver, Colorado. One of our authors linked the recent shootings in Columbine High School⁷² with the *Keyes* litigation three decades earlier.”⁷³

“I think I heard someone trace that connection,” Teresa said. “Remind me how it goes.”

“Sure. *Keyes* was an early school desegregation suit that found de jure discrimination in the Denver public schools. The federal court ordered the district to desegregate, even if that meant forced busing.”⁷⁴

“I’ve heard that same story,” I said. “I have a friend from the area. He said that the litigation was tense and protracted. The case went up and down on appeal many times before the final decree was upheld by the Supreme Court. While the case was pending, forty-six school buses and the home of the federal judge were bombed.⁷⁵ When the decree became final, white families moved to the suburbs in droves rather than send their kids to school with blacks.”⁷⁶ I paused to see if my friends were familiar with this period of history. When they nodded, I continued:

“Towns like Littleton grew rapidly. And since the new residents were who they were, schools like Columbine High School became virtually all white. Peer pressure increased. Kids competed to wear the

68. See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

69. *Id.*

70. See BELL, *supra* note 5, at 421-23; Boris I. Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 *YALE L.J.* 1387, 1388-89 (1962).

71. BELL, *supra* note 5, at 179-80.

72. See James Brooke, *Terror in Littleton: The Overview*, *N.Y. TIMES*, Apr. 21, 1999, at A1 (describing the tragedy).

73. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

74. *Id.* at 242-43.

75. See Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace — and Denial — of Equal Opportunity in Higher Education*, 70 *U. COLO. L. REV.* 703, 777-78 (1999) [hereinafter Delgado & Stefancic, *Home-Grown Racism*].

76. *Id.* at 778.

best clothes, drive the biggest SUV, be on the cheerleading squad, earn the highest SATs.”⁷⁷

“And we all know what happened in that pressure cooker atmosphere,” Teresa picked up. “Ironic. You never hear of mass shootings in schools, like Berkeley or Santa Monica High, which are healthily integrated.⁷⁸ There, no group holds a decisive majority. No kid is a total outcast, because everyone can find some social group to hang out with. Rich kids, weird kids, poor kids, musicians, theatre groupies, Goths, budding bohemians, writers, and athletes.”

“And so,” Rodrigo concluded. “The parents who fled Denver, seeking the company of the like-minded, found it. But their kids, a generation later, paid the price. If you’re a kid, safety lies in diversity. And schools like the two you just mentioned, Teresa, don’t sacrifice excellence, either. They’re at the top in academic achievement, as well.”

After a pause, I said. “Sobering thought. Did you have other examples up your sleeve?”

“Oh,” said Rodrigo with a start. “I did. What some white folks will do to be comfortable. Point number two is that they hate feeling guilty. So they adopt strategies and modes of discourse that neatly absolve them of guilt for racial transgressions.”

“I assume you mean things like a legal standard for proof of discrimination that requires that the plaintiff show intent,”⁷⁹ said Giannina. “We talked about that in my constitutional law class the other day.”

“Yes. Unless a black can show that a white intended a policy or practice to disadvantage him, the black will go without recourse. The white can say he intended no harm, even though the effect of what he did was to assure that people like him got ahead.”

“And the same is true for proof of causation,” I added. “It must be tight.”

“Air tight,” Giannina added. “We all know cases that stand for that proposition.”⁸⁰

77. Interview with Anonymous (law professor and parent of two Littleton school children), in Boulder, Colo. (Mar. 2001) (on file with author).

78. See Timothy Egan, *Santee Is Latest Blow to Myth Of Suburbia's Safer Schools*, N.Y. TIMES, Mar. 9, 2001, at A1.

79. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

80. It is true that this requirement is absent in statutory discrimination cases. Yet, even there, other limitations are being imposed that curtail the scope of liability and of relief. See *infra* notes 81-82 and accompanying text; see also *City of Boerne v. Flores*, 521 U.S. 507 (1997) (applying “congruent and proportional” standard to litigation under Congress’s Section 5 power). Once minorities begin to make legal inroads, courts move to curtail those advances.

“Not to mention tougher standing requirements⁸¹ and res judicata rules,”⁸² Rodrigo went on. “Blacks can’t stray too far afield from injury-in-fact rules. And unless they’re in the very same class that litigated a previous case of discrimination, forget it. Prior adjudication rules will bar them benefiting from an earlier decree.”

“So, whites need rarely feel guilty, at least in a legal sense,” Rodrigo summarized. “All the law is stacked against the minority seeking relief. The hoops are set higher and higher every Supreme Court term.”⁸³

After a pause, Giannina said, “I can think of a few other ways society arranges for whites’ comfort level.”

“I want to hear them,” her husband said. “But first, I should check the bedroom. We’ve been talking for quite a while. Little Gus may be stirring.”

When we all nodded, Rodrigo got up, tiptoed over to Teresa’s bedroom door, and peeked inside. “Still dead to the world,” he reported, returning to his seat on the sofa. “Where were we?”

“The psychic comfort of whites,” Giannina replied. “You were arguing that in recent times, civil rights has undergone a shift. Without anyone’s announcing it, the dominant objective of civil rights has changed from assisting blacks to helping whites. Guaranteeing their well-being and comfort are now the subtext for much of what we see. The Rehnquist Court has neatly flipped things around.”

“With a little help from lay society,” Rodrigo added. “Here’s where my third prong comes in.”

When Rodrigo looked around expectantly, I took the bait. “Namely?”

“Discourse. But first, let’s hear about those two areas Giannina mentioned. Plus, I guess I have one more.”

“I’ll just name them quickly,” she said looking at her watch. “Affirmative action — the terms in which we talk about it — and the social construction of heroes. White heroes, I mean.”

“Affirmative action I can understand,” I said. “You must mean the way liberal whites have been reframing the issue not as one of retributive justice — making amends for past transgressions — but as one of the distributive kind.⁸⁴ We have such-and-such social good; who should get it? So many black lawyers, white engineers, Asian-American

81. *E.g.*, *Warth v. Seldin*, 422 U.S. 490 (1975).

82. *See* *Martin v. Wilks*, 490 U.S. 755 (1989) (partially overruled by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991)); *see also* Susan S. Grover, *The Silenced Majority: Martin v. Wilks and the Legislative Response*, 1992 U. ILL. L. REV. 43.

83. On the retrenchment in affirmative action and remedies for racial wrongs, *see*, for example, LAWRENCE & MATSUDA, *supra* note 54.

84. *E.g.*, Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 569-70 (1984).

accountants, and so on. A nice, neat problem of social engineering. No need to address things like all-white law schools and fraternities, state bar associations that excluded African Americans until quite recently, or bias built into the SAT. We just look forward. What kind of society do we want, how much mixture?"⁸⁵

"The diversity rationale operates in similar fashion," Teresa added. "It, too, neatly sidesteps issues of guilt."

"Exactly," Rodrigo replied. "It treats black admissions as a social good, because everyone benefits from having different perspectives in class discussions."⁸⁶

"If only for entertainment value," Teresa laughed. "To cater to jaded white appetites, or professors' desire to hear a new ghetto-style answer to their standard Socratic question from time to time."

"Demeaning, when you think about it," Giannina said. "Which brings me to my last point, namely absolutism. I was reading about this the other day."

"You mean that article by Sumi Cho on Justice Warren?"⁸⁷ Rodrigo asked. "Someone at school — maybe Laz⁸⁸ — mentioned it. I got it out of the library and added it to my reading pile at home."

"That's the one," Giannina said. "It's long, and so I started to skim it, the way I sometimes do for articles that seem a little off my immediate course right then. But it riveted my attention. I ended up reading every word."

"Sounds like we all should," said Teresa, jotting something down on a sheet of note paper. "What's her thesis about Justice Warren?"

"It's that the towering figure and architect of much progressive Supreme Court jurisprudence, and defender of civil and constitutional liberties, suffered a serious blind spot, one that threatened to besmirch his historical record."

"And that blind spot is . . . ?" I wheedled.

"It has to do with his racial jurisprudence," Giannina replied. "But not with blacks . . ."

"I should hope not," I said. "For he was the architect of *Brown v. Board of Education*⁸⁹ and other landmark cases articulating new pro-

85. *Id.* at 569.

86. On this feature of the diversity rationale, see, for example, *id.* at 569-70.

87. Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73 (1998).

88. See Delgado, *Rodrigo's Tenth Chronicle*, *supra* note 1, which introduces "Laz," Rodrigo's colleague and best friend on the faculty. A staunch conservative, Laz (who is gay) nevertheless sympathizes with the plight of minorities and immigrants who, like his Polish ancestors, experienced economic hardship on arriving in America.

89. 347 U.S. 483 (1954).

tections for African Americans.⁹⁰ He is deservedly one of the heroes of the civil rights movement. For blacks, anyway. So I assume his blind spot, as you called it, lay elsewhere?"

"It did," Giannina replied. "Cho lays it all out. As with another famous historical figure, Supreme Court Justice John Harlan . . ."

"Author of the famous dissent in *Plessy v. Ferguson*,"⁹¹ Teresa interjected.

"Indeed," Giannina acknowledged. "A landmark in equality jurisprudence. And just as recent scholarship has shown that Harlan suffered a remarkable lapse,⁹² so did Justice Warren."

"I know that Harlan was the author of some appalling jurisprudence with respect to Asians,"⁹³ Teresa said. "What was Warren's mistake?"

"It, too, had to do with Asians," Giannina continued. "As wartime governor of California he was an enthusiastic proponent of interning Japanese and Japanese Americans, even though the evidence of their disloyalty and espionage was entirely fabricated.⁹⁴ Indeed, he was one of the principal fabricators."⁹⁵

"One of the principal fabricators?" I asked in astonishment. "What did he make up?"

"Professor Cho shows how he sent the federal government trumped-up evidence of Japanese fifth column activities.⁹⁶ She implies he wanted the Japanese out so that Anglo farmers and bankers could take over their lands and property."

"I've read Peter Irons on how much of the evidence General DeWitt relied on to convince his superiors in Washington that wartime removal was warranted was based on mere supposition or thinly veiled dislike of the Japanese.⁹⁷ What did Warren rely on?" I asked.

"Much of the same," Giannina replied. "One of his most telling pieces of evidence was a map of California he had his staff compile, with red pins showing Japanese-owned land right next to strategic installations.⁹⁸ It turned out that much of this was empty farmland, in

90. On Justice Warren's role in expanding civil rights and civil liberties, see, for example, JACK POLLOCK, *EARL WARREN: THE JUDGE WHO CHANGED AMERICA* (1979); BERNARD SCHWARTZ, *SUPER CHIEF, EARL WARREN AND HIS SUPREME COURT* (1983).

91. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

92. See, e.g., Gabriel J. Chin, *The Plessy Myth, Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 156 (1996).

93. *Id.* at 157-66.

94. See generally PETER IRONS, *JUSTICE AT WAR* (1983); Cho, *supra* note 87.

95. Cho, *supra* note 87, at 78, 107-08.

96. *Id.* at 90-91.

97. See IRONS, *supra* note 94, at 26-28, 40.

98. See Cho, *supra* note 87, at 93.

some cases located along railroads.⁹⁹ That land was undesirable, so the Japanese had bought it for a reduced price and then farmed it successfully.¹⁰⁰ Warren's map made it look like Japanese had deliberately acquired property next to strategic installations so that they could report what they saw to Japanese military authorities back home."¹⁰¹

"And what happened when this came to light?"

"Nothing. Biographers and historians treat Warren's conduct as a mere anomaly in an otherwise stellar record.¹⁰² Performed under wartime pressure, what he did was excusable, even though it caused tens of thousands of innocent Japanese to spend the war behind barbed wire, losing property and businesses in the process.¹⁰³ They say we shouldn't be presentist — apply today's standards to an earlier period."¹⁰⁴

"And so, Cho's point is that white folks make allowances for their kind when one of them missteps. They find reasons why the act was not as blameworthy as it might seem."

"Exactly," Giannina said. "It's just another way in which civil rights law and discourse safeguard the comfort and good reputation of whites."

After a pause, I prompted: "Rodrigo, I think you said you had one more way."

"I do," Rodrigo replied. "I was discussing this with Laz the other day. He was delighted by your Earl Warren example. As you know, Laz is conservative, fair-minded, and probably my best friend on the faculty. He said Warren was no hero of his, and didn't deserve his fame."

"And the two of you came up with another example?" I prompted. I was anxious to see where the young wunderkind was going.

"Yes — hate speech."¹⁰⁵

"I bet you discussed the way our great tradition of free speech protects vicious racial epithets and disparagement¹⁰⁶ — speech, in other words, that keeps minorities down. But when minorities try to use free speech to parade, sit in, or protest unfair social conditions, it turns out their speech wasn't free after all. It was either uttered in the wrong

99. *Id.* at 96-98.

100. *Id.*

101. *Id.* at 93, 101.

102. *Id.* at 78-83.

103. *Id.* at 80-81 (citing remarks by figures such as Ed Cray and Bernard Schwartz).

104. *Id.*

105. *See, e.g., supra* note 19 and accompanying text.

106. *E.g.,* Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778 (2000) (book review) (describing how the reigning legal paradigm is changing); *supra* note 19 (citing sources).

place, at the wrong time, with too much muscle mixed in, or without asking permission first."¹⁰⁷

"Minority speech, in other words, must be mannerly, decorous, prayerful, and carried out in the most public of settings without creating too much noise, litter, or commotion. The opposite of hate speech, which can be as rowdy, raunchy, and vicious as one wants," Giannina said. "Some of my friends and I were discussing this after our First Amendment class the other day."

"You can even burn a cross on the front yard of a black family, striking terror in the hearts of their children,"¹⁰⁸ Teresa added. "I'm not even a lawyer, and I know about that case."

"Have we captured your thought?" I asked Rodrigo. "Or did you and Laz have more?"

"Oh," said Rodrigo. "I was so enjoying listening to the two of you that I seem to have taken a short vacation. Yes, we had more. The other part was historical. Have you ever noticed how the terms in which literature and popular culture depict minorities vary over time?"¹⁰⁹

"I have," I said, happy to be able to amplify. "I was just reading an article by a pair of critical race theorists on exactly this subject. I think they called it the functional theory of racial imagery.¹¹⁰ The idea is that the way minorities appear in song, literature, and myth varies from period to period, depending on what white society needs at the time. In one period, slavery for example, whites have things well in hand. So, the literature of the time depicts the slaves as singing, happy, and contented with their lot.¹¹¹ Later, after Emancipation, blacks emerge as a threat. So, the dominant images change to the bestial, out-of-control black with designs on white women — images that justify brutal repression.¹¹² And so it goes with other racial groups¹¹³ — the images change to justify whatever it is whites need from minorities — labor, exploitation, extermination, land."¹¹⁴

"All designed to keep whites comfortably in control," Rodrigo concluded.

107. See, e.g., PEREA ET AL., *supra* note 15, at 754 (commenting on this irony).

108. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

109. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1261-76 (1992) [hereinafter Delgado & Stefancic, *Images of the Outsider*].

110. *Id.*; see also PEREA ET AL., *supra* note 15, at 959-1017.

111. See Delgado & Stefancic, *Images of the Outsider*, *supra* note 109, at 1262-64.

112. *Id.* at 1264.

113. *Id.* at 1267-75.

114. *Id.* at 1276.

Just then, Giannina held up a finger to ask for silence for a moment. "I think I heard him starting to stir. That usually means we have about ten minutes before he announces himself in no uncertain terms. If you're going to finish up, Rodrigo, you'd better do it now."

"Yes," I seconded. "You spoke of a third area where whites guard their own comfort level. What was it, discourse?"

III. DISCOURSE AS A PROTECTOR OF WHITE WELL-BEING

"It was," Rodrigo said. "Consider, for example, how recent civil rights discourse dwells at great length on the concept of the innocent white male."¹¹⁵

"Tom Ross wrote two articles on the subject. Half the Supreme Court — not to mention every conservative think tank in the land — seems to believe that protecting the innocent white male . . ."

"From job loss, competition for university seats, having a bad conscience,"¹¹⁶ Giannina interjected.

"Is the principal objective. It's as though the whole point of civil rights discourse has shifted from protecting blacks to protecting whites," Rodrigo continued. "But not only that, consider how the discourse of colorblindness . . ."¹¹⁷

"So much in vogue these days," Teresa added.

"It certainly is," Rodrigo agreed. "Half of my students seem to subscribe to it. Even ones who consider themselves leftists and supporters of the underdog."

"To play devil's advocate for a moment," I asked, "what's wrong with that? Sometimes it's not so bad to be colorblind. It at least prevents you from singling out other people for adverse treatment because of the color of their skin."

"When used that way, nothing is wrong with it," Rodrigo conceded. "But some people use colorblindness as a sword. Because they've convinced themselves they are colorblind, they feel no hesitation at labeling a black, for example, racist or obsessed with race, merely because she wants to raise black issues or support a black studies department at the university."

"I've seen examples of that myself recently," Giannina interjected. "I spoke at a local high school during a law day celebration. I mentioned some figures about black poverty, Latino school dropout,

115. See Thomas Ross, *Innocence and Affirmative Action*, 43 *VAND. L. REV.* 297 (1990); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 *WM. & MARY L. REV.* 1 (1990).

116. *E.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (commenting on the need to protect the expectations of the innocent white male jobseeker).

117. On colorblindness and colorblind jurisprudence, see, for example, BELL, *supra* note 5, at 131-54.

and taxis that won't stop for men of color.¹¹⁸ Several of the students were upset that I even raised racial issues. They said they were color-blind, and that I should be interested in taxis that won't stop for anybody, white or black."

"As though Euro-American looking business executives suffer that indignity every day," Rodrigo interjected.

"What other discourse strategies do you have on tap for us?" I asked. "You'd better move along, or we're likely to be interrupted by some loud baby discourse soon."

"Oh, right," Rodrigo said, stealing a quick glance at his watch. "Another is the black-white binary paradigm of race.¹¹⁹ This one is the favorite, not of conservatives, but of a certain type of liberal."

"You mean ones who identify race with black and refuse to expand analysis to include other groups of color, such as Latinos, Indians, Arabs, or Asians?" I asked.

"Precisely. This strategy protects a type of comfort Euro-Americans derive from keeping things simple. They don't have to deal with the panoply of ways in which those other groups are racialized."¹²⁰

"Such as language, for Asians and Latinos,"¹²¹ Giannina said.

"Or foreignness for those groups, and Muslims as well,"¹²² Teresa added.

"Religion, for Latinos, Native Americans, and, of course, most Arabs and South Asians,"¹²³ I added.

"Not to mention accent discrimination for many of those same groups,"¹²⁴ Teresa said.

"As well as conquest, and English Only rules and laws.¹²⁵ Features — all of them — that rarely afflict African Americans," Rodrigo went on. "Of course, some of our liberal friends try to justify their position by means of black exceptionalism . . ."¹²⁶

118. See, e.g., Courtland Milloy, *For Cabbies, Judging Fares Isn't Simple*, WASH. POST, Jan. 15, 2000, at B1.

119. See, e.g., Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino Critical Scholarship, and the Black-White Binary*, 75 TEXAS L. REV. 1181 (1997); Juan Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997).

120. E.g., Delgado, *Bell's Toolkit*, *supra* note 50.

121. *Id.* at 298, 300.

122. *Id.* at 300.

123. *Id.* at 298.

124. *Id.* at 298, 300; see also PEREA ET AL., *supra* note 15, at 551-61.

125. See, e.g., PEREA ET AL., *supra* note 15, at 541-48, 848-57; STEFANCIC & DELGADO, *supra* note 57, at 9-19.

126. See DELGADO, *supra* note 3, at 162-84 (explaining and illustrating the term).

“Right,” Teresa said. “They try to convince themselves that their favorite group is so special, so morally deserving, as to justify singular treatment.¹²⁷ Those other groups, which have been subject to lesser degrees of discrimination, can wait their turn, until blacks have been restored to the status-quo ante.”

“Which might mean waiting forever,” I pointed out. “Rodrigo, I don’t mean to cut you off, but it may be time for you to wind up. Speaking for myself, I find your demonstration provocative, if not convincing. The purpose of civil rights law and discourse today is not to improve things for historically disadvantaged groups, but historically advantaged whites. You have provided examples of material and psychological self-interest, and from the realm of discourse, all converging on your principal point. What I want to know is, what follows from this?”

Rodrigo looked around the circle quickly, and seeing the others nod agreement, began as follows:

IV. IN WHICH RODRIGO OUTLINES A CIVIL RIGHTS STRATEGY FOR AN AGE IN WHICH WHITE INTERESTS HAVE SILENTLY OCCUPIED THE CENTER OF CIVIL RIGHTS THOUGHT AND DISCOURSE

“What my analysis means is that people like us should adopt strategies that take account of the new, implicit civil rights agenda,” Rodrigo began.

“Either that or try to change that agenda,” Giannina added, I thought a little sharply.

“Point well taken,” said Rodrigo. “But until it changes, reformers who want to improve things for the poor community and minorities need to bear in mind that their audience sees things in changed terms.”

“And what does that mean, practically speaking?” I coaxed.

“Well, for one thing,” Rodrigo said, “it means that trying, over and over, to prove black misery and Latino destitution with statistics, figures, and examples, is counterproductive. It just makes whites feel uncomfortable. And the point of civil rights today is to guard against exactly that. The same is true for proving guilt — white guilt, I mean.”

“In other words, the reparations campaign,”¹²⁸ Teresa said.

“That and more. The restitutionary prong of affirmative action, compensation for past discrimination. All of that is out. Unless you’re proving the complicity of some specific social actor, preferably located far away, whites will never accept your findings. They will always find some way of avoiding responsibility.”

127. *Id.* at 172-86.

128. *Id.* at 179-83.

“Too much time has passed,”¹²⁹ Giannina said.

“Or the entity that did the discriminating is not the very same one being asked to make recompense,”¹³⁰ Teresa added.

“Or, the discrimination is proved — or even conceded — but by the wrong actor,”¹³¹ Rodrigo went on. “There are all these ways of avoiding unpleasantness. Which, I guess, is my point.”

“What about Martin Luther King’s strategy of raising creative tension, as he called it?”¹³² Giannina asked. “In the sixties, that proved an invaluable means of calling attention to black grievances. Civil disobedience, blacks getting hauled off to jail, courting arrests and beatings — all these forced complacent whites to come to terms with black demands.”¹³³

“Yes, but that was a different era,” Rodrigo replied. “Then, civil rights meant blacks. Half the country opposed it, but at least that’s what it meant.”

“And today,” I summarized, “things are reversed. Civil rights has come to mean taking care of white interests, white comfort. So King’s strategy wouldn’t work today.”

“I’m afraid not,” Rodrigo conceded. “Unless it rose to the level of seriously interfering with the machinery of the state. But then, of course, it would be deemed criminal or criminalized. Short of that, whites would simply find it an annoyance. Colorblindness enables them to take the moral high ground. Do anything that irritates them, and *you* are the one labeled a racist, sued for a civil rights violation, fired from your job.”

“Or labeled a hot-head with a chip on his shoulder, living and reliving the past,” I added.

Giannina stood up. “I’m afraid Junior is starting to make his presence felt. He’s probably hot and cranky.”

“Like some whites today,” I cracked. “Cranky, I mean. I think we should meet soon and outline a new civil rights strategy for our times. I just hope we don’t have to end up offering reparations to whites.”

“For troubling their consciences and taking their jobs,” Rodrigo said. “But, speaking of consciences, mine will bother me if I don’t go in there and help out Giannina.”

I looked at Teresa as he disappeared into the bedroom. “A metaphor for our times. Perhaps the one thing we can do today is take care of our own.”

129. See Delgado & Stefancic, *Home-Grown Racism*, *supra* note 75, at 712-14.

130. *Id.*

131. *Id.*

132. See PEREA ET AL., *supra* note 15, at 1097-1104 (describing this strategy).

133. BELL, *supra* note 5, at 653-734.