



## Alabama Law Scholarly Commons

---

Articles

Faculty Scholarship

---

1998

### Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley

Richard Delgado

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

Follow this and additional works at: [https://scholarship.law.ua.edu/fac\\_articles](https://scholarship.law.ua.edu/fac_articles)

---

#### Recommended Citation

Richard Delgado, *Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley*, 93 Nw. U. L. Rev. 215 (1998).

Available at: [https://scholarship.law.ua.edu/fac\\_articles/382](https://scholarship.law.ua.edu/fac_articles/382)

This Article is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Alabama Law Scholarly Commons.

## RODRIGO'S ROADMAP: IS THE MARKETPLACE THEORY FOR ERADICATING DISCRIMINATION A BLIND ALLEY?

AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE.  
By Stephan Thernstrom & Abigail Thernstrom.  
New York: Simon & Schuster, 1997. Pp. 545. \$32.50.

WHAT IT MEANS TO BE A LIBERTARIAN: A PERSONAL  
INTERPRETATION. By Charles Murray. New York: Broadway Books,  
1997. Pp. 170. \$12.00.

*Richard Delgado\**

### SOLILOQUY

*It had been a glorious day in this quaint town in the Great Northwoods of Michigan. Sunshine filtered through the massive hardwood trees, giving the underlying grounds a dappled effect. Stately, flat-bottomed clouds punctuated the sky moving slowly as though keeping time with the hands of the great clock at campus center. The sudden peal of distant chimes reminded me that the final session of what had turned out to be a surprisingly stimulating academic conference on privatizing hydroelectric energy production was drawing to a close. I had decided to attend because—aside from being on sabbatical and in the region visiting friends—I was interested in environmental theory, having done a small amount of writing in this area earlier in my career.<sup>1</sup> My hope that this northern midwestern location would draw some representatives of the famous Chicago school of "law and economics"<sup>2</sup> had been realized. In fact, the closing panel fea-*

---

\* Jean N. Lindsley Professor of Law, University of Colorado Law School. J.D., 1974, U.C.-Berkeley School of Law. I am grateful to Gabe Carter and Ida Bostian for invaluable editing and research assistance in preparing this article.

<sup>1</sup> For a sampling of critical writing in this area, see, for example, Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69 (1991); Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75 (1996); Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209 (1991); Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721 (1993).

<sup>2</sup> See, e.g., RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) [hereinafter EPSTEIN, *FORBIDDEN GROUNDS*]; RICHARD EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995) [hereinafter EPSTEIN, *SIMPLE RULES*]; RICHARD

*tured two individuals whom I had most hoped to see—Richard Posner and my friend Rodrigo's<sup>3</sup> colleague, Lazlo Kowalski, a young scholar with a growing reputation.<sup>4</sup> As expected, they came out in favor of free market solutions with minimal regulation of the hydroelectric industry.*

---

POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986) [hereinafter POSNER, *ECONOMIC ANALYSIS*]; RICHARD POSNER, *THE ECONOMICS OF JUSTICE* (1981) [hereinafter POSNER, *ECONOMICS OF JUSTICE*].

<sup>3</sup> See Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) [hereinafter Delgado, *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 the base high school, then attended an Italian university and law school on government scholarships, graduating fourth in his class. When the reader meets him, he has returned to the United States to investigate graduate law (L.L.M.) programs. At the suggestion of his sister, veteran U.S. civil rights lawyer Geneva Crenshaw, see DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) [hereinafter BELL, *AND WE ARE NOT SAVED*], he seeks out "the professor" for advice. Despite their age difference, the two become good friends, discussing affirmative action and the decline of the West, see Delgado, *Chronicle*, *supra*; law and economics, see Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993) [hereinafter Delgado, *Second Chronicle*]; love, see Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993) [hereinafter Delgado, *Third Chronicle*]; legal rules, see Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) [hereinafter Delgado, *Fourth Chronicle*]; the critique of normativity, see 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 of color, see 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, see Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994); black crime, see Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994); the rule of law, see Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994); narrative jurisprudence, see 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)); affirmative action, see Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995) [hereinafter Delgado, *Tenth Chronicle*]; clinical theory, see Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996) [hereinafter Delgado, *Eleventh Chronicle*]; the problem of desperately poor border settlements, see Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997); formalism, see Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism and Law's Discontents*, 95 MICH. L. REV. 1105 (1997) [hereinafter Delgado, *Thirteenth Chronicle*]; the recent right-wing surge, see Richard Delgado, *Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 HARV. C.R.-C.L. L. REV. 275 (1997); racial mixture and assimilation, see Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) (reviewing LOUISE ANN FISCH, *ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE* (1996)); and alternative dispute resolution, see Richard Delgado, *Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391 (1997) (unnumbered tribute to the late Professor Grillo, over the next five years. During this period, the brash, talented Rodrigo earns his L.L.M. degree and embarks on his first teaching position. The professor meets Rodrigo's friend and soulmate "Giannina," and learns that Rodrigo's family immigrated to America via the Caribbean. His father Lorenzo looks black and identifies as such, but speaks perfect Spanish.

<sup>4</sup> See Delgado, *Tenth Chronicle*, *supra* note 3, at 1713-14, introducing Rodrigo's friend and colleague, Lazlo Kowalski ("Laz"). A young professor in his early years of teaching, Kowalski resembles

*My interest whetted by an earlier conversation with Rodrigo, I had been reading up on the law-and-economics movement, which has ascended to a position of great prominence in the legal academy over the last twenty years, and hoped to gain some additional insight from the conference speakers. Although I found the law-and-economics scholars' work elegant and even logically compelling, some of their underlying assumptions concerning human nature and motivation troubled me. If the premises from which these scholars derived their views of deregulation and market efficiency as moral imperatives were wrong, did this mean that their advocacy of free-market mechanisms at the expense of environmental and other forms of regulation was fatally flawed?*

*In particular, I was skeptical of the notion that "rational" actors in a free market would always, or even generally, act in a self-interested manner to maximize satisfaction, and that this would result in a greater social good.<sup>5</sup> If the hope that we would do better by doing less—that society would be better with less government—was wrong, then the implications were massive. Perhaps it was my romanticism for the civil rights spirit of the 1960s. Perhaps I was simply set in my liberal ways. Nevertheless, I had great difficulty with the notion that eliminating governmental intervention would lead to greater good for those already at the bottom of the social heap—women, gays, the poor, the homeless, racial and ethnic minorities, and new immigrants.<sup>6</sup> I still felt in my bones that it was necessary to provide for government regulation of human nature, which I perceived as much more complex than the blithe prose of law and economics suggested.*

*It seemed to me that people act for a variety of reasons, some economic, some emotional, and others that can only be described as incomprehensible. Any attempt to assume human motive seemed inherently problematic; we cannot, after all, look inside another's head or heart.<sup>7</sup> To bypass this problem, the law-and-economics scholars employ the market as the medium for communicating human preferences.<sup>8</sup> Assuming that autonomy is not impaired by force or coercion, the market becomes a proxy for inferring volition or motive on the part of individuals engaged in transactions. Further assuming that the parties have sufficient information to act*

Rodrigo in his brilliance and love of ideas, but is politically conservative. Despite their differences, the two are fast friends.

<sup>5</sup> See, e.g., POSNER, *ECONOMIC ANALYSIS*, *supra* note 2, at 3-13.

<sup>6</sup> See Jeremy Pelofsky & Vincent del Giudice, *Fed. Chief Decries Racial Bias*, *BOULDER DAILY CAMERA*, Jan. 17, 1997, at 9B. (Federal Reserve Chairman Alan Greenspan criticized racial discrimination in the workplace as inefficient and lamented that "business and financial industry decisionmakers are subject to some inertia in expanding their vision to seek talent wherever it lies.")

<sup>7</sup> "Economics does not seek to depict states of mind; it is concerned with what people (even animals) do, not what they feel or think. To complain that economics does not paint a realistic picture of the conscious mind is to miss the point of economics . . ." Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 *HARV. L. REV.* 1431, 1439 (1986) [hereinafter Posner, *Ethical Significance*].

<sup>8</sup> See POSNER, *ECONOMIC ANALYSIS*, *supra* note 2, at 3-11.

upon, the motive for any free market transaction is presumably that both sides will be made better, or at least not worse, off.<sup>9</sup> Moreover, encouraging a system of such exchanges is calculated to increase the wealth or utility of society as a whole.

I am not at all averse to economics or economic theory, which I regard as a particularly powerful way of conceptualizing our lives under a capitalist system. What bothered me was its expanding application to apparently non-economic phenomena, such as racial discrimination. Beginning with Gary Becker's ground-breaking work in 1957,<sup>10</sup> law and economics had come to dominate discussion in many areas that I, at least, felt were ill-suited to that form of analysis. Like most humanists, I found something disturbing about applying cost-benefit treatment to phenomena such as human emotions. In particular, I was perturbed by how easily so many accepted that economic analysis could explain the mysteries of human nature. If we have not been able to make significant headway in unraveling many of the most intractable—and some would say delicious—secrets of life in over two thousand years, why would one suppose that economic theory could succeed? Perhaps I was again being merely romantic, but I rebelled against the thought of reducing human complexity to numbers and graphs. Indeed, I thought it dangerous to allow economics to dictate non-economic social realities, such as race relations, as a growing chorus of conservative voices in think tanks and Congress were beginning to urge, many going so far as to insist on the complete repeal of all our civil rights laws.

As the final afternoon discussion came to an end, the sun was just dipping below the stone facade of the clock tower. The hands read 5:35 but I was feeling weary. It is remarkable how tiring it can be to sit and listen to people talk for nine straight hours—or was it my advancing age? I made a mental note to go to bed early and get a fresh start in the morning. However, I first wanted to see if I could speak with Laz, who had just finished answering questions from the audience and was smiling as everyone enthusiastically clapped. As the crowd began to disperse, he was surrounded by

---

<sup>9</sup> "Pareto superiority" is an economics term that refers to any transaction that makes at least one person better off without making anyone else worse off. A Pareto superior transaction is thus an efficient transaction that will, at least in theory, increase overall social welfare. "Pareto optimum" refers to an equilibrium situation in which it is impossible to make any Pareto improvements: we cannot make any individual better off without making someone else worse off.

<sup>10</sup> See generally GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971). After exploring the economics of racial discrimination, Becker and his followers then pushed the application of economic theory to education, fertility, household labor, criminal behavior, prehistoric hunting, slavery, suicide, adultery, and even the behavioral responses of rats and pigeons. See, e.g., POSNER, *ECONOMICS OF JUSTICE*, *supra* note 2. For example, law-and-economics scholars employing the egoist behavioral model—that all individuals act in a strictly self-interested manner—have applied economic theory to altruism, love, marriage, and numerous other human emotions and actions. Even irrationality itself has been economically analyzed in this way. See Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 *UCLA L. REV.* 1309, 1311 (1986).

a small group of students, professors, and journalists, all wanting to say something personally to him.

Deciding to seek him out later, I headed out from the lecture room into the fading sunshine in the direction of my hotel. The sound of the school band, practicing off in the distance, made me smile briefly, remembering my own undergraduate days. Too bad I did not take more courses in economics, I thought. My interest in the role of human nature in law and economics, and its possible mismatch in areas such as racial discrimination, stemmed from a 1985 article by Robin West,<sup>11</sup> in which she argues that Richard Posner, in implicitly following the Kantian moral tradition of autonomy, justified the principle of "wealth maximization" on the basis of consent. Because wealth maximizing transactions promote autonomy, they are morally attractive; and because participants in a transaction, even unwitting losers, have at least implicitly consented to the transfer in the hopes of maximizing their personal satisfaction, they are morally legitimate. Wealth maximization thus becomes, for Posner, a moral imperative with which the state should not interfere, except to correct injustices stemming from fraud, force, or other forms of interpersonal abuse that negate free choice.

The brilliant insight of West, which forms the basis of my current research, is that law and economics oversimplifies human nature. In particular, it fails to account for masochistic, self-abasing tendencies. According to West, "[W]e as a people are more authoritarian and submissive than the depictions of our nature relied upon by mainstream liberal theorists."<sup>12</sup> The "divergent phenomenological depictions of our inner lives" between mainstream law-and-economics liberals and more egalitarian social thinkers like myself, as West points out, ultimately hinge upon the "ethical significance of choice."<sup>13</sup> If consent is a moral trump, as the law-and-economics scholars assert, then free-market transactions are morally appealing and insulated from critique,<sup>14</sup> regardless of their inescapable tendency to produce winners and losers, haves and have-nots, rich and poor. West primarily focuses on the victimization side of the equation. Using the disturbing stories of Franz Kafka, she shows a "disjunction between a system that formally and outwardly insists upon the legitimating function of consent and a human personality that inwardly and persistently seeks the security of authority."<sup>15</sup> Kafka's terrifying stories illuminate the resulting alienation—the disjunction between outward descriptions and in-

---

<sup>11</sup> See generally Robin West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) [hereinafter West, *Authority*].

<sup>12</sup> Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449, 1449 (1986).

<sup>13</sup> *Id.*

<sup>14</sup> See West, *Authority*, *supra* note 11, at 386.

<sup>15</sup> *Id.* at 387.

ward experience—that typifies our modern world and is “deeply familiar” to the contemporary individual at the existential level.<sup>16</sup> West criticizes Posner’s vision of the social world as “unfamiliar” because his hypothetical characters possess “welfare-maximizing inner worlds” that correspond artificially with the overly simplified outer world of free-market economics.<sup>17</sup>

Just then, I passed a campus kiosk covered with flyers announcing a rich array of coming events, including a lecture by Dinesh D’Souza on hate-speech codes. Knowing that he would undoubtedly speak out against regulation in this area, I wondered idly what he proposed to replace it. Probably nothing, I mused. This reminded me that I wanted to explore another, implicit side of West’s equation: authoritarian, cruel tendencies in human nature.<sup>18</sup> Authority and submission are sides of the same coin. If some individuals in the modern world seek out submission to authority, then some must also seek out an authoritarian role. It is really, as economists would express it, a matter of supply and demand. If modern individuals desire submitting to authority, there must be authoritarian individuals to whom one submits. If our social structure tolerates authoritarianism, then certain individuals will be channeled into authoritarian roles while others will locate themselves on the other side, submitting to this authority. Indeed, a neo-Nietzchean such as Michel Foucault, a favorite of my friend Rodrigo, would probably argue that modern institutions of authority, such as penology or psychoanalysis, actually are designed to produce and replicate authoritarian and submissive sets of individuals.<sup>19</sup>

West explicitly and compassionately focused on the victims in Kafka’s stories, and on their needs and desires to seek out and submit to authority, as a means of criticizing Posner’s “simplistic and false psychological theory of human motivation.”<sup>20</sup> I wanted instead to focus on law-and-economics scholars’ failure to account for evil as a major factor in human motivation. In allowing such a small role for state regulation of racism and other forms of cruelty, I believed that the law-and-economics scholars were simply mistaken in holding that free markets would, by themselves, rectify such human shortcomings. They were wrong because their assumptions about human nature were seriously deficient. I had the inescapable conviction that evil, or moral wrong, was both socially constructed—racial prejudice—and biologically based—people are naturally hostile and territorial towards outsiders—and that this residual, innate hostility would not simply go away if the government retreated and let people function ac-

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 388.

<sup>18</sup> In particular, racism, which entails deriving pleasure, and sometimes material advantage, from suppressing the chances of others.

<sup>19</sup> See MICHEL FOUCAULT, *MADNESS AND CIVILIZATION* (1965).

<sup>20</sup> West, *Authority*, *supra* note 11, at 385.

ording to a free-market system.<sup>21</sup> By rendering an inadequate account of human evil, the normative implications of free-market ideologies were thus dangerously conservative.

I was shaken from my thoughts by voices. A small knot of conference-goers was converging on the hotel. My walk had taken longer than anticipated and, realizing that I had not eaten since morning, stirred a mighty hunger within me. Upon entering the hotel, I went straight to the restaurant, a homely, generic place with a menu posted on an easel that seemed to feature American cuisine. I would have preferred to go out and sample some of the local ethnic fare but my appetite was overpowering. I sat down and ordered a hot turkey sandwich and a dinner salad. After the waiter left, I looked around the room and spotted none other than Lazlo Kowalski, and who should be sitting next to him but Rodrigo! Seated in a booth on the opposite side of the restaurant, they were talking animatedly. I waited until a pause in their conversation, then half stood and waved in their direction. Laz immediately spied me, stood up, smiled, and waved for me to join them. Catching the waiter's eye to let him know I was moving, I picked up my table setting and water glass and joined my young friends.

"Professor!"<sup>22</sup> Rodrigo exclaimed, shaking my hand warmly and gesturing me to sit down. "We were just talking about you. What are you doing here? It's great to see you!"

"I'm on sabbatical and visiting some friends in the region," I answered. "I dropped by hoping to catch a glimpse of Laz and maybe learn something about environmental law. Are you attending the conference?"

"No. Giannina<sup>23</sup> and I are here for something much more mundane—her sister's baby's christening. We got in just this afternoon. I dropped by to offer Laz moral support."

"I didn't see you inside," I said.

"It's a big auditorium," Rodrigo said. "And packed. I thought Laz did a great job, especially afterward in the Q and A."

<sup>21</sup> Here, moral wrong—evil—is used in the broad sense of harming another person—physically, psychologically, or emotionally—and not in the narrow sense of "morality" that, for example, Richard Posner utilizes. Posner asserts that efficiency is an adequate concept of justice insofar as wealth maximization promotes broader social welfare by conferring benefits on others. This is because Posner assumes that "a person's income is less than the total value of his [or her] production," so that "at every stage in the accumulation of that money through productive activity, net benefits were conferred on other people." POSNER, *ECONOMICS OF JUSTICE*, *supra* note 2, at 66. The economic norm of wealth maximization is thus moral, according to Posner, because it promotes individual liberty while simultaneously enhancing aggregate social welfare. *See id.*

<sup>22</sup> Like Giannina and Rodrigo, the Professor is an imaginary character and not to be confused with any person, living or dead. As I have created him, the Professor is a civil rights scholar of color in the late stages of his career.

<sup>23</sup> *See* Delgado, *Third Chronicle*, *supra* note 3, at 402 (introducing "Giannina," Rodrigo's life companion and soulmate). A published poet and playwright, *see id.*; *see also* Delgado, *Fourth Chronicle*, *supra* note 3, at 1137, Giannina recently decided to enroll in law school. *See* Delgado, *Thirteenth Chronicle*, *supra* note 3, at 1108.



Laz grinned appreciatively, just as the waiter arrived to ask, "Are you gentlemen ready to order?"

My two young friends did, Laz a cold-cut combo, Rodrigo a steak ("medium rare, please"), after which we continued:

"So, what brought you here, Professor?" Laz asked, smiling to show that he was pleased I had shown up. "You're not switching sides, are you?"

"Not at my age, I'm afraid," I said. "Although I do have an amateur's interest in law and economics. Rodrigo and I had a long conversation once about its relation to racism and civil rights."<sup>24</sup>

"He told me," Laz replied. "Too bad I wasn't there, but we didn't know each other then."

"It would have benefited from your contribution," I acknowledged. "But if you have the time—and you, too, Rodrigo (I nodded across the table at my friend)—I'd love to revisit the issue. A number of books have come out recently. . . ."

Rodrigo held up one hand to suggest a pause, while he rummaged for a moment in his bookbag, which was resting on the floor at the foot of his chair.

"Including one I've just been reading," he said, holding up a slender black volume with familiar-looking silver printing on its cover.<sup>25</sup>

"That's one I had in mind," I said. "The other one's by Stephan and Abigail Thernstrom."<sup>26</sup> Both books advocate cutting back programs designed to assure equal opportunity for blacks and other minorities."

"I've read both of those," Laz said animatedly. "And I'd love to talk about them. Building on the framework laid down by early law-and-economics scholars such as Epstein,<sup>27</sup> Becker,<sup>28</sup> and Posner,<sup>29</sup> Charles Murray argues that the country's antidiscrimination laws ought to be jettisoned.<sup>30</sup> The Thernstroms argue that the country's commitment to affirmative action should go, too.<sup>31</sup> And it may surprise you to know that I agree, with the Thernstroms, at least."

<sup>24</sup> See Delgado, *Second Chronicle*, *supra* note 3.

<sup>25</sup> CHARLES MURRAY, *WHAT IT MEANS TO BE A LIBERTARIAN: A PERSONAL INTERPRETATION* (1997) [hereinafter MURRAY, *WHAT IT MEANS TO BE A LIBERTARIAN*].

<sup>26</sup> STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE* (1997) [hereinafter THERNSTROMS, *AMERICA IN BLACK AND WHITE*].

<sup>27</sup> See EPSTEIN, *FORBIDDEN GROUNDS*, *supra* note 2; EPSTEIN, *SIMPLE RULES*, *supra* note 2; Richard Epstein, *The Status Production Sideshow: Why the Antidiscrimination Laws are Still a Mistake*, 108 HARV. L. REV. 1085 (1995); Richard Epstein, *The Subtle Vices of the Employment Discrimination Laws*, 29 J. MARSHALL L. REV. 575 (1996) [hereinafter Epstein, *Subtle Vices*].

<sup>28</sup> See GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976); BECKER, *supra* note 10.

<sup>29</sup> See POSNER, *ECONOMIC ANALYSIS*, *supra* note 2; POSNER, *ECONOMICS OF JUSTICE*, *supra* note 2; Posner, *Ethical Significance*, *supra* note 7.

<sup>30</sup> See MURRAY, *WHAT IT MEANS TO BE A LIBERTARIAN*, *supra* note 25, at 79-101.

<sup>31</sup> See THERNSTROMS, *AMERICA IN BLACK AND WHITE*, *supra* note 26, at 348-461.

Rodrigo and I must have looked aghast, for Laz quickly continued: "Not because I oppose minorities' advances, for as you know I'm a well-wisher, being the son of immigrants myself. But conservative principles and ordinary common sense show that these programs really do people of color little good, while greatly increasing resistance by my side and by working-class whites. I think they also increase stigma for high-achieving blacks and Chicanos. I didn't think so before, but I do now."

"Well," I said, drawing a deep breath. "We do have a lot to talk about. Do the two of you have some time?"

I. RODRIGO, LAZ, AND THE PROFESSOR RESOLVE TO DISCUSS ARGUMENTS AGAINST OUR NATIONAL CIVIL RIGHTS ARMAMENTARIUM, BEGINNING WITH A BRIEF TREATMENT OF THE CASE OF WOMEN AND JOBS

Laz and Rodrigo both smiled with anticipation, but before we could begin, the waiter arrived with our food. "Dig in, everybody," I said, and for the next few minutes we ate in tacit silence. Then Rodrigo looked up:

"Giannina and I were discussing one aspect of this the other day. She had just read some news stories about the lack of women managers and executives.<sup>32</sup> Her analysis might suggest how minorities of color will fare under a regime, like Laz's, of no civil rights enforcement."

"I didn't say *no* civil rights enforcement," Laz said pointedly. "As you know, I detest racism. I just don't think that governmental programs are the best way to combat it. Actually, I have some ideas that even the two of you might approve of. I can run them past you later, if you like. (Rodrigo and I both nodded.) But, for now, I'd love to hear what Giannina had to say about women in the job market."

"Okay," Rodrigo agreed. "But only on condition that you remember to tell us your ideas, Laz. Well, back to Giannina. We were talking about some of the same books the professor just mentioned. She said that women's experiences cast doubt on the ability of the free market to redress sexism."

"Oh?" said Laz, looking up a little skeptically. "I just read that women are now slightly over fifty percent of undergraduates at the nation's colleges.<sup>33</sup> It seems to me only a matter of time before the job market sees them distributed, if not evenly, at least in large numbers, virtually everywhere."

"She wouldn't dispute that," Rodrigo replied. "In fact, she argued that changes in the job market, not kindness, were what prompted affirmative

---

<sup>32</sup> On the findings of a federal commission to study this "glass ceiling," see, for example, Karen DeWitt, *Job Bias Cited for Minorities and Women*, N.Y. TIMES, Nov. 23, 1995, at B14.

<sup>33</sup> On the growth of the number of women in the nation's colleges and universities, see *Excerpts from Carnegie Foundation Report on Education at U.S. Colleges*, N.Y. TIMES, Nov. 2, 1986, at A38.

action programs in the first place. You'd concede, wouldn't you, Laz, that white women have been the main beneficiaries of affirmative action?"<sup>34</sup>

Laz grinned ironically. "Absolutely."

"In that case, recall what was going on in the country right around the time affirmative action got rolling in the mid- and late-1960s."

"A civil rights revolution?" Laz queried. "Marchers in the streets? Two Democratic regimes in a row?"

"Those, too," Rodrigo said. "But Giannina was thinking of the job market. Transistors had just been invented. It must have been clear to elite groups that we were in the early stages of a technological revolution that would ultimately lead to an information-based society. And what kind of workers would that society need in large numbers?"

We were both silent for a moment. "Women?" Laz finally ventured.

"Exactly," Rodrigo replied. "Giannina pointed out that the new data-processing industries would need millions of new workers. Clean, neat, and careful, to process data in, and process data out. The new workers would need to be conscientious and hard-working, but not very ambitious, because few of these jobs led anywhere. And who would be the perfect workers to fill these new jobs?"

"I see where you're going" Laz interjected. "But, sobering as your analysis is—and, mind you, I'm not so sure that these jobs go nowhere—doesn't it just prove my point? The market worked. Women returned to the workforce, got jobs, lots of them, and all without having Big Brother looking over everybody's shoulder."

"That happened, but only to a point," Rodrigo agreed. "Two kinds of limitations set in."

"What kinds?"

"The first is the glass ceiling that a federal commission recently documented.<sup>35</sup> That limitation, which sets in at some point in practically every woman's career, stops her from advancing beyond a certain point. The reason the glass ceiling is there in the first place is that some of the women who entered the marketplace were not content with entry- and mid-level jobs. They began to compete with men, insisting on being considered for middle-management positions, partnerships in accounting and law firms, and the like."

"So the point of affirmative action was to admit women, but in just the right numbers and for just the right low-level jobs. Not too competitive, not too highly paid. Ingenious," I said sadly.

---

<sup>34</sup> On the way white women have benefited from affirmative action, see Steven A. Holmes, *Defending Affirmative Action, Liberals Try to Place the Debate's Focus on Women*, N.Y. TIMES, Mar. 2, 1995, at B7; Steven A. Holmes, *G.O.P. Leadership Backs Out on a Bill to End Preferences*, N.Y. TIMES, July 13, 1996, at A1.

<sup>35</sup> See DeWitt, *supra* note 32.

"The idea was to assure a supply of compliant, conscientious workers to operate computers, do legal research, and other forms of paper-pushing. It was not to revolutionize the workplace, much less to employ black men."

"Hmmm," Laz said. "I'll have to think about that. What's the second limiting principle?"

"Childbirth," Rodrigo replied. "Too few babies were being born—white ones, anyway. Recall that raft of books, most written by conservatives, lamenting the 'birth dearth?'"<sup>36</sup> They warned that white women were having too few babies, while minority women were having too many.<sup>37</sup> The precious national gene pool was deteriorating.<sup>38</sup> According to some of them, we were losing several I.Q. points per generation.<sup>39</sup> It was time to get white women out of the workplace and back in the bedrooms."

"It is interesting that the family-values movement sprang up right around the time you are thinking of," I said.

"About five or ten years back, just as women's gains were cresting. Giannina pointed that out, too."

"Intriguing!" Laz commented. "I don't agree totally with what she says. But her theory of the market's unseen limitations, which click in when women's progress reaches a certain point, has the ring of truth. It reminds me of Derrick Bell's interest-convergence theory, which explains the twists and turns of blacks' fortunes in terms of the class interests of elite whites.<sup>40</sup> That theory I definitely agree with. But, speaking of Bell, you mentioned that Giannina thought her theory might apply to people of color. What specifically did she say about race?"

"Unfortunately, we never got to finish that discussion. So, working that out is up to us."

"I'm game, if you are," I said, then paused for the waiter who had just appeared at our table to ask how we found our food. "Fine," we said in unison, and, after topping off our water glasses, he departed. As he left, Rodrigo resumed speaking.

"I have a theory I can run past you, if you like. And, because it's a critique of law and economics, Laz, I'd love your comments. It'll also enable us to discuss those two books we mentioned. In fact, they're what stimulated Giannina's and my discussion."

<sup>36</sup> See, e.g., BEN WATTENBERG, *THE BIRTH DEARTH* (1987).

<sup>37</sup> See JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* 33-44 (1996) [hereinafter STEFANCIC & DELGADO, *NO MERCY*]. On the history and politics of the eugenics movement, see STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (1981); STEFAN KÜHL, *THE NAZI CONNECTION* (1994).

<sup>38</sup> See STEFANCIC & DELGADO, *NO MERCY*, *supra* note 37, at 37-44.

<sup>39</sup> On this supposed deterioration, see RICHARD HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

<sup>40</sup> See Derrick Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter Bell, *Interest-Convergence*] (sets out, and illustrates, this famous axiom).

"Too bad she's not here, so we could benefit from her insights," I lamented. "Didn't you tell me once that she majored in economics?"

"She did," Rodrigo replied.

## II. WILL THE MARKET CURE RACISM? RODRIGO, LAZ, AND THE PROFESSOR DISCUSS RECENT BOOKS ARGUING THAT IT CAN

After pausing for the waiter to remove our plates, I turned to Rodrigo. "I've had some thoughts on this myself, prompted by a marvelous article by Robin West.<sup>41</sup> And Laz, I hope you'll jump in whenever you think we're wrong. We need you to keep us honest. Don't be silent just because you're outnumbered."

Laz smiled and said quietly, "Don't worry," so Rodrigo began:

"My theory has four parts, all converging on the inadequacy of the account of evil in the work of classic liberals, as well as their modern counterparts." (I smiled inwardly as I realized my young protégé and I had been thinking along the same lines. I decided, however, to wait to voice my own thoughts, and continued listening.) "Both groups seem to think that racism and similar forms of power-tripping will go away if we simply let the free market function. Four different sources suggest this is very unlikely."

"Before you two get into that," Laz spoke up, "I wonder if it doesn't make sense to lay out, if only briefly, the case that it will. That way, we'll all have a common understanding of what the argument is that we're critiquing."

Rodrigo and I nodded agreement, a little abashed (in my case, at least) that we hadn't thought to do that first. "Laz, why don't you do the honors. Those two books we just mentioned might be a good starting point."

### *A. Laz Summarizes the Murray and Thernstrom Books, Which Advocate Doing Away With Programs for Racial Equality*

After pausing while our waiter refilled our coffee cups, Laz began:

"Agreed. In fact the two books are complementary in some important respects. The Murray volume, like earlier ones by Epstein, Posner, and Becker, proposes the elimination of all employment discrimination laws<sup>42</sup> as part of a general program that includes deregulation of most industries, abolition of highway speed limits, vouchers for public education, and other familiar libertarian themes.<sup>43</sup> In this respect, Charles Murray, who as you know is a scholar at the American Enterprise Institute and co-author of the best selling *The Bell Curve*,<sup>44</sup> goes much further than other conservative reformers, such as Richard Epstein, who would eliminate workplace anti-

<sup>41</sup> See West, *Authority*, *supra* note 11.

<sup>42</sup> See MURRAY, *WHAT IT MEANS TO BE A LIBERTARIAN*, *supra* note 25, at 79-89.

<sup>43</sup> See *id.* at 37-40, 52-54, 60-78, 93-97, 114-23.

<sup>44</sup> HERRNSTEIN & MURRAY, *supra* note 39.

discrimination laws but leave laws forbidding discrimination in housing, voting, or public accommodations intact.”<sup>45</sup>

Laz looked up expectantly, with a slight smile. I took the bait: “Yes, yes. We see your point. Conservatives exhibit variation, too. They’re not all the same. Go on.”

Smiling appreciatively, Laz continued. “Drawing on the early work of Adam Smith,<sup>46</sup> Murray begins by observing that human beings are social animals who desire the approval of others.<sup>47</sup> They are also ‘self-regarding’—interested in pursuing their well being and that of their close friends and families.<sup>48</sup> It follows that humans, if left alone and deprived of resort to force and violence, will cooperate.<sup>49</sup> They will also be generous and tolerant. ‘To satisfy my material needs,’ Murray writes, ‘I must persuade other people to trade with me.’”<sup>50</sup>

“Sounds good so far as it goes,” Rodrigo conceded. “But suppose that a given individual or sector of society does not behave that way. Then what?”

“You mean she or it discriminates against others, by reason of their color, say?” (Rodrigo and I nodded.) “Then, according to Murray, we must allow them to do so. In a free society, he writes (Laz looked down at the slender volume lying open on the table), ‘the freedom of association cannot

<sup>45</sup> Compare EPSTEIN, *FORBIDDEN GROUNDS*, *supra* note 2, at xii, and EPSTEIN, *Subtle Vices*, *supra* note 27, at 575 (“[P]rinciples applicable in private employment markets may not carry over to these other areas.”), with CLINT BOLICK, *THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION?* (1996) (proposing broad repeal of antidiscrimination laws in favor of letting the free market reign).

<sup>46</sup> Often called the precursor of modern economics, Adam Smith’s *laissez-faire* economic approach is a cornerstone in the philosophy of the neoclassical economic movement, including the law-and-economics school. His seminal work, *The Wealth of Nations*, published in 1776, presents a pointed attack on government for actions that promote particular interests at the expense of the general well being of society. See generally ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (R.H. Campbell et al. eds., Oxford Univ. Press 1976) (1776). Its most famous passage explains that markets, if left unfettered, will result in the greatest social good because the freedom of individuals to pursue their own interests will ineluctably promote the public interest and achieve the greatest order and efficiency, as if guided by an “invisible hand”:

As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestick industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the publick interest, nor knows how much he is promoting it. By preferring the support of domestick to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.

*Id.* at 456 (emphasis added).

<sup>47</sup> See MURRAY, *WHAT IT MEANS TO BE A LIBERTARIAN*, *supra* note 25, at 80.

<sup>48</sup> *Id.* at 80-81.

<sup>49</sup> See *id.* at 81.

<sup>50</sup> *Id.* at 80.

be abridged.<sup>51</sup> And this freedom entails, as well, the freedom not to associate with someone, just as an employer does when, on a hunch, he or she decides to hire worker A and not worker B, or a landlord picks one tenant over another, believing that the first is likely to be quieter and to pay the rent more promptly than the other.<sup>52</sup> Citizens and private institutions, but not government, must have the freedom to discriminate and follow their tastes and preferences in comrades, co-workers, and tenants.<sup>53</sup>

"But is not discrimination on the basis of race different from that which is based on preference for loud music or absenteeism at work?" I asked.

"Murray says you cannot separate the bad kinds of discrimination from the good. 'They are of a piece.'<sup>54</sup> Moreover, he says, efforts to pursue one and not the other have done people of color little good. The nation was already renouncing racism and discrimination before the Civil Rights Act of 1964 was passed.<sup>55</sup> The country did not make progress against racism because Congress enacted that statute; rather, Congress enacted it because the old way of doing business was passing into history.<sup>56</sup> Ultimately, he feels that the Act and the edicts that followed it imposed a suffocating bureaucracy and sparked legitimate resistance among whites."<sup>57</sup>

Laz looked up to see our reaction. But just then the waiter arrived with our desserts. After we ate for a moment, Rodrigo observed:

"That's more or less what I remember from my reading. It will come as no surprise that I take issue with practically everything you recounted. But before I lay into Murray, why don't we get the other book on the floor."

"Fine," Laz replied, taking a deep breath. "The Thernstroms' book is not nearly so negative about laws forbidding bias in housing, credit, voting, and jobs,<sup>58</sup> although, interestingly, they take strenuous issue with *Griggs v. Duke Power*<sup>59</sup> and the line of cases that find redressable discrimination in employment practices that have an adverse, or disproportionate, impact on blacks and other minorities.<sup>60</sup> Their main target, however, is affirmative action."

<sup>51</sup> *Id.* at 81.

<sup>52</sup> *See id.* at 82-83.

<sup>53</sup> *See id.* at 82-84.

<sup>54</sup> *Id.* at 86.

<sup>55</sup> *See id.* at 51, 86-88.

<sup>56</sup> *See id.* at 87-88.

<sup>57</sup> *See id.* at 54-59, 88.

<sup>58</sup> *See* THERNSTROMS, *AMERICA IN BLACK AND WHITE*, *supra* note 26, at 422-92.

<sup>59</sup> 401 U.S. 424 (1971). *See also* EPSTEIN, *FORBIDDEN GROUNDS*, *supra* note 2, at 159-241 (discussing disparate impact doctrine).

<sup>60</sup> *See* THERNSTROMS, *AMERICA IN BLACK AND WHITE*, *supra* note 26, at 429-33, 438-40.

"By which they mean preferences, based on race, for blacks, Chicanos, Asian-Americans, and Native Americans in hiring, promotion, and in higher education admissions," I chimed in.<sup>61</sup>

"Exactly," Laz agreed. "And although I don't agree with them entirely, they make perhaps the strongest case yet against that practice. I still think affirmative action is salvageable with a change here and there. They don't. For them, it's reverse racism, plain and simple. And, like Murray, they hold that it's entirely unnecessary since the country has repudiated racism for more than thirty years, and blacks have been making steady progress in every important area of life."<sup>62</sup>

"What optimists," Rodrigo observed, his voice dripping with sarcasm.

"A fair criticism," Laz conceded. "They do appear to lay great emphasis on the odd statistic showing black or brown progress, passing lightly over all the evidence of stagnation and pain."<sup>63</sup>

"As I recall, they place great emphasis on the growth of the middle class of color,<sup>64</sup> ignoring frightening statistics about misery, crime, infant mortality, and school dropout among the poor," I said.

"What's more," Rodrigo seconded, "they draw a dubious conclusion from those Panglossian statistics, namely that affirmative action is not needed. Indeed, the very growth in the number of middle-class blacks that they cite in support of ending affirmative action is directly traceable to affirmative action policies in the nation's professional schools."<sup>65</sup>

"Still, you must concede that things are better for minorities than they were in the days of Jim Crow. The Thernstroms who, like Murray, are long-time opponents of affirmative action, devote the first third of their book to showing how far we have come as a nation since those terrible days.<sup>66</sup> Having shown how unimaginably bad conditions were in the South during the late 1800s and first part of this century, they then trace the start of improvement to World War II, when jobs opened up for blacks in industry and in the Armed Forces.<sup>67</sup> It was the overall expansion of the U.S. economy, not civil rights legislation, that sparked black progress."

"I might agree," I said quietly. "But, go on."

<sup>61</sup> See *id.* at 171-77, 179-80, 312-461, 539.

<sup>62</sup> See *id.* at 16-19, 538.

<sup>63</sup> See *id.* at 232-54.

<sup>64</sup> See *id.* at 183-231.

<sup>65</sup> On the role of affirmative action in increasing the number of physicians and lawyers of color, see, for example, David Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS. CONST. L.Q. 4 (1996). See also CHARLES LAWRENCE III & MARI MATSUDA, *WE WON'T GO BACK* (1997) (recounting stories of successful attorneys, professors, physicians, and others of color who have benefited from affirmative action).

<sup>66</sup> See THERNSTROMS, *AMERICA IN BLACK AND WHITE*, *supra* note 26, at 16, 183-203.

<sup>67</sup> See *id.* at 67-84.



"When the Thernstroms come to the civil rights milestones of the modern era—*Brown v. Board of Education*,<sup>68</sup> the Civil Rights Act of 1964, and the voting rights legislation of the following year, however, they change course. While hailing efforts to assure fundamental rights of citizenship, they criticize virtually every governmental program aimed at improving conditions for blacks.<sup>69</sup> Today, they write, few whites are out-and-out racists.<sup>70</sup> Polls of white people supposedly show this. But programs that emphasize color and distribute benefits to blacks over seemingly more-deserving whites inflame whites who would otherwise support black causes.<sup>71</sup> They also induce dependency and reinforce a black leadership style that thrives on resentment, assuring that relations among the races remain tense."<sup>72</sup>

"Do they have any solution?" Rodrigo asked. "I don't recall seeing one."

"Not really," Laz answered. "Conditions for blacks won't improve much more, they say, until they repair their family structure."<sup>73</sup> Back in the era of rapid advances—the 1940s and 1950s—most blacks lived in intact families. Today many do not.<sup>74</sup> That's why, according to the Thernstroms, despite two decades of civil rights and affirmative action, the situation is not better than it is. Affirmative action may even positively injure minorities. Without it, black entrepreneurship and ownership of small businesses would have flourished.<sup>75</sup> Instead, too many blacks today are reliant on government jobs and contracts."

"Which may be coming to an end—the contracts part, I mean,"<sup>76</sup> Rodrigo ventured.

"I'm sure they'd say 'good riddance.' But don't conclude that they're heartless. They do say that the early, color-blind civil rights laws were a

---

<sup>68</sup> 347 U.S. 483 (1954).

<sup>69</sup> See THERNSTROMS, *AMERICA IN BLACK AND WHITE*, *supra* note 26, at 16-17, 315-529.

<sup>70</sup> *See id.* at 530-31.

<sup>71</sup> *See id.* at 539-40.

<sup>72</sup> *See id.* at 494-524, 539-40.

<sup>73</sup> *See id.* at 194-98, 233-45, 253-57, 534.

<sup>74</sup> *See id.* at 236-40, 253-57.

<sup>75</sup> *See id.* at 186, 189.

<sup>76</sup> *See Adarand Constructors v. Peña*, 115 S. Ct. 2097 (1995). *See also* EPSTEIN, *SIMPLE RULES*, *supra* note 2, at 170-86 (hailing this trend).

good idea.<sup>77</sup> Epstein and other libertarians do, too.<sup>78</sup> And they do leave a place for idealism,<sup>79</sup> just as Murray argues for courtesy toward all.<sup>80</sup>

"Maybe not heartless, but plain wrong," Rodrigo exclaimed. "Merely showing that improvement was underway before—or insisting, as they do, that 'people don't need affirmative action to trade with blacks'<sup>81</sup>—does not mean that social programs did no good. Black progress was stalling in the late 1950s and early '60s. Southern states mounted real resistance to integration and *Brown*.<sup>82</sup> Everyone knows that white neighborhoods will accept a small number of black families. Then, a tipping point arrives.<sup>83</sup> So, the early gains might well not have continued. It's like arguing that society had no need for the federal government to build the system of interstate highways because model-T drivers were learning to steer around the potholes. Are we ready to move on to my argument about the marketplace?"

I couldn't help but smile at the eagerness of my young protégé to parade his ideas before us. Laz, too, smiled and nodded assent. I thanked Laz for his comprehensive and even-handed summary. We settled down, Rodrigo took a last swig of his coffee, looked up, and began:

### III. RODRIGO PUTS FORWARD A FOUR-PART ARGUMENT WHY THE FREE MARKET OF SOCIAL AND ECONOMIC EXCHANGES WILL NOT ELIMINATE RACISM AND DISCRIMINATION

"As you know, I'm convinced that in a nation such as ours, with a long history of white-over-color subordination, racism will not wither away by itself. Furthermore, I have a four-part argument that proves this. But let me start with a thought experiment or two."

"I love your thought experiments," Laz said.<sup>84</sup> "Fire away."

<sup>77</sup> See THERNSTROMS, *AMERICA IN BLACK AND WHITE*, *supra* note 26, at 21-22, 122-48, 172-80, 532-33, 540.

<sup>78</sup> See Epstein, *Subtle Vices*, *supra* note 27, at 575-76; Richard Epstein, *Standing Firm, on Forbidden Grounds*, 31 *SAN DIEGO L. REV.* 1, 26-32 (1994). See also EPSTEIN, *FORBIDDEN GROUNDS*, *supra* note 2, at 16-17 (only a "small, hardened minority" will disdain fairness and cooperation in favor of cruel, destructive behavior).

<sup>79</sup> See THERNSTROMS, *AMERICA IN BLACK AND WHITE*, *supra* note 26, at 534-35, 540, 544-45.

<sup>80</sup> See MURRAY, *WHAT IT MEANS TO BE A LIBERTARIAN*, *supra* note 25, at 82.

<sup>81</sup> THERNSTROMS, *AMERICA IN BLACK AND WHITE*, *supra* note 26, at 450.

<sup>82</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>83</sup> On this phenomenon, see BELL, *AND WE ARE NOT SAVED*, *supra* note 3, at 140-161 (story of "seventh candidate" who was one minority too many for a white law school to accept); DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 624 (3d ed. 1992) (tipping in school desegregation cases); *id.* at 743-85 (in housing law). On "white flight"—the tendency of whites to move out of a neighborhood when residents of color reach a certain percentage, see Amy L. Wax, *The Two-Parent Family in the Liberal State: The Case for Selective Subsidies*, 1 *MICH. J. RACE & L.* 491, 518 n.84 (1996). The phrase was coined by Thomas C. Schelling, *A Process of Residential Segregation: Neighborhood Tipping*, in *ECONOMIC FOUNDATIONS OF PROPERTY LAW* 307 (Bruce A. Ackerman ed., 1975).

<sup>84</sup> For an early version, see Delgado, *Second Chronicle*, *supra* note 3, at 1193.

"Imagine two black men, A and B. One lives in a city with very little racism, say Seattle; the other in one where the white majority hates and despises blacks. Let's suppose both have similar credentials—they're engineers. Who will earn more money, A or B?"

I looked at Rodrigo and said, "A, of course. Experiencing fewer headwinds, he will rise to the top, or, at least, to the level his abilities allow. In fact, I was reading somewhere that Seattle has one of the lowest indices of prejudice in the country. Black workers earn over ninety percent of what similarly qualified whites do."

Rodrigo replied, "I agree with you. But that's just the opposite of what law and economics would predict. The black living in the racist city ought to be at more of a premium than the one living in Seattle. Assuming that at least one firm would hire him, he ought to command top dollar. But this flies in the face of experience. Historically, blacks have always migrated from regions such as the South with high prejudice to ones where it is low, rather than the other way around.<sup>85</sup> And for good reason. Racism changes the market and depresses wages."

"But Murray and his colleagues say it's the reverse," I said. "If there's a market, it should depress racism. I see how your thought experiment exposes a possible flaw in the theory. But you mentioned another one."

"You and I were talking about this before.<sup>86</sup> It has to do with the unthinkable. Imagine a rural state, say Minnesota. The legislature is concerned about the high toll in deaths and accidents caused by teenage drivers. So, it decides to allow children to obtain driver's licenses at age eleven. Studies show that many children this age would make very good, careful drivers. With the new change, young Johnny can help Dad and Mom on the farm. He can drive the tractor a few miles along County Road 5 from the back twenty to the front fifty, which is a big help. At the age of sixteen, however, Johnny must surrender his license until age twenty-six, at which time he can get it back again."

"So the overall accident rate goes down with all those dangerous teenage drivers off the road. And Dad gets some help on the farm," Laz said.

"Exactly," Rodrigo said. "But would other states emulate Minnesota's example? No. The sight of little twelve-year olds, hunched over the steering wheel, carefully and responsibly driving Mom to church, would fly in the face of society's conception of children. Children are supposed to be dependent, small, in need of protection. The notion that some of them might turn out to be safer drivers than older teenagers and young adults goes against the grain. No other state would follow Minnesota's lead. Even that state itself might repeal the law."<sup>87</sup>

---

<sup>85</sup> See BELL, RACE, RACISM, AND AMERICAN LAW, *supra* note 83, at 56-60 (describing this internal migration).

<sup>86</sup> See Delgado, *Second Chronicle*, *supra* note 3, at 1193-94.

<sup>87</sup> See *id.*

"And you think this has some bearing on the market and race?" Laz interjected.

"Yes," Rodrigo replied. "Minorities labor under similar stereotypes.<sup>88</sup> Even if one firm prospered by hiring a brilliant black or Chicano chief executive officer, others would not rush to follow suit. They would be sure that something would go wrong with the other firm and its CEO—maybe he or she would be fired for graft. Or, if the minority executive proceeded to double profits year after year, they would simply pronounce him or her an exception. The next black that applied would be ruled out for some reason."

Laz furrowed his brow. "I'm not so sure," he replied. "Profits that large should give the racist competitor pause. But if you're right, why should that be?"

"It's because racism is so strongly supported by extra-market forces, like stereotyping and internalized, scarcely visible preconceptions. The thick web of culture, language, and institutional inertia discourages the competitive frenzy marketplace advocates place their faith in. If the market brings changes, they will come at best slowly and painfully. In the short run, minorities in the marketplace will confront a host of pseudo-economic stereotypes, like that they're 'dull,' 'lazy,' or 'of bad character.'"

"But this isn't because of any market failure, it's because of false information," Laz retorted. "As the market starts to work, businesses will gain exposure to more black and brown workers and learn that their stereotypes are false and the taste for discrimination is costly."

"But there you are," Rodrigo replied, leaning forward excitedly. "You and your friends—nothing personal, Laz, you know you're my pal—are making what we might call a category mistake, like asking 'What color is the number seven?'<sup>89</sup> To see racism as a matter of private taste is to mistake its very nature. It's a public harm, one that warps the entire fabric of social and political life. Racism should be condemned socially, by all of society, and one means of doing so is by affirmative action and other forms of intervention in the free market."

"Well, are you saying that blacks and Chicanos somehow fall outside the free market?" Laz asked incredulously.

"Yes, in a way. Slaves were not parts of the free market, except as chattels. They could not buy their freedom, and the same is true of their successors today. A rich black or Latino is still subject to police harassment merely by reason of driving a nice car or walking the streets at night. No, Laz, racial equality is a public good which the market cannot easily, or

<sup>88</sup> See Peggy Davis, *Law as Micro-Aggression*, 98 YALE L.J. 1559 (1989); 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, 1262-75 (1992); Margaret Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 LEGAL STUD. F. 243 (1991).

<sup>89</sup> Cf. Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1402, 1410-19 (1981) (making a similar argument in the case of environmental protection).

quickly, address. It demands a pre-allocative normative reckoning by society as a whole. Only once the difficult normative questions have been faced up to does the market become a viable means of effectuating those normative decisions, including the very basic one of who is an equal member of society.”

“Political decisions have costs,” Laz said. “And who is to say that society will make the right ones? We could decree fair treatment and hire an army of police to watch out for any show of racism. But blacks and Latinos would still, in most cases, be stuck in dead-end, private sector jobs.”

“We should make the effort, nevertheless,” Rodrigo replied. “As my thought experiments show, the market just won’t drive out racism. Thinking it will is a category mistake. Waiting around for the market to catch up with our public ideals is morally unacceptable. If we believe in equality, we must condition the market and ourselves to break down long-standing barriers to freedom for all.”<sup>90</sup>

Laz shook his head and smiled in spite of himself. “Interesting thought experiments, Rodrigo. And your distinction between public and private commitments and category mistakes does give me pause. But you’ll need more than that to make a believer out of me.”

#### *A. Rodrigo’s First Argument: Cultural Texts Show the Ubiquity of the Problem of Evil*

“Okay,” Rodrigo said. “Consider how four types of evidence converge on the necessity of constraining the problem of evil: cultural texts, social science studies of helping behavior, evolutionary science, and cross-cultural studies.”

“Hmmm,” said Laz. “I’m curious to see where you’re going. I’ve often thought that you bleeding-heart types lacked an adequate account of human evil, visible in your treatment of crime and criminals, for example. But now it seems you are going to use this against my side. I’m all ears.”

“You’ll have to decide for yourself which way the argument cuts,” Rodrigo said. “The marketplace argument, which owes its origin to early utilitarians like Bentham,<sup>91</sup> Mill,<sup>92</sup> and Smith,<sup>93</sup> is almost entirely forward-looking. If one course of action doesn’t work, try another. This may account for the cheerful, social-engineering character of liberal civil rights law that all three of us have noted, as well as the short attention span of lib-

<sup>90</sup> Compare this suggestion with Gerald L. Rosenberg, *The Implementation of Constitutional Rights: Insights from Law and Economics*, 64 U. CHI. L. REV. 1215 (1997) (nondiscrimination decrees must coincide with market forces to be effective) and Bell, *Interest Convergence*, *supra* note 40.

<sup>91</sup> See, e.g., POSNER, *ECONOMIC ANALYSIS*, *supra* note 2, at 20 n.2; POSNER, *ECONOMICS OF JUSTICE*, *supra* note 2, at 13-50 (discussing how present-day law and economics rests on Bentham and other early utilitarians and liberal political theorists).

<sup>92</sup> See POSNER, *ECONOMIC ANALYSIS*, *supra* note 2, at 299, 449.

<sup>93</sup> See POSNER, *ECONOMICS OF JUSTICE*, *supra* note 2, at 19, 64.

erals who, once having put a plan or law in place, think the problem is solved and want to move on to another one, such as saving the whales."<sup>94</sup>

I wanted to move back to Rodrigo's evidence. "And by cultural texts, I assume you mean ones such as Shakespeare, Melville, and *The Bible*, which recognize the human impulse to harm enemies, distrust foreigners, and conquer and enslave other societies?"<sup>95</sup> I asked.

"Those and more," Rodrigo answered. "They all show humans struggling with the impulse to war against and suppress others. Human nature, of course, also contains a generous and benevolent impulse, as Adam Smith recognized.<sup>96</sup> But it is, unfortunately, limited mainly to persons we know well."<sup>97</sup>

"I think I can see where you are going," I interjected. "It's amazing—I was reflecting just this afternoon on Robin West's classic exchange with Richard Posner.<sup>98</sup> Are you familiar with her Harvard article?"

When the two young scholars, who had entered teaching recently, nodded a little uncertainly, I elaborated as follows:

"Robin West, now professor of law at Georgetown, criticized Richard Posner, and implicitly the entire law-and-economics school, for rendering an imperfect view of human nature. Basing their theories on a view of mankind as interested in satisfying basic needs, Posner and his colleagues put forward a mechanism, namely the market, and a medium, namely economic exchanges, to enable that satisfaction to be maximized.<sup>99</sup> In their view, exchanges and contracts, such as for labor, entered into freely by autonomous individuals ordinarily ought to be left alone, because they should be presumed to advance the interests and well being of the parties who negotiated them.<sup>100</sup> Even if one of the parties turns out to be the loser in a transaction, say an investment, allowing such exchanges benefits all of society and so should win the endorsement even of those who occasionally lose. They, too, benefit from the overall wealth and freedom such a regime of free market rules brings."<sup>101</sup>

Laz asked, "And I suppose West took issue with that basic premise?"

<sup>94</sup> See Richard Delgado, *Playing Favorites*, 74 TEX. L. REV. 1223, 1224 (1996); Girardeau Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990) (on failure of liberal litigation strategy to effect much long-lasting change).

<sup>95</sup> See WILLIAM SHAKESPEARE, *MACBETH* (1602); HERMAN MELVILLE, *MOBY DICK* (1851); *Exodus* 20:3-17 (Rev. Stand. ed. 1953).

<sup>96</sup> See *supra* notes 46, 93 and accompanying text.

<sup>97</sup> See *supra* note 46 and accompanying text. Thus, some evolutionary biologists have explained selective altruism as an expression of the fundamental impulse to propagate one's genes. For a discussion of this view and its relation to social norms, see HELENA CRONIN, *THE ANT AND THE PEACOCK* 325-80 (1991); Robert Lipkin, *Altruism and Sympathy in Humes's Ethics*, 65 AUSTRALASIAN J. PHIL. 18 (1987).

<sup>98</sup> See West, *Authority*, *supra* note 11.

<sup>99</sup> See *id.* at 385, 388-90. See POSNER, *ECONOMICS OF JUSTICE*, *supra* note 2, at 352.

<sup>100</sup> See West, *Authority*, *supra* note 11, at 388-90.

<sup>101</sup> See *id.* at 389-90.

"She did. Drawing on great literature, especially the stories of Franz Kafka, she shows that, in addition to a happiness-maximizing impulse, men and women have a darker side that causes us to surrender our autonomy and to allow ourselves to be dominated and made miserable."<sup>102</sup>

"That sounds like classical masochism," Laz said. "I agree that some people behave that way, although some of my fellow conservatives probably would quarrel over how much. Conservatives, as you know, tend not to be very interested in unconscious motives."<sup>103</sup> Richard Posner, in a reply to Professor West, said as much, if I recall.<sup>104</sup> But I gather you're emphasizing something different in human nature?"

"Yes," said Rodrigo. "The flip side of what she emphasized, in fact. Sadism—although that word may be a little more psychoanalytic than I would like. What I mean is that cultural texts, as well as the human record, show a recurring tendency on the part of individuals to want to dominate and mistreat others.<sup>105</sup> Early man limited his fellow feeling to members of his family or clan.<sup>106</sup> Today, even though our sympathies are more universalistic, we still tolerate economic exploitation by ruthless capitalism in Latin America and Russia.<sup>107</sup> And famines in Africa or poverty in our inner cities draw less attention than troubles on our doorsteps."<sup>108</sup>

"Out of sight, out of mind, I suppose. But with respect to the law-and-economics school and its account of racism, your point is . . . ?" I coaxed.

"The cultural record shows that we are apt to be much less generous with people of other races. The English language alone boasts a rich vocabulary including xenophobia, chauvinism, and racism, as well as an extensive set of words that stereotype and demean others merely on the basis of their skin color. This implies that, left to their own devices, humans will not choose to deal with others whom they regard as different. They will not hire, trade with, or in general bring them into their circles of regard. They

<sup>102</sup> See *id.* at 393-404, 409-411.

<sup>103</sup> See POSNER, *ECONOMIC ANALYSIS*, *supra* note 2, at 615-25 (describing racism as a "taste" whose correction through law would be costly); POSNER, *ECONOMICS OF JUSTICE*, *supra* note 2, at 360-61 (same); Posner, *Ethical Significance*, *supra* note 7, at 1431, 1439-40.

<sup>104</sup> See Posner, *Ethical Significance*, *supra* note 7, at 1439-40, 1444-45.

<sup>105</sup> See *supra* note 95 and accompanying text; see also JOHN KEEGAN, *A HISTORY OF WARFARE* (1993).

<sup>106</sup> See Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 450-56 (1972).

<sup>107</sup> See Amnesty International Publications (visited Jan. 30, 1995) <<http://www.amnesty.org/ailib/aipub/index.html>> (detailing police interrogation abuses, torture, and mistreatment of dissidents and religious minorities in these and other areas).

<sup>108</sup> See Delgado, *Eleventh Chronicle*, *supra* note 3, at 69-74. See also Francis C. Pizzulli, *Asexual Reproduction and Genetic Engineering: A Constitutional Assessment of the Technology of Cloning*, 47 S. CAL. L. REV. 476, 578 (1973) ("[M]urder, destruction, and perjury are held to be grave crimes when committed within groups, but appear to become virtues when committed upon one group by another: generals and pilots are decorated for homicide and wholesale destruction, and politicians are often rewarded for the most outrageous lies.").

will engage in economic exchanges with them, such as renting hotel rooms or seeking them out as clients, but only if others of their own kind are unavailable."<sup>109</sup>

"This makes me think of your Minnesota thought experiment," Laz mused. "I think I have a reply, but go on. I'd like to hear your other arguments against the marketplace theory first."

*B. Rodrigo's Second Argument: Biology and the Study of Other Species Discloses That Many Adopt Strategies Similar to Human Ones*

"My second argument proceeds by induction," Rodrigo said. "Consider how other species engage in similar behavior. I hasten to add that I don't mean that biology is destiny, nor that every species kills for pleasure—most don't."<sup>110</sup> Moreover, I believe that racism and other forms of human aggression can be greatly reduced by teaching, moral and religious appeals, and firm legal pressure.<sup>111</sup> Human beings, after all, have free will, or at least our political and legal institutions assume so. But seeing how other species, including ones closely related to us, adopt strategies that defend territory or exclude competitors from food, light, or other necessities of life adds to my argument. It shows that we can't safely rely on innate human goodness, or its manifestation in the market, to curb such behavior among ourselves."

"I can think of works like Konrad Lorenz's *On Aggression*,"<sup>112</sup> I added. "And Jane Goodall's work, which shows that the great apes not only cooperate but fight, and sometimes kill, to advance group interests in breeding, territory, and food."<sup>113</sup> Sometimes they do it for what she can only describe as the fun of it.<sup>114</sup> These and other works of animal and evolutionary science show how some species see to their own survival by attacking others, even ones closely related to them."

"You're not saying that these animal studies prove something about human behavior, are you?" Laz asked. "Because humans are different. We have souls. We have speech. We have an ideal, not just a material, nature. If parents indoctrinate children with a sense of right and wrong, certain realms *may* be left safely to the market. People are just fundamentally different from a flock of sheep or a group of untrained dogs that might require constant watching—regulation, if you will."

<sup>109</sup> See Delgado, *Second Chronicle*, *supra* note 3, at 1193-95, 1198-1201.

<sup>110</sup> See, e.g., KONRAD LORENZ, *ON AGGRESSION* 30 (1966).

<sup>111</sup> See, e.g., THERNSTROMS, *AMERICA IN BLACK AND WHITE*, *supra* note 26, at 530-34 (white attitudes changing); C.L. Ten, *The Effects of Punishment*, in *CRIME AND PUNISHMENT: PHILOSOPHIC EXPLORATIONS* 312 (Michael J. Gorr & Sterling Harwood eds., 1995) (crime and aggression to some extent deterrable).

<sup>112</sup> *Supra* note 110.

<sup>113</sup> See JANE GOODALL, *THE CHIMPANZEES OF GOMBE: PATTERNS OF BEHAVIOR* 313-56, 488-534 (1986).

<sup>114</sup> See *id.* at 334.



"I don't want to make too much of the naturalistic argument," Rodrigo conceded. "It just puts us on notice not to assume too much. My next argument addresses specifically human behavior. Ready to move on?"

It was late, and I was starting to flag. Rodrigo must have noticed, for he said "I hope we're not wearing you out, Professor. You've been up longer than we have and traveled farther to get here. Want to postpone the rest until breakfast?"

"No, no," I insisted. "I'm going strong. I want to hear the last two prongs of your argument. But I could use a cup of tea."

Laz immediately looked around, attracted the waiter's attention, and seconds later we were placing orders. More coffee for my two young friends (whose iron constitutions caused me, once again, to marvel—coffee this late would have me tossing and turning all night) and a soothing chamomile tea for me. Then, Rodrigo continued:

*C. Rodrigo's Third Argument: Studies of Helping Behavior in Cross-Race Situations Cast Doubt on the Ability of Free Choice and Deregulation to Drive Out Racism*

"Good idea, Professor. I'm a little bushed myself," Rodrigo admitted. "But I can go through my last two arguments quickly. I'm sure the two of you are familiar with the social science literature dealing with so-called helping behavior in cross-race situations, and also with the role of influence on cognition?"

"We were talking about the first group of studies before," I said.<sup>115</sup> "But maybe not the second. Why don't you summarize them for us."

*1. Studies of Helping Behavior in Cross-Race Situations.*—The waiter set down our steaming beverages, and I motioned surreptitiously for the check. Rodrigo objected, but I waved him aside: "I'm on sabbatical. Please be my guests." The two exchanged glances, and I knew I would have a battle on my hands later, so I said, "We'll see. But why don't you go on." Rodrigo took the bait. As he did so, I stealthily removed my credit card from my wallet, which I had been holding in my lap.

"A host of social science studies explore what people do in cross-race situations. In a typical one, the scientist has a black female assistant stage an accident in which she spills a bag of groceries.<sup>116</sup> Later, a white one does the same thing, and they record what happens. Sometimes they do something similar with stranded motorists.<sup>117</sup> The studies show that people go to the aid of persons of their own race more readily than they do to persons of another race or ethnicity. Some researchers explain the results in

<sup>115</sup> See Delgado, *Eleventh Chronicle*, *supra* note 3, at 78-79.

<sup>116</sup> See *id.* (describing this and similar experiments).

<sup>117</sup> See *id.* at 79.

terms of 'norm theory.'<sup>118</sup> We respond to persons in need according to how normal or abnormal their plight seems to us. Thus, famines in Biafra evoke little response because we think they are normal in that part of the world. But if our middle-class neighbor shows up at our doorstep, not having eaten in two days because of losing his or her job, we immediately rush to his or her aid."<sup>119</sup>

"I remember that line of experiments," I said, "and see how they fortify your argument. If an economic exchange is the kind that can also help the other person, say a hiring decision, then one might well unconsciously look for people like oneself—freckle-faced blondes of European descent, if one is like that, rather than black men with Afros, even if they have Ph.D's. This skews the marketplace in favor of any group who can exercise discretion not to deal. But what's the second line of experiments?"

"I was thinking of studies, such as Stanley Milgram's<sup>120</sup> and Solomon Asch's,<sup>121</sup> of authority and mindset. Are you familiar with these?"

Laz said, "I know about Milgram and his studies of obedience. In a series of articles and a book, he described experiments that show how people behave when commanded by authority figures.<sup>122</sup> In one, he hooked up volunteers, who did not know the purpose of the experiment, to a fake console with a series of switches.<sup>123</sup> The 'doctor,' wearing a white coat, explained that the purpose of the study was learning and reinforcement, and that they were to be the 'teacher,' administering small electric shocks to a 'learner' in another room.<sup>124</sup> The doctor warned the volunteer, however, never to flip the switches beyond a certain point, because doing so could administer a potentially lethal dose of electricity.<sup>125</sup> As the experiment proceeded, the doctor directed the teachers to administer higher and higher doses of electricity, each of which was followed by more and more heart-rending groans from the other room.<sup>126</sup> The shrieks were emitted, of course, by trained actors and were completely fake.<sup>127</sup> Although all of the volunteers showed distress over what they were doing, fidgeting and sweating, most followed the directions of the doctor, even to the point of administering what they believed could be a lethal jolt of electricity to a fellow human being.<sup>128</sup> Afterward, many confronted the realization that, like good Nazis,

<sup>118</sup> *Id.* at 78 (describing classic works in this vein of scholarship).

<sup>119</sup> *See id.*

<sup>120</sup> *See* STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* (1974).

<sup>121</sup> *See* Solomon Asch, *Opinions and Social Pressure*, 193 *SCI. AM.* 31 (1955).

<sup>122</sup> *See* MILGRAM, *supra* note 120.

<sup>123</sup> *See Id.* at 3.

<sup>124</sup> *Id.*

<sup>125</sup> *See id.* at 4.

<sup>126</sup> *See id.*

<sup>127</sup> *See id.* at 3.

<sup>128</sup> *See id.* at 41-43.

they had done what an authority figure commanded even though they might have killed another human being."<sup>129</sup>

2. *Studies of Belief and Group Influence.*—"And the other line of experiments," Rodrigo continued, "while not quite so graphic, is just as well known. Asch and his collaborators held up cards with lines drawn on them and asked a group of volunteers to identify which of two matched in length.<sup>130</sup> All except one were confederates of the experimenter and instructed to vote for the wrong line. The idea was to see if group pressure would cause the subject who was not in the know to go along."<sup>131</sup>

"I read about those studies," I interjected. "In most cases, the subject did so. And, afterward it turned out that many acquiesced not just to avoid trouble or to get the experiment over with, but because they actually believed the majority, despite their original conviction to the contrary. Group dynamics actually changed what they saw."<sup>132</sup>

"I see how these studies help your side," Laz said. "As with your twelve-year old driver example,<sup>133</sup> they suggest that people won't trade with perfectly acceptable partners of another race because, as Milgram's and Asch's studies show, they have adopted the racist assumptions of the society they inhabit.<sup>134</sup> Again, I have some reservations, because I think people have more free will than that. But, let's hear your fourth argument."

*D. Rodrigo's Fourth Argument: Studies of Other Societies, and of Particular Institutions in Our Own, Show That Highly Formal Settings Elicit the Least Racism*

"My final point also proceeds by induction. Damn! Those are some fast hands, professor!" I had just snatched the bill from the waiter, who had arrived bearing it on a small tray.

"You can say what you will about altruism in mixed-race settings," I replied with a smile, "but in this one, I'm paying. My salary's much higher than yours, and I've learned many a new wrinkle today. You young scholars don't realize how much we old timers learn from upstarts like you. Especially when it comes to recent currents, such as marketplace theory and social science studies, that came along after we got our start. So, consider it even. We can split breakfast if we're all up that early. Want to eat together?"

<sup>129</sup> See *id.* at 20-21, 35, 41-43.

<sup>130</sup> See Asch, *supra* note 121, at 32.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.* at 33.

<sup>133</sup> See Delgado, *Second Chronicle*, *supra* note 3, at 1193-95.

<sup>134</sup> See *id.* See also Delgado, *Third Chronicle*, *supra* note 3, at 403-415 (addressing some other aspects of this problem of those who are "beyond love").

Laz and Rodrigo glanced at each other. "We were going to go for a quick run, then grab a bite before we catch our flight back. Want to join us?"

"I did bring my running shoes," I said. "But I'm sure you two will want to set a faster pace than I can go comfortably—just as you do in intellectual conversation. Why don't we start out together, then you can go on ahead at some point. I'll finish my run and meet you back here at, say, eight-thirty?"

"Perfect," said Laz. "Let's meet outside the hotel at seven. The desk clerk said they have running maps for guests."

Having settled our morning plans, Laz and I sat back expectantly. After the waiter refilled our cups, Rodrigo looked up.

"My final argument draws on empirical and cross-cultural studies. For example, in connection with hate speech, a specific form of racism, writers have been studying the effect of formal rules. Basing their conclusions both on the nature of prejudice and on the success of Canada and certain European societies in bridling it, these scholars have developed what they call the 'fairness and formality' hypothesis.<sup>135</sup> Are you familiar with it?"

"I've read about it," Laz said. "It holds that formal institutions are apt to diminish, not just the amount of racism that is expressed in behavior, but the very impulse itself.<sup>136</sup> Formality, such as the robes, flags, and other paraphernalia of a court proceeding, reminds all present that the higher values of the American creed are to predominate.<sup>137</sup> Informal settings, such as those that characterize alternative dispute resolution, present fewer such reminders and so, all other things being equal, are apt to call up more prejudice.<sup>138</sup> Scholars have used this to explain why racism is relatively absent in settings like the military and sports, which contain many formal rules and so afford less scope for discretion.<sup>139</sup> They have also used it to compare the record of relatively laissez-faire societies such as the United States to that of societies such as Canada, Great Britain, Italy, and Germany, which believe in freedom of expression but nevertheless forbid racist and anti-semitic speech."<sup>140</sup>

---

<sup>135</sup> See Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387-91, 1400-04 [hereinafter Delgado, Dunn, Brown, Lee & Hubert, *Fairness*]; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

<sup>136</sup> See Delgado, Dunn, Brown, Lee & Hubert, *Fairness*, *supra* note 135, at 1387-91, 1400-04.

<sup>137</sup> See *id.* at 1387-91.

<sup>138</sup> See *id.* at 1387-88, 1402.

<sup>139</sup> See *id.* at 1371-73, 1384-85, 1390-91.

<sup>140</sup> See, e.g., Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 IOWA L. REV. 737 (1993) (book review); Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425.

"And so you agree that, all things being equal, formality offers better prospects for discouraging prejudice than its opposite?" Rodrigo asked.

"I would," Laz conceded. "Like most conservatives, I have no problem with formality. And, although I don't draw quite the same conclusion you do from your four-part argument, I concede that you've shown a chink, maybe a large one, in the armor of the law-and-economics movement and that of some of my more complacent colleagues in the libertarian camp. Racism does present a unique challenge to free market philosophy. Your thought experiments plant the seed of doubt, and your four sorts of evidence drive it home: We cannot sit back complacently, rake in profits, and rationalize that the system that benefits us and our class is best for those at the bottom of the hierarchy too. Self-respecting conservatives must do better than that!"

"Can you do better, Laz?" I asked. I respected the young man's intelligence and candor. His befriending of Rodrigo, a year younger than he, junior on his faculty, and poles apart politically, spoke volumes for Laz's fairmindedness and generosity. I hoped he had a proposal, and despite the late hour was delighted when he said:

#### IV. LAZ PROPOSES A CULTURAL SYNTHESIS: A RACE-NEUTRAL PROGRAM ON WHICH LEFT AND WHITE MIGHT AGREE

"Actually, I've been giving this some thought. As you know, Professor, my own parents were immigrants.<sup>141</sup> I was raised to detest discrimination of any kind. I believe all men and women are entitled to rise according to their merits, without artificial barriers or preferences. At the same time, I agree with Rodrigo that merit is, to some degree, constructed, and is apt at any point in history to favor those activities that the empowered group does well. I also concede that with respect to race, neutral, process-oriented market strategies are not apt to pick out members of minority groups for advancement and beneficial trade. But the Thernstroms and Murray do make valid points. Formal governmental programs aimed exclusively at blacks and Latinos institutionalize bureaucracy, deprive people of the opportunity to act out of generosity by converting everything into an obligation, foster a hand-out mentality among the beneficiaries, stigmatize able minorities, and stir up hostility among working-class whites, like my family.<sup>142</sup> The trick is to find something that minimizes these costs while allowing suffering populations, until recently mired in slavery and Jim Crow laws, to move ahead."

---

<sup>141</sup> On Laz and his family background, see Delgado, *Tenth Chronicle*, *supra* note 3, at 1713-14, 1746.

<sup>142</sup> See *supra* notes 65-83 and accompanying text.

Rodrigo looked up with an expression that I can only describe as a mixture of wariness and hope. "Go ahead, Laz. I'm anxious to hear your thoughts."

Glancing quickly over at me, Laz began. "The American public is tired of race-conscious remedies. Although one can quarrel over what the polls mean, it's only a matter of time before affirmative action and similar programs targeted specifically at minorities come to an end. The question is what to replace them with."

"Aren't they necessary to counter the effects of past discrimination, level the playing field, and allow enough professionals of color to enter the ranks to serve as role models?" Rodrigo asked.

"I agree that those things are important, and it's inexcusable that the Thernstroms offer no replacement for them. I think, however, the answer is to put in place color-neutral programs to help *all* those who are poor and disadvantaged. These programs would include special consideration in college admissions for anyone who can show that he or she was raised under impoverished circumstances and had to struggle to get there. They would also include special outreach to inner-city schools and programs to create jobs and ameliorate urban blight. Many of the problems of the ghettos and barrios are not racial in nature, but economic. What's needed is universal programs. Not only will these be more palatable to the white middle class, they will help the truly poor and deserving. The son or daughter of the black or Chicano brain surgeon may not get special help, but why should they? At the same time, the child of Ukrainian immigrants who is the first person in his or her family to attend college would get special consideration. Remedial programs like those we have in place now don't help desperately poor blacks, who can't get into college or win construction contracts even with a helping hand. My programs would."

Laz had been speaking quietly and urgently. Finally Rodrigo spoke. "Laz, your proposal reminds me of William Julius Wilson's recent book.<sup>143</sup> And, much as I respect your humanism and commitment to equal rights, I doubt it will fill the bill. Even under universal programs, blacks will end up being excluded and given short shrift unless the programs have a race-conscious component or are monitored extremely carefully. Those in charge, even with the best will in the world, will not see to it that jobs and other benefits are distributed evenly among whites and minorities. Ellis Cose showed that even black executives and law partners suffer racism every day.<sup>144</sup> It's true that we must deal with poverty, crime, drugs, and lack of services in the cities. But race will always remain a separate and independent subordinating factor. Blacks are not just white people who hap-

---

<sup>143</sup> See WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996); see also RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION* (1996) (proposing that affirmative action on the basis of race be phased out in favor of a version based on class).

<sup>144</sup> See ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1994).

pen not to have any money right now. Pretending that race doesn't count is an evasion."

"Pretending that black people's problems are all due to race is also an evasion," Laz said evenly. "And programs based on race are social dynamite. They single out beneficiaries by an easily identifiable physical factor—one that bears a lot of historical baggage, I might add. If you could give aid directly to the black poor, which I admit are in great need of it, and could do it quietly and for a short time without being discovered, I might favor it. But you can't do that in a society such as ours. And if you did do it openly, you'd just foster resentment and make matters worse."

"You could try educating white people to accept it," Rodrigo ventured. "Economic conditions are better than they have been for a time. The pie is expanding. Giving a job to A does not mean taking one from B."

"But programs that change the infrastructure are much better. They last forever," Laz replied. "And they have a cascading effect. Create more jobs in the inner city or the manufacturing sector, and you put more money into the pockets of the poor. Some will open small businesses, or send their children to community colleges, when before they couldn't afford it."

"I feel the attraction of your approach," Rodrigo conceded. "And I, too, welcome the day when race does not matter. But, for now, it does. Perhaps there's no way out of the trap, and we just have to muddle through, using whatever degree of remedial race-consciousness society will tolerate, while hoping that broad, race-neutral programs aimed at the poor in general will provide some incidental relief. I just hope it happens before the poor of color sink into an irreversible, never-ending downward spiral."

"One last thing the two of you might want to consider, given your wary views on law and economics, is the difference between allowing free market forces to rule and using market incentives to induce certain kinds of behavior. For example, in environmental law, the first approach would entail allowing the national forests to be sold to whomever values them the most—environmentalists or timber companies. The second incentive approach would correspond to using 'pollution permits' which polluters must buy in order to pollute, but which they can sell if they become cleaner. This might work with affirmative action." Laz sat back with an expectant expression.

"You mean companies with good records of hiring blacks could, say, sell their surplus brownie points, so to speak, to firms who don't like them?"<sup>145</sup> I asked.

"Exactly," Laz said. "This should satisfy even Charles Murray, because his main objection to antidiscrimination laws is that they force people

---

<sup>145</sup> See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 47 (1992) (proposing a similar "Racial Preference Licensing Act").

to do what they may not want to do, namely satisfy their taste for discrimination. It also requires a lesser role for government. . . .”

“Which should keep him happy,” I interjected.

“Indeed,” Laz said. “Government would not need to ride herd on every company and every transaction, because the sales of these discrimination permits would go on privately, between companies.”

“Perhaps the two broad sorts of programs—race-neutral and race-conscious—will work together,” I said, sensing that our discussion was about to come to an end and hoping to set the stage for tomorrow’s. “As white folks begin to see that the new programs, such as job training, benefit them and their struggling counterparts, their empathy and receptiveness to dealing with the special problems of racism may soften. The two sorts of plans, then, may work together, each being a necessary precondition of the other.”<sup>146</sup>

“An intriguing suggestion, Professor,” Laz said, brightening and pushing his chair back from the table. “I’d love to know how your and Rodrigo’s observations on human nature fit into it. Why don’t we talk about it more tomorrow morning. Rodrigo and I have afternoon classes to teach back home tomorrow, so we might want to get a few hours of sleep.”

“I’m game,” said Rodrigo. “It’s almost ten. The Professor and I discussed something similar before.<sup>147</sup> Maybe we can build on that.”

As we stood up and started walking toward the elevator to our rooms, Laz turned to me and said, “If there’s one thing I think we can all agree on, it’s that the combination of the Thernstroms’ anti-affirmative action proposal and the Murray libertarian suggestion to eliminate or water down all the civil rights laws is lethal. It would leave people of color with little protection, requiring them to pull themselves up by their bootstraps, something not even white immigrants managed to accomplish unaided. We all agree that the market alone won’t drive out racism or do much to alleviate the special problems of the underclass of color. Laws forbidding racial discrimination will remain necessary into the foreseeable future. Whether we can do more than that is open to debate. The two of you think we can. The Thernstroms disagree. I say we can target poverty of all kinds, black or white. Will this improve conditions for your people quickly enough to turn things around? I wish I knew.”

“It’s a topic for another day,” I said, standing up and yawning.

Rodrigo pressed the “UP” button. “And maybe another book,” he smiled.

---

<sup>146</sup> Compare the professor’s suggestions with Anthony Bertelli, *Marketing Racism: The Imperialism of Rationality, Critical Race Theory, and some Interdisciplinary Lessons for Neoclassical Economics and Antidiscrimination Law*, 5 VA. J. SOC. POL’Y & L. 97 (1997) (while Title VII is powerless to change employers’ behavior, a preference-based system that couples racial fairness with the profit motive might work).

<sup>147</sup> See Delgado, *Third Chronicle*, *supra* note 3, at 389-415.



