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STARK KARST

*Richard Delgado**

LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION. By *Kenneth L. Karst*. New Haven: Yale University Press. 1993. Pp. xii, 321. \$30.

INTRODUCTION

It is said that if you really want to know about the habits of foxes, you ought to ask a chicken. By the same token, if one is interested in learning about conservatives and the conservative agenda, one should read what the liberals are writing. No one is better at keeping tabs on the far right than a liberal, for whom the activities and agendas of the other side of the political spectrum are fundamentally important. Members of groups that are on the *far left* — like critical race theory and critical legal studies — are apt not to pay quite as close attention. For them, the differences between the moderate left and the moderate, or even immoderate, right are not that significant.¹ When the right rises up and smites one of the left's own,² this group reacts with surprise and consternation, evidence that they have not been watching what is going on.

Kenneth Karst,³ a respected liberal scholar, *has* been watching, and what he sees and writes makes sobering reading. Everyone, even — perhaps especially — my friends on the critical and postmodernist left, should read his work. His new book, *Law's Promise, Law's Expression: Visions of Power in the Politics of Race, Gender, and Religion*, examines in chilling detail what he calls the "social issues" agenda of the new right (p. ix-x), especially in its symbolic or expressive dimension. Written before the recent election swept Republican majorities in to both houses of Congress with what many considered mandates to enforce family values, cut welfare, get tough on crime, and roll back affirmative action, Karst's book is practically prescient on the country's recent right-

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1. See, e.g., Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929 (1990) (arguing that no great difference exists between the two dominant political parties with respect to issues of racial justice).

2. See, e.g., Clint Bolick, *Clinton's Quota Queens*, WALL ST. J., Apr. 30, 1993, at A12 (launching successful opposition to nomination of Lani Guinier for office of Assistant Attorney General).

3. David G. and Dallas P. Price Professor of Law, UCLA School of Law.

wing surge.⁴ Among the matters he discusses are the right's drive to control women's reproductive faculties by opposing abortion and workplace reforms aimed at helping working mothers (pp. 31-56). He examines how the counterrevolution has been rolling back blacks' 1960s civil rights gains and depicting the African-American poor as oversexed opportunists and leeches (pp. 67-111). He shows how conservatives have rallied against gays in the military (pp. 27, 124-37) and women in combat jobs (pp. 112, 116-24).

Karst also traces the rise of the religious right and the gains they have made in such areas as prayer in schools (pp. 28, 147-48, 154, 158), moments of silence (p. 208), official celebrations of Christmas (pp. 148, 150, 154-56, 159-60), and opposition to gay marriages, gay rights ordinances, and the abolition of sodomy laws (pp. 14, 20, 58-61, 64-65, 182-87). He discusses the right's revival of Cold War sentiment and their campaign against recognizing the harm of sexual harassment in the workplace (pp. 42, 110, 122) and racist speech on campus and elsewhere (pp. 96-103). He describes further elements in the counterrevolution: the campaign in favor of neighborhood schools and against busing (pp. 27, 69, 90-94), the resistance to diversified student bodies and curricula at universities (pp. 103-06), and the role of TV evangelists in aiding the election efforts of fundamentalist political candidates and those who support "family values" (pp. 16, 21-22, 159). He shows how right-wing groups demonize the poor (pp. 69, 137-46), bash Hollywood (p. 139), and attack publishers and radio stations guilty of "indecentcy" (pp. 44, 89, 100). He discusses the role of right-wing lobbyists (pp. 25-26, 44), telephone trees, and letter-writing campaigns (pp. 22-23). He depicts the rise of skinheads and other Aryan supremacist groups (pp. 34-35, 47, 98), and he describes the new right's efforts to equate poverty and immorality (pp. 137-46), to require respect toward the American flag and other symbols of authority (pp. 160-70), and to oppose what they consider the glamorization of premarital and extramarital sex (pp. 137-39). Finally, Karst teaches us about tough-on-crime measures and politicians who pander to white suburbanites' fear of black criminality (pp. 68, 74, 85).

The combined effect of all this description, rendered in generally good, clean prose, is sobering, to say the least.⁵ Karst has done his readers an incalculable service by bringing to the fore the full

4. I say "practically" because Karst's book ends on a note of optimism. See pp. xii, 187-211 (reading a few recent Supreme Court cases, including concurrences and dissents, as evidence that the courts are beginning to slow their rollback of civil rights and civil liberties). For a somewhat similar book that does not succumb to the temptation to end on an optimistic note, see ANDREW HACKER, *TWO NATIONS, BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992).

5. A few developments are absent from Karst's treatment: opposition to broadening the academic canon and to new modes of scholarship; resistance to Afrocentric schools and curricula; the increase in suburban communities that build walls and gates to keep out un-

panoply of fronts on which right-wing think tanks, congregations, and citizen groups have been waging cultural wars. Even my leftist friends can learn from this book. Many of us have been so caught up in fretting over liberalism's faults — its short attention span, its lack of staying power, and so on — that we may not have noticed what the right has been doing. If we are discontent with liberalism, Karst might say, we have not seen anything yet. As a timely, well-organized treatment of the activities of one-half of the political spectrum, then, the book rates a solid "A." It is on the level of interpretation — of understanding how we should see what is happening, and of identifying an appropriate response — that the book falters. In setting out my reservations about Karst's book in these two respects — interpretation and remedy — I do not wish to be misunderstood. I have been a critic of some of Karst's previous work.⁶ This book, however, is a spectacular, sound, engaging, and alarming work. The following observations are meant not so much as criticisms but as comments that Karst and others concerned over the right-wing counterrevolution may wish to address in future writing.

NEEDED: A BETTER THEORY OF INTERPRETATION AND REMEDY

As important as *Law's Promise* is in sounding a warning and analyzing the growth of the New Right, there are nevertheless issues that it does not treat fully. These include the question of cultural causation of the trends Karst details; the connection between symbolic and real-world entrenchment; and the issue of remedy — why can't progressives simply talk back to the conservatives, marshaling their own symbolism to combat the powerful messages and programs of their counterparts on the right?

A. Causation: Why Is the Right-Wing Surge Taking Place Now?

Karst, a committed liberal whose previous work champions the rights of gays, minorities, and women,⁷ is obviously concerned about the implications of his own studies. The pattern of right-wing advance worries him because of its potential to render America even more unequal than it is now.⁸ But his tools for representing

desirables; the growth of right-wing student presses and associations of scholars; the NRA's opposition to gun control; and the English-only movement.

6. See, e.g., Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (criticizing Karst and other white male academics for ignoring the work of minority scholars, especially on civil rights issues).

7. E.g., KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989); Kenneth L. Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

8. Karst is the principal proponent and champion of the constitutional right of equal citizenship. See *supra* note 7.

and countering what is taking place are not as sharp as they might be. Many of his interpretive devices are sexual and Freudian. Thus, for example, Karst portrays the backlash against women and gays in terms of the sexual insecurities of worried men anxious to preserve the gender line (pp. 31-66). He describes the development of an ideology of manhood and the way in which society has come to equate masculinity with power (pp. 33-34). He presents the backlash against minorities in somewhat similar terms: blacks represent passion, a type of animalistic sexual freedom that likewise worries repressed whites (pp. 5-6, 72-74, 86-87). Hence, whites adopt a host of repressive measures aimed at keeping blacks "in their place."

There is nothing wrong with trying to understand human phenomena in terms of psychological mechanisms like sexuality and fear of loss of control. But these explanations can account for at most only a part of what we are seeing today. Active, self-assured women have long threatened certain types of men.⁹ By the same token, society has associated minorities of color with sexuality for centuries in hundreds of scripts, stories, narratives, and myths.¹⁰ Finally, homosexuality has long inspired fear and disgust in many men.¹¹ The associations Karst identifies greatly antedate the current rise of conservatism, so something else must be at work. What could it be?

Some lay the blame for the rise of the new right on poor leadership,¹² the United State's economic decline,¹³ or the excesses of the sixties.¹⁴ Others emphasize the contribution of conservative and neoconservative think tanks, which have been shrewdly and effectively promoting the right-wing agenda.¹⁵ I believe these explana-

9. See, e.g., SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991) (describing the way in which many are working to roll back the gains of the women's movement).

10. 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 *Images*].

11. See, e.g., Marc A. Fajer, *Can Two Real Men Eat Quiche Together?, Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 *U. MIAMI L. REV.* 511 (1992).

12. That is to say, halfhearted leadership on civil rights and related issues by the Clinton, Bush, and Reagan administrations. See, e.g., pp. 1-2, 20-25, 28-31, 129-30.

13. On the "socioeconomic" theory of racial and interclass hostility; see Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 *WIS. L. REV.* 1359, 1378-79.

14. E.g., pp. ix, 1, 9-11.

15. Ellen Messer-Davidow, *Manufacturing the Attack on Liberalized Higher Education*, 36 *SOC. TEXT* 40 & nn.3-6, 41 (1993).

tions all have merit: Reagan-era officials told ethnic jokes;¹⁶ Bush was no friend of minorities, condemning the Civil Rights Bill of 1991 as a "quota bill";¹⁷ and, throughout our history, nativism, racism, anti-immigrant sentiment, and America-first attitudes have flourished during times of economic upheaval.¹⁸ Yet, I believe that more accounts for the social-agenda surge that Karst chronicles. For one thing, we are not currently in particularly hard times, at least when one considers broad, aggregate measures such as growth in the GNP or levels of unemployment.¹⁹ Instead, we have qualitative shifts in types of employment, as industries move from the cities to the suburbs, lay off middle management, downsize, farm certain operations out to developing countries, and begin to rely more on service than factory products.²⁰ All this entails considerable anxiety on the part of workers, anxiety that can easily discharge itself in the form of antiforeigner and antiminority sentiment and behavior. Moreover, the dramatic increase in the sheer number of foreigners and minorities — who, according to demographers, could outnumber whites by the middle of the next century²¹ — fuels these fears. Struggling whites perceive that there are more minorities because there are; they perceive that minorities sometimes win jobs at the expense of whites because this in fact does happen more frequently today than in the past.

At the same time, the collapse of the Soviet empire means that the United States need no longer behave in exemplary fashion toward its own domestic minorities. For several decades, beginning shortly after the end of World War II, the United States was engaged in the Cold War with the Soviet Union for the loyalties of the Third World, much of which was black, brown, or Asian.²² Lynchings, beatings, and other forms of highly visible mistreatment of blacks and Mexicans gave the United States a black eye; the Soviets

16. Melinda Beck, *James Watt's Last Gaffe?*, NEWSWEEK, Oct. 3, 1983, at 45; Sydney Schanberg, *Oratorical Mistakes*, N.Y. TIMES, June 5, 1982, at 23; *Verity Apologizes for "Jap" Remark*, L.A. TIMES, Oct. 17, 1987, at 22.

17. *Civil Rights Bill Passes House, Vote Not Veto-Proof, Bush Calls Measure a Quota Bill*, FACTS ON FILE WORLD NEWS DIG., June 6, 1991, at 416 E-1; Adam Clymer, *Rights Bill Passes in House But Vote is Not Veto-Proof*, N.Y. TIMES, June 6, 1991, at A1.

18. On nativism and anti-immigrant sentiment, see *Images*, *supra* note 10, at 1261-75.

19. I am grateful to Bill Ong Hing for pointing out these statistics and their relevance to me. Bill Ong Hing, untitled manuscript (1994) (on file with author).

20. *Id.*

21. On the increase in minority populations, see *America's Challenge, The New Face of America: How Immigrants are Shaping the World's First Multicultural Society*, TIME Special Issue, Fall 1993, at 3, 5; Felicity Barringer, *Census Shows Profound Change in Racial Makeup of the Nation*, N.Y. TIMES, Mar. 11, 1991, at A1, B8.

22. *E.g.*, Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (describing the relation of Cold War politics to domestic desegregation efforts); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (same).

capitalized on these cruelties and made it difficult for us to maintain that we were better than godless communism.²³ Now, of course, the Cold War has ended, and, along with it, any need to compete, on a level of image, with the Soviets.

Karst disavows any intent to offer a comprehensive explanation of the nation's right turn (pp. ix-x). Yet, some such explanation is necessary — without it the reader might develop the impression that these changes are merely temporary aberrations rather than the long-term products of structural changes.

B. *Why Worry About Symbolism?*

The social forces just mentioned — the qualitative shift in the labor market and the end of the Cold War — fuel the sharp rise in conservative and antiminority sentiment Karst describes, so that the conservatives' campaign of symbolic expression has met a receptive audience. Should we be concerned about the proliferation of conservative sentiment and symbolism? Perhaps we should simply let it play itself out. Karst would say no, as would I. The campaign of conservative symbolism is much more than mere talk. It prepares the way for action.²⁴ When a conservative parents group, for example, succeeds in getting the high school choir to sing "Silent Night" at a holiday service, this sends a message to at least one minority — Jews. But it also encourages and gives permission to other reactionary forces to work harder on other fronts, such as supporting the English-only movement, rolling back multiculturalism and affirmative action at schools and on campuses, opposing abortion, and "standing up" to gays, lesbians, and other minority groups. During the civil rights decade, racism and sexism were affirmatively discouraged. Then they were spoken in code.²⁵ Now it is not even necessary to speak in a veiled fashion — the reader is invited to consider how many outspoken antiminority and antigay letters to the editor published in the local newspaper he remembers in the last one-year period, and compare them, say, to the level he observed ten or fifteen years ago. It is not just the expressive climate that has been changing, however. The expressive changes have been accompanied by real-world ones: gay bashing, rollbacks in campus multiculturalism, changes in spending and hiring priorities

23. Bell, *supra* note 22; Dudziak, *supra* note 22, at 88-90.

24. See pp. 2-3, 17-18, 95, 186-187; cf. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 136-49 (1982); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 458-72; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323-41 (1989).

25. See Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673 (1985) (discussing subtle or latter-day racism).

and in who gets elected to state and national offices.²⁶ Karst is correct in focusing on the expressive dimension of our national discourse, because this dimension paves the way for material and political changes that figure importantly in the way poor people and minorities lead their lives. A nation that spoke of minorities respectfully would almost not need civil rights laws; in one that deems and insults minorities at every turn, even the most solicitous of judges will be unable to afford much protection.²⁷

C. *Karst's Remedy*

What, then, should be done about the growing power of the new right? If the ultraconservative program has been paving the way for tangible reverses of civil rights, separation of church and state, women's liberation, and other values liberals hold dear, some response would seem in order. Karst is commendably clear on what he thinks should be done. Progressives should enter the fray, countering the right's expressive campaign with one of their own.²⁸ They should also try to arrange society so that daily life will contain many "conversations" among minority groups and those in the mainstream — in the workplace, in schools, and in other public and private arenas — through school desegregation, affirmative action, and constant enforcement of the nation's antidiscrimination laws.²⁹ Statutes and decrees that place whites and blacks, men and women in close proximity to one another in schools and in workplaces can dispel stereotypes. They can assure that citizens get to know one another and begin to see that members of other groups are like everyone else — some good, some bad. Such laws can promote dialogues and enable the kind of close observation — like seeing a family picture on the desk of a black co-worker — that reduces prejudice.

Finally, courts should skeptically and searchingly review local and state laws that express exclusion and hostility toward women, gays, and minorities.³⁰ Opinions such as *Brown v. Board of Educa-*

26. *E.g.*, DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991) (criticizing the multicultural movement and affirmative action's dangers and excesses); LAURA LEDERER & RICHARD DELGADO, *THE PRICE WE PAY: THE CASE AGAINST HATE SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* (forthcoming 1995) (detailing the rise in anti-Semitic, racist, and antigay slurs and assaults); Charles V. Zehren, *Cultural forces helped unleash GOP landslide*, DENVER POST, Nov. 24, 1994, at 25H.

27. See Richard Delgado & David Yun, *The Neoconservative Case Against Hate Speech Regulation — Lively, D'Souza, Gates, Carter and the Toughlove Crowd*, 47 VAND. L. REV. 1807 (making this point).

28. See, *e.g.*, pp. 62, 91-95, 105-09, 172.

29. *E.g.*, pp. 105-11, 115, 207.

30. For examples of past court rulings that have accomplished this expression, see pp. 91-94, 140, 176-77, 180-82, 186-87.

tion³¹ and *Roe v. Wade*³² signal powerfully to the rest of society how it should think about blacks and women. When the people of Colorado enact a referendum denying gays and lesbians the right to enact antidiscrimination laws, that sends a message. When a Colorado judge declares the measure unconstitutional, that sends another one (pp. 182-87, 200).

Progressives *should* engage in their own expressive campaign, legislatures *should* pass statutes that encourage dialogue, and the judiciary *should* actively protect civil rights. But these strategies have difficulties that Karst glides over, difficulties that have a common core. Consider the first measure, that liberals speak out against injustice, racism, and other social ills. There is no doubt that reactionary groups are marshaling the expressive force of law to subordinate gays, keep women marginalized, blame minorities for their condition, and portray black — not white — crime as a major social threat. Yet, the solution that Karst proposes — that progressives “talk back,” get their own meanings in circulation — glosses over something important. What it leaves out is similar to what his second suggestion, about enforced mixing, also leaves out — namely a theory of how this will happen.

Recent writing about First Amendment theory as it relates to law and social reform has been addressing why narratives — reform-minded stories, tales, briefs, arguments, and exhortations — are such an ineffectual way of changing consciousness.³³ The system of free expression, it seems, is most useful in connection with redressing small, not large, systemic errors — more useful in addressing clearly bounded disputes rather than larger problems like racism and sexism.³⁴ For example, speech and dialog are quite helpful in deciding whether parking in one spot is safer than another or whether a light object falls more quickly than a heavy one in a vacuum.³⁵ They are much less useful for dispelling racial stereotypes and other forms of systemic distortion. Prejudice is woven into the system of narratives by which we, as a society, understand reality. These scripts form part of the master narrative; anyone who speaks out against them is heard as saying something outrageous or incoherent, something that cannot be said — or understood — in the current paradigm.³⁶ The stock of stories that we have internalized, including stories about race, is deeply imbedded. It forms part

31. 347 U.S. 483 (1954).

32. 410 U.S. 113 (1973).

33. See, e.g., *Images*, *supra* note 10; Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEXAS L. REV. 1929 (1991).

34. *Images*, *supra* note 10, at 1259.

35. *Id.*

36. *Id.* at 1259-61, 1281.

of the common wisdom — the baseline from which we judge and accept or reject new stories, such as that blacks are as nice, intelligent, and hardworking as anyone else, or that gays and lesbians just want to be left alone like anyone else, have no aggressive agenda, and do not want to convert children to their orientation and lifestyle.³⁷

In an important sense, we are our stock of stories. New stories that deviate from those stories we already hold strike us as alien, extreme, and political. Thus, an individual who believes that blacks are lazy, unmotivated, and dumb — because he has heard and internalized hundreds of stories, plots, and narratives to this effect — when confronted with a high-achieving African American will simply pronounce him an exception.³⁸ We can only change our stock of beliefs, presuppositions, and interpretive structures very slowly, in part because they form the very basis for our evaluation of new accounts and new narratives that challenge what we believe.³⁹

This insight, which refutes what I have described as the “empathic fallacy,”⁴⁰ bodes ill for Karst’s suggestion that liberals simply raise their voices. But it also raises a puzzle, namely, why conservative stories — racist, paranoid, poor-baiting ones — have established themselves so readily in recent years. Why has it proven so easy for conservatives to persuade the rest of society that the poor are lazy, that affirmative action is reverse discrimination, and that forced prayer in school is a good idea, among other things? I believe the answer is twofold. First, as critical race scholars claim, it may be that racism — and other similar sentiment — is ordinary and natural in the United States rather than exceptional.⁴¹ If so, the increase in conservative, antiblack, anti-affirmative action sentiment may evidence only a return to business as usual. It would be merely because the current retrenchment comes so soon after the civil rights decade of the sixties that the changes Karst describes stand out so starkly. It may also be that conservative messages simply resonate more with the American people than liberal ones do. Conservative messages evoke a distant past, a time when things were better, a time we now see through a sort of rosy glow. Liberal messages ask us to move to a situation in which we have never been. Naturally, messages like this arouse anxiety.⁴²

37. See *id.* at 1279-82.

38. *Id.* at 1287.

39. *Id.* at 1277-81.

40. *Id.* at 1281 (defining the empathic fallacy as the belief that persons can reform their own beliefs merely through free speech and open dialogue).

41. Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1393-96 (1991) (book review); see also Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373-74 (1992).

42. I am grateful to Jean Stefancic, who brought this possibility to my attention.

Karst's call for law reform faces some of the same impediments as his demand for progressive symbolic expression. Law does teach, does have a powerfully symbolic dimension, as Karst points out.⁴³ It is also certainly true that progressives ought to try to have their values enshrined in the law. Yet, they ought not place great faith in law's efficacy, even during times like the sixties when the courts were occasionally disposed to hand down decisions beneficial to minorities and the poor. *Brown v. Board of Education*,⁴⁴ for example, brought about little change in black-white school assignment; black children are as likely to attend segregated schools, particularly in the North, as they were before that landmark decision.⁴⁵ Local officials interpreted *Brown* the only way they could — in accord with their common sense — namely to require desegregation that was as deliberate as possible, as narrow as possible, and that disrupted school assignment, curricular, disciplinary, and other practices as little as possible.⁴⁶ *Brown* even may have worsened minorities' predicament by sending a symbolic message that formal racial equality had arrived. Conservatives and racists were furious, redoubling their efforts out of the belief that the Court had done something unprincipled. At the same time, many civil rights defenders relaxed, believing that society had achieved racial equality. Indeed, society now seems ready to blame blacks for their poverty and despair. With all these beneficial decisions and laws on the books, what can be done if blacks are still miserable and struggling?⁴⁷

On a thousand fronts, local officials and individual actors sabotaged *Brown*, causing it to lose whatever efficacy it might have had.⁴⁸ All landmark decisions that go against the social grain of the nation risk this fate. They are handed down against a background of narratives, social practices, and understandings that weakens the surprising decision and causes it to have less efficacy than its backers had hoped. For reform to occur, "everything must change at once."⁴⁹ But the law cannot change everything at once. The doctrines of standing, mootness, ripeness, and case and controversy as-

43. *E.g.*, pp. 43-65, 117, 140-42.

44. 347 U.S. 483 (1954).

45. On the relatively slight direct effects of *Brown*, see Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9-10 (1994).

46. For a discussion of this and other social forces that limited *Brown's* efficacy, see Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995).

47. *Id.* at 547-48.

48. *Id.* at 550-51, 555.

49. *Id.* at 554-58, 568 (pointing out that otherwise, the cultural weight of unchanged narratives and practices erodes any gains).

sure that courts can resolve only the disputes before them.⁵⁰ Landmark decisions succumb quietly and ineluctably to cultural weight, just as other narratives face resistance when they deviate too sharply from the familiar ones, the ones we hold dear.⁵¹

Cultural weight similarly problematizes Karst's remaining suggestion, institutional integration.⁵² It is certainly desirable to have people of all races, sexes, ages, and sexual orientations working together. Yet, social scientists no longer believe that this approach — the "social contact" hypothesis, which formed the basis for institutional integration in the early 1960s — has much efficacy. Placing blacks and whites side by side can actually increase racial friction, at least unless the situation is highly structured.⁵³ Instead, most social scientists today subscribe to a "confrontation" theory for reducing racism, according to which racist behavior and expression are remarked, noted, and challenged.⁵⁴ For social contact to work, the contact must be between persons roughly equal in status and take the form of cooperative work toward a common objective, such as winning at sports.⁵⁵ Social contact, by itself, just like an impeccable moral argument, is unlikely to bring about great change. Change must be built into the structure — just as messages and narratives cannot change beliefs unless beliefs are ready to change. Thus, things are even more difficult than Karst recognizes, at least at the remedy stage. Sometimes, destruction — of a comfortable premise, like a familiar job setting — precedes reconstruction; sometimes the discomfort level of persons within the system must be raised, or the social environment radically restructured, before reform has a chance of success.

A MORE CRITICAL APPROACH

Narrative scholars associated with critical race theory have hit upon something analogous in legal scholarship, namely counter-storytelling.⁵⁶ Many writers in the legal storytelling movement tell stories *simpliciter* — of how it felt to be discriminated against, for example, or to be an "affirmative action baby."⁵⁷ These first-person "agony" tales may have some limited effect, especially with readers

50. On these doctrines, see RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW* 1026-73 (3d ed. 1989).

51. See *supra* text accompanying notes 34-39.

52. See *supra* text accompanying notes 27-31.

53. See Delgado et al., *supra* note 13, at 379, 1385.

54. *Id.* at 1386-87.

55. *Id.* at 1386.

56. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412-16 (1989) (coining term).

57. See, e.g., STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991).

who are already disposed to be sympathetic. But CRT writers have also been deploying a different form of tale or narrative, one not aimed so much at telling the reader how it feels to be black or to experience discrimination. Rather, the new form aims at challenging one or more narratives of the majoritarian faith, stories the reader holds simply because he or she is a member of the culture.⁵⁸ Thus, many stories by Derrick Bell,⁵⁹ Patricia Williams,⁶⁰ and other writers of color⁶¹ mock, discomfit, and cast doubt on received wisdoms such as: without intent no discrimination; the situation of black people in this country is getting better and better; and we have all the race reform laws and programs that we need. The theory behind these counternarratives is that destruction sometimes precedes construction, that unless one challenges the narrative base — the collection of countless stories, images, plots, and tales that constitute the audience's preunderstandings about race — one's more affirmative suggestions will meet at best an indifferent response.⁶² Karst's talk-back suggestion, then, goes but halfway.

Karst's institutional remedy does as well. Early on, social scientists realized that simply mixing the races — placing them side by side in workplaces and schools — did not reduce prejudice and, in fact, often increased it.⁶³ What was needed was equal status contact in pursuit of common goals, such as in sports or the military.⁶⁴ Recently that view of restraining racism has given way to a different approach that holds that racism will not abate unless settings are structured so as to challenge racism's every manifestation quickly and reliably.⁶⁵ The trouble with Karst's proposals, then, is that he assumes improvement will happen all by itself. He takes little account of the way in which culture and preunderstandings resist change. He downplays history's teaching that civil rights triumphs are almost invariably followed by backsliding, at the end of which the supposed beneficiaries are little better off than they were before, and sometimes worse off. He accurately chronicles our cur-

58. Delgado, *supra* note 56, at 2413-15.

59. See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

60. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

61. See, e.g., Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992); Delgado, *supra* note 56, at 2411-14 (tracing the history of legal storytelling among current minority scholars to early narratives on the slave chronicles); Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

62. Delgado, *supra* note 56, at 2412-29.

63. See *supra* text accompanying note 53.

64. See *supra* text accompanying note 55.

65. See *supra* text accompanying note 49.

rent condition and the remarkable strides that forces of reaction have made.⁶⁶ His suggestions about what we should do, however, could stand an infusion of critical suspicion. They do not go far enough; they assume things will be easier than they will actually be. His suggestions miss history's lesson that merely talking back is rarely enough, that putting blacks and whites together will not solve racial problems, and that cultural momentum tends to continue — merely repeating, earnestly and seriously, the Truth will not sweep its momentum away.

Like many majoritarian progressives, Karst underestimates America's predicament. He understands very well its depth — and for this, we as readers should be grateful. But he underrates the effort that will be required to lift us from our present condition.

66. See *supra* text accompanying notes 2-5.