REVIEW ESSAY

The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality

THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE. By Richard Delgado.† New York: New York University Press, 1995. Pp. 273.

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Ask your own soul what it would say if the next census were to report that half of black America was dead and the other half dying.[1]

PROLOGUE

Black America, some people said, was dying. And they wondered what they would hear in the souls of white folk when white America heard the news.

Part of the story, perhaps, was told in June 1995, by the Supreme Court of all America.[2] The session of the Court had not been convened to determine the fate of black America—not explicitly, at any rate, and

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1. W.E.B. DU BOIS, *The Souls of White Folk*, *in* WRITINGS 923, 926 (1986).

2. The narrative that follows is built around three decisions from the 1994-95 Term of the United States Supreme Court: Missouri v. Jenkins, 115 S. Ct. 2038 (1995); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); and Miller v. Johnson, 115 S. Ct. 2475 (1995). The characters and events that comprise the narrative are not, as far as we know, "real." Except that some are, sort of.

not exclusively. Still, it was clearly on the agenda, with no less than three major race-related disputes on the High Court's docket.

And what the Court had to say on such matters did tend to matter. As the highest tribunal in the land, it possessed the power to shape the law, and as a consequence, the power to shape the larger society. This last point was the focus of some academic debate—some questioned the societal impact of the Court's decisions—but this much remained fairly certain: the law could be expected to play at least some role in shaping the development of societal conventions, and on matters of law, the words of the Supreme Court tended to be the final ones.

More importantly, perhaps, the Court helped establish the parameters of cultural discourse. It was a major participant in the national political dialogue, and its voice carried a certain authority not often accorded its elected counterparts. Ironically, perhaps, the paradigms it helped shape were not only legal ones: some were epistemological, some quite political, some downright moral. In reinforcing popular attitudes and beliefs, or in challenging them through new perspectives and dissonant information, the Court helped establish a national mood. It confirmed or denied the citizenry's sense of what is real and what is right. Over time, it transformed their sense of both the possible and probable, and forever changed the way the people saw one another and saw themselves. Yes, the Court's words mattered.

And what the Justices of the High Court had to say on this occasion, in the closing weeks of their judicial term, might have mattered more than usual. Their words, after all, were addressed to the most intractable of national problems: the enduring dilemma of racial inequality. For a waiting nation—for judges, lawyers, lawmakers and their constituents, for teachers and students, parents and children, for the American people of every station, and every hue—the High Court would do no less than newly define the meaning of racial equality.[3] It would be a progress report of sorts: how equal was America? But more importantly, it would set the agenda for the millennium. In this struggle for racial equality, what could be achieved, and how? Whose struggle

3. The disputes resolved by the Supreme Court were ones involving "black" and "white" Americans specifically, but as this text is intended to demonstrate, the lessons learned from the stories told by the Court transcend the simple dichotomy of "black" and "white" and even, for that matter, the world of "racial" minority and majority. There are, in varying contexts, many "outsiders" in contemporary America, and many "strangers" to the world portrayed by the Court.

was it, and when could it end? There were nine of them, one was black and eight were white, and they would need to explain what *their* souls had to say when they pondered the fate of black America.

They had chosen three specific issues to address: the racial desegregation of America's public schools; the national government's use of preferences or presumptions to benefit racial minorities; and the explicit reliance on "race" in the creation of electoral districts as a device to ensure minority representation in the federal legislature.

A. The Desegregation Story

It was William H. Rehnquist, the Chief Justice himself, who began the address to the nation. He selected the desegregation case from the Kansas City, Missouri School District (the "KCMSD") as the basis for his story.

"As this school desegregation litigation enters its 18th year, we are called upon again to review the decisions of the lower courts."[4]

The crowd was still settling into the large chamber. A reporter covering the session noted that the Chief Justice had barely begun his tale, and already a certain weariness weighed heavily in his voice.

"This case," the Chief Justice continued, "has been before the same United States District Judge since 1977."[5]

His voice grew heavier.

"After a trial that lasted 7 1/2 months . . . ."[6]

Heavier still. The crowd sank with it.

"As of 1990, the District Court had ordered $260 million in capital improvements."[7]

And the weariness seemed to give way to frustration.

"Since then, the total cost of capital improvements ordered has soared to over $540 million."[8]

And the frustration yielded to disdain.

"The District Court's desegregation plan has been described as the most ambitious and expensive remedial program in the history of school desegregation. . . . As a result, the desegregation costs have es-

4. *Jenkins*, 115 S. Ct. at 2042.
5. *Id.*
6. *Id.*
7. *Id.* at 2044.
8. *Id.*

calated and now are approaching an annual cost of $200 million. These massive expenditures have financed . . . ."[9]

Soon, no one doubted where this story was going.

The problem, it evolved, was that the District Court had done too much to encourage the desegregation of the Kansas City schools. As the Chief Justice put it, "Proper analysis of the District Court's orders challenged here . . . must rest upon their serving as proper means to the end of restoring the victims of discriminatory conduct to the position they would have occupied in the absence of that conduct . . . ."[10]

But the judge in Kansas City had apparently done more than simply "restor[e] the victims" of segregation to their proper place; his remedy for the racial segregation of the Kansas City schools, according to the Chief Justice, "included an elaborate program of capital improvements, course enrichment, and extracurricular enhancement not simply in the formerly identifiable black schools, but in schools throughout the district."[11]

And still worse, the judge's goal had been to counteract the increasing segregation of the majority black metropolitan schools from the majority white suburban schools. As the Chief Justice saw it, the judge's plan was

> not designed solely to redistribute the students within the KCMSD in order to eliminate racially identifiable schools within the KCMSD. Instead, its purpose is to attract nonminority students from outside the KCMSD schools. But this *inter*district goal is beyond the scope of the *intra*district violation identified by the District Court.[12]

It was axiomatic: "The proper response to an intradistrict violation is an iutradistrict remedy."[13]

Associate Justice Sandra Day O'Connor agreed. "Neither the legal respousibility for nor the causal effects of KCMSD's racial segregation transgressed its bouudaries, and absent such interdistrict violation or segregative effects, [our decisions] do not permit a regional remedial plan."[14]

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9. *Id.* (citation omitted).
10. *Id.* at 2049.
11. *Id.* at 2051.
12. *Id.*
13. *Id.* at 2050.
14. *Id.* at 2059 (O'Connor, J., concurring).

But perhaps the effects of the long history of official racial segregation could not be so easily cabined; perhaps disadvantage, oppression, and hostility did not respect district lines. Perhaps the KCMSD was largely black, and surrounding districts largely white, precisely because the people of Missouri—indeed, most Americans—had been taught for centuries that racial segregation was both natural and desirable. That, in fact, was the position of the trial court; that the interdistrict segregation it was forced to overcome, the immediate product of the so-called "white flight" from the city district, was ultimately traceable to the segregative policies of the state. Perhaps it was fair to suppose that the state was responsible for the continuing segregation.

No, said the Chief Justice.

"The lower courts' 'findings' as to 'white flight' are both inconsistent internally, and inconsistent with the typical supposition, bolstered here by the record evidence, that 'white flight' may result from desegregation, not *de jure* segregation."[15]

Again, Justice O'Connor agreed:

> What the District Court did in this case . . . and how it transgressed the constitutional bounds of its remedial powers, is to make desegregative attractiveness the underlying goal of its remedy for the specific purpose of reversing the trend of white flight. However troubling that trend may be, remedying it is within the District Court's authority only if it is "directly caused by the constitutional violation."[16]

And what had "directly caused" the demographic separation of black and white citizens? Justice O'Connor was not certain, but she leaned in favor of the "typical supposition."

> Whether the white exodus that has resulted in a school district that is 68% black was caused by the District Court's remedial orders or by natural, if unfortunate, demographic forces, we have it directly from the District Court that the segregative effects of KCMSD's constitutional violation did not transcend its geographical boundaries.[17]

The segregation, apparently, was caused by the Kansas City judge's own efforts. Or perhaps it was just natural. As Justice O'Connor ex-

15. *Id.* at 2052 (footnote omitted).
16. *Id.* at 2060 (O'Connor, J., concurring) (citation omitted).
17. *Id.*

plained, "In this case, it may be the 'myriad factors of human existence,' that have prompted the white exodus from KCMSD, and the District Court cannot justify its transgression of the above constitutional principles simply by invoking desegregative attractiveness."[18]

"The unfortunate fact of racial imbalance and bias in our society," she continued, "however pervasive or invidious, does not admit of judicial intervention absent a constitutional violation."[19]

The reporter now thought he recognized the genre of the tale: it was tragedy.

The apparent deficits in minority achievement were also insufficient to justify the trial court's plan. "Just as demographic changes independent of *de jure* segregation will affect the racial composition of student assignments," the Chief Justice continued, "so too will numerous external factors beyond the control of the KCMSD and the State affect minority student achievement. . . . So long as these external factors are not the result of segregation, they do not figure in the remedial calculus."[20]

"External factors"—the reporter briefly wondered what those might be.

"The basic task of the District Court is to decide whether the reduction in achievement by minority students attributable to prior *de jure* segregation has been remedied to the extent practicable."[21]

And the Kansas City judge had not done his job. "Although the District Court has determined that '[s]egregation has caused a system wide *reduction* in achievement in the schools of the KCMSD,' it never has identified the incremental effect that segregation has had on minority student achievement or the specific goals of the quality education programs."[22]

But the reporter knew that identifying the "incremental effect" of centuries of educational inequity would be no easy task. Presumably, the Chief Justice knew it too.

"Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the KCMSD will be

18. *Id.* at 2061 (citation omitted).
19. *Id.*
20. *Id.* at 2055-56 (citation omitted).
21. *Id.* at 2055.
22. *Id.* (citation omitted).

able to operate on its own."[23] After all, the Chief Justice noted, "our cases recognize that local autonomy of school districts is a vital national tradition."[24]

But then, racial segregation was a part of that tradition, and so too was resistance to the desegregation effort. So, for that matter, were pervasive educational inequities—racial disparities in funding, in physical resources, in the curriculum itself—inequities that persist to this day, crystallized in the oftentimes absurd differences between urban and suburban schools.[25] Would the end of the segregation effort signal a return to these traditions?

The Chief Justice took a surprising tack. Those awful traditions, he suggested, were no more; the unfortunate students who labored under them had long since graduated. "Minority students in kindergarten through grade 7 in the KCMSD always have attended AAA-rated schools; minority students in the KCMSD that previously attended schools rated below AAA have since received remedial education programs for a period of up to seven years."[26]

The implications were clear: centuries of racial deprivation caused no lingering racial harms. There was, accordingly, no need for racial redress.

"It may be that in education, just as it may be in economics, a 'rising tide lifts all boats,' but the remedial quality education program should be tailored to remedy the injuries suffered by the victims of prior *de jure* segregation."[27]

And it was time for each individual to sink or swim.

Associate Justice Clarence Thomas echoed the Chief Justice's sentiments: "To ensure that district courts do not embark on such broad initiatives in the future, we should demand that remedial decrees be more precisely designed to benefit only those who have been victims of segregation."[28] "The mere fact that a school is black does not mean that it is the product of a constitutional violation."[29]

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23. *Id.* at 2056.
24. *Id.* at 2054.
25. Robert L. Hayman & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 697-709.
26. *Id.* at 2056.
27. *Id.*
28. *Id.* at 2073 (Thomas, J., concurring).
29. *Id.* at 2062.

What, then, did it mean?

"The continuing 'racial isolation' of schools after *de jure* segregation has ended may well reflect voluntary housing choices or other private decisions."[30] "The Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race."[31]

There was something else on Justice Thomas' mind. "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."[32] He spoke, according to some, with special authority: he was, after all, "black."

> "Racial isolation" itself is not a harm; only state-enforced segregation is. After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority.[33]

The crowd stirred. It was, the reporter knew, an extraordinary moment: Justice Thomas was turning a half-century of constitutional jurisprudence on its head. Fully five decades ago, in *Brown v. Board of Education*,[34] the Supreme Court had held that racially segregated schools were inherently unequal. In a culture marked by an entrenched racial hierarchy, a hierarchy mutually dependent upon notions of natural racial superiority, the bare fact of state-sponsored separation perpetuated racial supremacy, both as a scientific myth and as a social fact.

Now, remarkably, Justice Thomas was suggesting that it was not segregation, but the effort to *de*segregate, that perpetuated the malevolent myths of black inferiority and white superiority. "Two threads in our jurisprudence have produced this unfortunate situation, in which a District Court has taken it upon itself to experiment with the education

30. *Id.*
31. *Id.* at 2065.
32. *Id.* at 2061.
33. *Id.* at 2065-66.
34. 347 U.S. 483, 495 (1954).

of the KCMSD's black youth."[35] The reporter winced at the harshness of the metaphor.

> First, the court has read our cases to support the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development. This approach not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority.[36]

"Such assumptions," Justice Thomas concluded, "and any social science research upon which they rely certainly cannot form the basis upon which we decide matters of constitutional principle."[37]

Justice Thomas accused the Kansas City judge of "misreading" *Brown* and the early desegregation decisions.[38] Some members of the assembled audience were shaking their heads. Was it disagreement? Dismay? Something worse? Those familiar with the desegregation cases knew that the social science evidence offered to the Court in *Brown*—evidence on which the Court had expressly relied—described a vicious cycle of racism, in which racial prejudice generated racial segregation, which in turn generated racial differences in self-concept and achievement, which in turn seemed to legitimate and heighten the prejudice. *Brown* attacked the link in the chain that appeared most vulnerable to law; the segregation it outlawed was, the Court knew, both a cause and effect of racial inequality.[39]

But Justice Thomas saw it differently. "The lower courts should not be swayed by the easy answers of social science, nor should they accept the findings, and the assumptions, of sociology and psychology at the price of constitutional principle."[40]

"Psychological injury or benefit," Justice Thomas continued, "is irrelevant to the question whether state actors have engaged in intentional discrimination: the critical inquiry for ascertaining violations of the Equal Protection Clause. The judiciary is fully competent to make independent determinations concerning the existence of state action

35. *Jenkins*, 115 S. Ct. at 2062 (Thomas, J., concurring).
36. *Id.*
37. *Id.* at 2064.
38. *See id.* at 2064-66.
39. *See* Hayman & Levit, *supra* note 25, at 709-10.
40. *Jenkins*, 115 S. Ct. at 2066 (Thomas, J., concurring).

without the unnecessary and misleading assistance of the social sciences."[41]

The reporter was not sure just what Justice Thomas was saying. That there had been no official segregation? That it had caused no harm? That it no longer caused harm? If he was saying the first, then he was clearly mistaken. And if he was saying either of the latter, then how did he purport to know?

Ironically, for all of his dismissals of social science, the Justice seemed quite willing to draw some social science conclusions of his own. "Given that desegregation has not produced the predicted leaps forward in black educational achievement," he asserted, "there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment."[42] It was both empirical and theoretical, and as the reporter listened to the obligatory citation of authority, he could not help but think that the Justice's selective citation belied his every claim.

And, compared to the roaring indictment of desegregation's unprincipled failures, *Brown*'s successes—in reducing the gap between black and white achievement,[43] in reducing negative racial attitudes by virtually every conventional measure—became mumbled asides.

"Although the gap between black and white test scores has narrowed over the past two decades,"—Justice Thomas' grudging acknowledgement was barely audible—"it appears that this has resulted more from gains in the socioeconomic status of black families than from desegregation."[44]

And those gains, presumably, were unrelated to the dismantling of segregation.

"It is clear that the District Court misunderstood the meaning of *Brown I*."[45] Justice Thomas was in full voice again.

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41. *Id.* at 2065.

42. *Id.*

43. *See, e.g.*, Richard Nisbett, *Dangerous, but Important, in* RUSSELL JACOBY & NAOMI GLAUBERMAN, THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, OPINIONS 110, 112-13 (1995) (reviewing literature and finding reduction in black-white IQ gap—historically fifteen points—from one or two to seven or eight points in the last generation); Hayman & Levit, *supra* note 25, at 711-16 (reviewing literature and concluding that, despite opposition and obstacles to desegregation, studies are suprisingly consistent in finding that desegregation improves minority academic achievement).

44. *Id.* at 2064 n.2.

45. *Id.* at 2064.

> Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. Public school systems that separated blacks and provided them with superior educational resources—making blacks 'feel' superior to whites sent to lesser schools—would violate the Fourteenth Amendment, whether or not the white students felt stigmatized, just as do school systems in which the positions of the races are reversed.[46]

The reporter was stunned by this revision of constitutional history. Justice Thomas seemed to be saying that racially separate schools would have been constitutional, provided neither the "black" nor "white" schools were provided "superior" resources. But then, the Justice retreated.

"Regardless of the relative quality of the schools, segregation violated the Constitution because the State classified students based on their race."[47]

But was it correct, the reporter wondered, that the bare fact of classification was unconstitutional? How was classification alone not "equal"? Was it unequal regardless of the purpose? Regardless of the effect? Regardless of the context? Justice Thomas did not explain.

"Of course, segregation additionally harmed black students by relegating them to schools with substandard facilities and resources."[48]

The reporter scribbled furiously; he was losing the story.

"But neutral policies, such as local school assignments, do not offend the Constitution when individual private choices concerning work or residence produce schools with high black populations."[49]

Now, at last, the tale was familiar. In the aftermath of *Brown*, District Court Judge John Parker had insisted that the Constitution did not require desegregation, but merely an end to segregation—the formal disestablishment, that is, of official segregative policies. In 1968, the so-called "Parker doctrine" had been unanimously rejected by the Supreme Court.[50]

Bnt not by Justice Thomas. "The point of the Equal Protection Clause is not to enforce strict race-mixing, but to ensure that blacks and

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46. *Id.* at 2065.
47. *Id.*
48. *Id.*
49. *Id.*
50. *See* Green v. County School Board, 391 U.S. 430, 437-38 (1968); *see also* Hayman & Levit, *supra* note 25, at 676-77 (discussing the "Parker doctrine" and its rejection by the Court).

whites are treated equally by the State without regard to their skin color."[51]

Justice Thomas concluded with a critique of the second flaw in desegregation jurisprudence: "Although I do not doubt that all KCMSD students benefit from many of the initiatives ordered by the court below, it is for the democratically accountable state and local officials to decide whether they are to be made available even to those who were never harmed by segregation."[52]

Justice O'Connor concurred. Those "myriad factors" that caused segregation "are not readily corrected by judicial intervention, but are best addressed by the representative branches; time and again, we have recognized the ample authority legislatures possess to combat racial injustice."[53]

There was, then, always the political process. It was ironic, in light of what was soon to come.

B. The "Affirmative Action" Story

It was Justice O'Connor who took the lead in telling the Court's next tale. This one concerned a federal "affirmative action" law that was designed to increase the participation of economically disadvantaged entrepreneurs in federal contracting; it included a statutory presumption that minority contractors were economically disadvantaged. It was, on the one hand, simply a recognition of an economic reality: statistically, minority contractors were likely to be disadvantaged in a way that white contractors were not.[54] On the other hand, the statute used the "r" word: "race."

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51. *Jenkins*, 115 S. Ct. at 2066 (Thomas, J., concurring).

52. *Id.* at 2073.

53. *Id.* at 2060 (O'Connor, J., concurring).

54. *See, e.g.*, Adarand Constructors v. Pena, 115 S. Ct. 2097, 2135 (1995) (Ginsburg, J., dissenting) ("Job applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race. White and African-American consumers still encounter different deals. . . . Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 529 (1989) (Marshall, J., dissenting) (acknowledging the evidence assembled by the Richmond City Council: "Its proof includes statistics showing that minority-owned businesses have received virtually no city contracting dollars and rarely if ever belonged to area trade associations; testimony by municipal officials that discrimination has been widespread in the local construction industry; and the same exhaustive and widely publicized federal studies relied on in *Fullilove*, studies which showed that pervasive discrimination in the Nation's tight-knit construction industry had operated to exclude minorities from public contracting."); Fullilove v.

The Court had told many stories about "race." Justice O'Connor's story, she said, would be an attempt to reconcile the earlier tales, an attempt to make of them some coherent whole.

"Despite lingering uncertainty in the details," she began, "the Court's cases . . . had established three general propositions with respect to governmental racial classifications."[55] The first of these, she announced, was "skepticism": "'[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination.'"[56] It was a relatively uncontroversial start.

With her second proposition, however, the tale took on a sharper edge. "'[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification.'"[57] "Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."[58]

Justice John Paul Stevens, second on the Court in seniority, and Justice Ruth Bader Ginsburg, the second most junior member of the Court, had suggested that the Court's earlier cases told at least two different tales: one when government used "race" to further the oppression of politically vulnerable minorities, the other when government used "race" to assist those minorities in overcoming the disadvantages created by a history of oppression.[59] But for Justice O'Connor, there was just one story.

Justice Thomas agreed with Justice O'Connor and he took the occasion to express his disagreement with the underlying premise of Justice Stevens' and Justice Ginsburg's positions "that there is a racial paternalism exception to the principle of equal protection."[60] Justice Stevens had questioned whether the different uses of "race" were

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Klutznick, 448 U.S. 448, 458-59 (1980) (citing Congressional findings that "in fiscal year 1976 less than 1% of all federal procurement was concluded with minority business enterprises, although minorities comprised 15-18% of the population").

55. *Adarand*, 115 S. Ct. at 2111.

56. *Id.* (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986) (plurality opinion of Powell, J.)).

57. *Id.* (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (opinion of O'Connor, J.)).

58. *Id.* at 2114.

59. *See id.* at 2120-22 (Stevens, J., dissenting); *id.* at 2134-36 (Ginsburg, J., dissenting).

60. *Id.* at 2119 (Thomas, J., concurring).

morally and constitutionally equivalent. "I believe," Justice Thomas responded,

> that there is a "moral [and] constitutional equivalence," between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. . . .
>
> That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.[61]

It was, the reporter thought, an easy argnment to comprehend: it offered simplicity, elegance, symmetry. But the Court—Justice Thomas included—was adamant that the only discrimination that mattered was "intentional" discrimination; so why was the character of that "intent" irrelevant? If the constitutional guarantee of equality was only implicated by "purposeful" official action, why should it not matter whether the purposes were benign or malevolent?

Justice Thomas attempted to explain. "There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution."[62]

The reporter remained perplexed. How did the presumption of economic disadvantage compromise the principle of "inherent equality?" Was it really "paternalistic" to acknowledge the truth of economic inequity, and to try to offer some redress? Justice Thomas sounded almost, well, Darwinian.

The reporter had barely begnn to crystallize this thought when Justice O'Connor abruptly moved on. Her third proposition, she said, was "congruence." It did not matter whether the discrimination was by a federal actor or a state actor, "'[e]qual protection analysis in the Fifth

61. *Id.* (citation omitted).
62. *Id.*

Amendment area is the same as that under the Fourteenth Amendment.'"[63] Justice Stevens, she noted,

> claims that we have ignored any difference between federal and state legislatures. . . . It is true that various Members of this Court have taken different views of the authority § 5 of the Fourteenth Amendment confers upou Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. We need not, and do not, address these differences today. For now, it is enough to observe that Justice Stevens' suggestion that any Member of this Court has repudiated in this case his or her previously expressed views on the subject, is incorrect.[64]

The reporter smiled. Not that long ago, Justice O'Connor had insisted that the historical truth of national Reconstruction meant that the federal government was entitled to a deference in dealing with "race" that was not applicable to the states.[65] The reporter was glad to hear that she had not repudiated that view. However, precisely what she *had* done remained something of a mystery.

"Taken together," Justice O'Connor continued, "these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[66] "The three propositions . . . all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*."[67]

She had found her unifying theme: only individuals have a right to constitutional protection and governmental redress. Groups, as groups, had no cognizable claims. It was catchy, and Justice Scalia was quick to join in.

Individuals, he declared,

> who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept

63. *Id.* at 2111 (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976)).
64. *Id.* at 2114 (citations omitted).
65. *Croson*, 488 U.S. at 490 (opinion of O'Connor, J.).
66. Adarand Constructors v. Pena, 115 S. Ct. 2097, 2111 (1995).
67. *Id.* at 2112.

> is alien to the Constitution's focus upon the individual.... To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.[68]

It was stirring language. The reporter surveyed the crowd; he wondered how many were convinced. He himself found the rhetoric oddly unsatisfying. It seemed—he searched for the word—detached. After centuries of discrimination against "individuals" because of their "race," it seemed almost absurd to insist that "individuals" were not entitled to redress because of their "race." And having constructed a socio-economic hierarchy rooted deeply in "race," it seemed wholly unrealistic to suggest that the harm could be undone without reference to "race." How else would "individuals" of any oppressed "race" be made truly equal?

"Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law."[69]

It was Justice Thomas again. The reporter shook his head. Precisely how did Justice Thomas imagine we were made unequal in the first place?

"[T]here can be no doubt," he continued, "that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination."[70]

Was it really true, the reporter wondered, that affirmative action was as "poisonous and pernicious" as, for example, compulsory segregation? Justice Thomas explained:

> So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and

68. *Id.* at 2118-19 (Scalia, J., concurring) (citations omitted).
69. *Id.* at 2119 (Thomas, J., concurring).
70. *Id.*

> may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.[71]

As Justice Thomas concluded his tale, four of his colleagues nodded their approval. Yet none of them, the reporter noted, chose to echo his sentiments.

The reporter, meanwhile, had more questions than answers. Was this "badge of inferiority" the same one that Justice Thomas had so casually dismissed in his desegregation story? Why were "attitudes" so central to this story, but so irrelevant in the desegregation tale? Just where, the reporter wondered, was the line between "social science" and "constitutional principle"? He wished there were time to ask, but a new story was already starting.

C. The Redistricting Story

It was Justice Anthony Kennedy who told the final tale of the session. It was to be a short story.

The United States Voting Rights Act required states with a history of racial discrimination in elections to obtain federal approval for any changes in their election schemes. The State of Georgia, with a 27% black population, had sought approval for a congressional redistricting plan; the federal government refused until Georgia provided that three of its eleven districts would be majority black.[72] One of the majority black districts was the Eleventh District. White voters in the Eleventh sued; perhaps they did not like being in the minority.

The central mandate of the equality guarantee, Justice Kennedy began, "is racial neutrality in governmental decisionmaking."[73] To support his simple assertion, Justice Kennedy reviewed the history of racial segregation.[74] It was not the history of exclusion; it was not the history of oppression; it was instead the history of "race." Segregation and redistricting were, like affirmative action, all part of the same story: the story of "race."

And the reporter knew the end of this story long before Justice Kennedy finished telling it.

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71. *Id.*
72. *See* Miller v. Johnson, 115 S. Ct. 2475, 2483-85 (1995).
73. *Id.* at 2482.
74. *See id.* at 2482-83.

"When the State assigns voters on the basis of race," Justice Kennedy said, "it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"[75]

The Eleventh District, he continued, belied this assumption. The district included "the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County, though 260 miles apart in distance and worlds apart in culture. In short, the social, political and economic makeup of the Eleventh District tells a tale of disparity, not community."[76]

The reporter failed to see Justice Kennedy's point: why was it that "community" and "disparity" were incompatible? Within any community there were differences; why could that not be true of the "black" community? What was wrong with the simple recognition that among many demographic variables, "race" tended to be prominent—but not exclusive—in defining political communities?

"It is true," Justice Kennedy acknowledged,

> that redistricting in most cases will implicate a political calculus in which various interests compete for recognition, but it does not follow from this that individuals of the same race share a single political interest. The view that they do is "based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens," the precise use of race as a proxy the Constitution prohibits.[77]

The reporter strained to understand: precisely when did it become demeaning to suggest that racial communities might be united by some political interests? Was that not, after all, substantiated by voting patterns and opinion surveys? Was that not, after all, the precise reason racial minorities were systematically excluded from the polls in the first place? For that matter, was it not the underlying premise of the "white" voters' lawsuit? Why else would they have objected? What else could they point to as their constitutional harm?

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75. *Id.* at 2486 (quoting Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993)).
76. *Id.* at 2484.
77. *Id.* at 2487 (citation omitted).

The state, Justice Kennedy continued, acts in a presumptively unconstitutional manner whenever the complaining party can prove that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations."[78] The same would be true whenever "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines."[79]

Race as a proxy? For what? Race for its own sake? As opposed to what? The reporter's head was spinning. He could barely hear Justice Kennedy as he approached the end of his story.

"A State is free to recoguize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests."[80]

Just what was Justice Kennedy saying? That there were no communities of race? Or that racial communities had no "common thread" of interests? Or was it that their common interests were not "relevant?"

Justice Kennedy ended with one final observation, "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids."[81]

And with that, the session ended. The Justices left the bench and retired to their offices and, eventually, to their homes. The assembled crowd of media and curious citizenry filed out of the historic chamber and into the hot, humid air of the summer afternoon. A hundred or so schoolchildren raced down the steps of the great building, briefly mingled on the sidewalks below, then scattered into small groups and marched dutifully to the buses that carried them on their field trip to the nation's capital. The reporter noted this curious phenomenon: the black students and white students did not ride the same buses.

The reporter thought back to his school days, and managed a smile at the memories of his own field trip to the Capital. His schools, he

78. *Id.* at 2488.
79. *Id.* at 2486.
80. *Id.* at 2490.
81. *Id.* at 2494.

recalled, were racially segregated, but *de jure* or *de facto*, he hadn't a clue which. Frankly, his family had moved so much, and he'd been to so many different schools, it was nearly certain that he'd grown up with both kinds of segregation, and maybe a few other types besides.

The reporter watched the schoolchildren as they scrambled to their seats on the buses, laughing and playing, without, it seemed, a care in the world. And his mind wandered back again to his own school days, to a day he had nearly forgotten.

He was just seven years old, barely beginning the third grade, but already attending his fourth school. The students were reporting to the rest of the class on their "Most Exciting Day of the Summer," and the reports were filled with gleeful tales of trips to the beach, of days at amusement parks, of adventurous rides on new bicycles with old friends. When it was his turn, he wasn't sure what to say. "I didn't really do anything," he had said, earnestly hoping that would be the end of the matter. But the teacher was not so easily satisfied, and the ominous silence of the other kids in the class had convinced him that he had better offer something.

And so he had spun a magnificent yarn about the day his family went to the farm. Yes, they had driven to a farm in the country, his uncle's farm, where they went every summer. His mother went, and his grandparents, and also his kid sister, who was only four years old and who was afraid of all the animals, especially the pigs. He had been allowed to ride the horses, and feed the pigs and goats, and go swimming with the ducks. And he had become friends with one of the little ducks, a duck named Donald, and when they went to leave at the end of the day, Donald had followed him into the car, and he didn't know what to say or do, with this little duck hiding under his seat, and so Donald had gone home with him, and nobody knew until they got back to his house and Donald waddled up the steps and onto the porch and into the house. And then Donald saw the reporter's kid sister, and started to chase after her to play, because, after all, she walked like a duck, and everybody else started chasing Donald, and feathers were flying everywhere, and they finally caught Donald and took him back to the farm, but he's allowed to come visit now nearly all the time. His voice had grown more and more animated as he told the story, and the laughter of the other kids had grown louder and louder. And when he finished, the kids in the class had clapped, and he, in return, had smiled.

At recess that day, the other kids had all come up to him, wanting to hear more about the farm, the ducks, and even his kid sister. And he ended up talking with them about pets, and families, and his one real passion, baseball. And he was feeling really quite good when the teacher found him, and said that she wanted to talk to him. He remembered her saying something about "needing to fit in," and something else about "playing by the rules," and when she told him that he was going to get a "D" on the assignment because he had made the story up, he felt like crying, and maybe he even did. And when they got back from recess he had to tell the class another story, a "true story," and he could not think of one, and his grade fell from a "D" to an "F."

That night, the teacher had called his Mom, and he had watched his mother's face anxiously as she talked on the phone. When she hung up, she beckoned him to her, smiled, and hugged him. "Well," she had said, "you do have quite an imagination, don't you?" She was not mad at all, she said, but she did hope quite sincerely that he did not plan on bringing any ducks into the house. He promised that he would not, asked if he could have a puppy, and was gently told not to press his luck.

He told a different story to the class the next day, a story about the day he and his friend Huey rode their bikes all day long and into the night and, to their great surprise, did not get punished for missing dinner. It was an okay story, and the kids were attentive, though they did not clap when he finished. The teacher, on the other hand, seemed quite pleased. He got an "A" this time, which was pretty good, seeing as how he'd never even been on a bike.

A siren wailed in the distance. Police? Ambulance? The reporter had forgotten how to tell them apart.

He was still standing on the hot sidewalk outside the Supreme Court, and the voices of the Justices, still fresh in his ears, began to blend with his distant childhood memories.

He shook his head reflexively, as if to disentangle the past from the present, the memories from the realities, the stories from the truth.

But they did not separate.

And he found himself thinking that it must be the heat.

INTRODUCTION

The tradition in legal scholarship has been to treat literature as one thing and doctrinal analysis as something different, but as the Prologue of this Essay on doctrine, narrative, and race demonstrates, the two are inseparable. The Prologue is both a story and doctrinal critique—that is to say, it is a particularized form of counterstory about the conventional story told in law.

This Essay suggests that doctrinal critique *is* counterstorytelling, a contention fairly proved by *The Rodrigo Chronicles*, Richard Delgado's literary challenge to the dominant legal culture. Part I of this Essay is devoted to a review of Professor Delgado's antidote to the conventional story: his critiques of meritocracy and the cultural hierarchies it produces, as well as his proposals for reconstructing racial reality. Woven in with our review of *The Rodrigo Chronicles* is commentary on the Supreme Court's most recent race decisions. We focus on the manner in which the stories told by the Supreme Court serve to perpetuate the prevailing construction of race, while simultaneously reinventing our cultural history and restricting the possibilities of our future. The Court's race troika vividly illustrates the need for Professor Delgado's work: a new discourse on race committed to comprehension, to compassion, and to an equality that is real.

Part II of this Essay moves to the level of theory or meta-narrative and evaluates the use of storytelling as a method of doctrinal critique. Much of the debate about storytelling has centered on the validity of storytelling as legal scholarship.[82] We explore instead the specific potential of storytelling as a method of criticism of legal decisions. We suggest that the narrative form of critique offers greater epistemological accuracy than formal, syllogistic doctrinal analysis because it embraces tentative, probabilistic, and contextual methods of description. Narrative also promotes critical inquiry in a way that doctrine-spinning cannot because it engages in dialogic, rather than dialectic, discourse. Finally, we conclude by suggesting that storytelling embodies a unique praxis: a method both for re-cognizing the plural truths of lived

82. *Compare* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (finding a narrow place for story telling as an adjunct to traditional legal analysis and commentary), *with* Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993) (advocating the counterstory as necessary to question majoritarian principles).

experience, and for reimagining the possibilities of a more compassionate world. This praxis is artfully demonstrated in the tales of *The Rodrigo Chronicles.*

A cautionary note on nomenclature is in order. The terms "narrative" and "story" are used here more or less interchangeably. Both terms are imprecise and fluid, but they are not without integrity.

By stories, we mean communications that are typically distinguished by four features: they are partial, they are subjective, they are realistic, and they are personal.

First, stories do not share the conceit of "impartiality" that is characteristic of most other texts. On the contrary, stories are very partial, explicitly so, in the sense that they do not purport to be neutral, to represent the only story, or the "whole" story. The storyteller does not believe that she has access to the whole truth; she does believe, on the other hand, that her stories may illuminate the search.

Second, stories are not detached and "objective," but are instead overtly "self" -conscious. Stories represent a celebration of subjectivity, an insistence on the importance of perspective and voice. Storytelling in this sense defies some postmodern conventions in insisting that the expressive self still matters, whether that self is in some salient sense still autonomous or largely the product of cultural construction. At times this "self" -consciousness may be largely a matter of form, as, for example, when a storyteller insists upon relating the stories told by individual justices in specific institutional and cultural settings, rather than attributing opinions to an anthropomorphized "court." At other times, this subjectivity is clearly a matter of substance, as when the storyteller asserts the distinctiveness and legitimacy of the outsider's voice.

Third, stories are not universal, general, or abstract; they are contextualized, highly particularized, and very concrete. Stories, then, are "real" whether they are offered as fact or fantasy, myth or matter of fact; they describe places and events in realistic terms and in real time. Above all, stories are populated by real people; they afford a special emphasis to personal details, to nuanced characterizations, to the richness of human experience.

Fourth, stories are personal. Since they are told by or about real people, they invariably describe personal development not in a vacuum, but in a context constructed by and filled with other people. Stories, then, are not about the atomistic individual who treads the barren, dehu-

manized terrain of the conventional text: stories are about personal interactions and connections, including those between the storyteller and the listener or reader. They are personal, then, in the sense that they are "interpersonal," representing the spaces between people as points of engagement, not as meaningless voids.

Characterized by these four features, stories are not limited to a particular form; they may appear as parables, allegories, myths, or autobiography.[83] Additionally, they need not have a particular substantive content, although we cannot deny the likelihood that our defining features privilege certain political values. Moreover, they need not exhibit all of these features to any particular degree in order to be considered "good" stories. We deliberately choose, in fact, not to enter the fray over the appropriate evaluative criteria for narrative scholarship. We simply feel compelled to describe those aspects of "narratives" or "stories" that qualify them for that appellation. The presence of these features does not determine, in our view, the worth or merit of the stories; it simply assists in determining whether the communication may fairly be called a "story"—in what sense and, perhaps most importantly, to what degree.

Which leads to our final observation: every communication may in some sense or to some degree be a "narrative" or a "story." Thus, it

83. Professor Anne Coughlin has suggested that autobiography may be a problematic form of storytelling in two important ways. First, the autobiography proposes an experiential truth which is, in certain empirical respects, falsifiable. That the falsifiable claims are personal to the author renders them, in the view of some critics, immune from constructive engagement. Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229, 1281-82 (1995). But the truth or falsity of autobiographical details is rarely important to the narrative message: the stories themselves are generally metaphors, or stories about subjective impressions. As such, autobiographies—or autocritographies—may be engaged as fully as any other form of scholarship; responses which rely upon alleged inaccuracies in the account need only be legitimate and relevant, and not devolve into *ad hominem* attacks.

Professor Coughlin also develops at some length one other apparent dilemma confronting autobiographical storytellers. Both in form and in substance, autobiographies may exalt the same modernist, liberal, individualist ethos that is often the target of outsider storytelling. *Id.* at 1287-91. The concern seems to us to be a pragmatic political one. At that, we think it is a legitimate concern, but likely overstated. The presence of human characters in stories does not necessarily signal an endorsement of liberal individualism, and the subject represented by autocritography need not be a modernist one. In fact, as we explain above, we think one of the distinguishing features of stories is their emphasis on the *inter*personal, and this is no less true of autobiography. Indeed, the stories Professor Coughlin cites to support her thesis, *see id.* at 1287-1302, seem to us less about individual achievement and more about personal interactions and community responses. But we cannot say for sure: they are, after all, just stories.

is a premise of our work that the narrative dimensions of judicial opinions are too often overlooked. Our Prologue, in this sense, simply highlights a story that was already latent in the judicial text. Our corollary premise is that doctrinal critique is a particularized form of counterstorytelling. Again, the tales related by the Prologue's reporter, like those told by Delgado's Rodrigo, are stories just like those told in conventional critiques, only more so. What we ultimately offer as our concluding hypothesis is the possibility that, in some circumstances, doctrinal critique might engage its object more effectively when these narrative aspects are emphasized, that is, when the critique (or the object doctrine) is offered, unabashedly, as a story.

I
THE RODRIGO CHRONICLES

> Oh, yes. There is the majoritarian story or tale. White folks tell stories, too. Only they don't seem like stories at all, but the truth. So when one of them tells a story such as, the pool is so small, or affirmative action ends up stigmatizing and disadvantaging able blacks, few consider that a story, or ask whether it is authentic, typical, or true. No one asks whether it is adequately tied to legal doctrine, because it and others like it are the very bases by which we evaluate legal doctrine. White tales like these seem unimpeachable . . . (pp. 194-95)(footnote omitted).

The Rodrigo Chronicles is the fictional account of a series of conversations between Rodrigo Crenshaw, a graduate law student, and his Professor. Rodrigo is the half-brother of civil rights attorney Geneva Crenshaw, the heroine of Derrick Bell's *Civil Rights Chronicles*,[84] and he shares his sister's commitment to social justice as well as her extraordinary abilities to see real inequity and envision a better world. Educated in Italy, "of color" but of no particular ethnic hue, Rodrigo brings to the dialogue both a "radical" philosophical insight and a cultural outsider's perspective. Relentless in his skepticism, Rodrigo incessantly questions "why?"; enduring in his faith, he still wants to know "why not?"

The Professor, meanwhile, seems to have traded some faith for knowledge in his struggles against injustice. In his conversations with

84. DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

Rodrigo, he seems to reverse the exchange. Part Socratic master, part professional mentor, part personal counselor, the Professor subtly guides the younger man through the maze of American racism. It is an enlightening journey for the student, an invigorating one for the Professor, and when it comes to its fittingly ambiguous end, it is clear that the fellow travelers are, above all, friends. And the stories of their journey fill the pages of the text to the brim.

A. The Story of Merit

In the conventional story, success is largely deserved. Economic gains, social advancement, political victories—these are the rewards for talent and effort. There is some room for the role of fortune in the conventional story, although luck, good or bad, is a minor player in the meritocratic tale. But there is, in this story, no room for bias. The meritocratic process, the story goes, is pure, cleansing itself of the aberrations of prejudice. The criteria of merit, meanwhile, are absolute and universal, determinate and measurable, valid and reliable for all people and all time. In short, as the conventional story would have it, people get what they deserve.

And so, in desegregation cases like *Missouri v. Jenkins*,[85] white students attend nearly all-white schools because their parents, after all, can afford to live in suburban (read "better") neighborhoods, and they out-perform their minority counterparts in conventional measures of achievement because they are, after all, academically advanced (read "better"). And in affirmative action cases like *Adarand Constructors, Inc. v. Pena*,[86] white contractors routinely are awarded contracts because, after all, they submit the lower (read "better") bids. And in voting rights cases like *Miller v. Johnson*,[87] white candidates keep winning elections from white electoral majorities because they are, after all, the more popular (read "better") candidates. Socially, academically, economically, and politically, superior efforts and superior talents yield their just rewards.

But *The Rodrigo Chronicles* reminds us that the criteria of merit are neither natural nor neutral, and that the processes of meritocratic assessment and reward do not cleanse or even escape the taint of racial

85. 115 S. Ct. 2038 (1995).
86. 115 S. Ct. 2097 (1995).
87. 115 S. Ct. 2475 (1995).

bias: indeed, they embody it. Merit results not from the inevitable recognition of natural superiority, but from the arbitrary vertical ordering of culturally constructed differences—that is, of social, economic, and political advantages and disadvantages.

Desegregation cases like *Jenkins* suddenly look quite different in this new light: residential options, it emerges, have been shaped by generations of official and unofficial segregation, and academic achievement by generations of educational deprivation and cultural hegemony. Affirmative action cases like *Adarand* look different as well: bidding possibilities, it emerges, are limited by the ecouomic realities of bonding requirements, insurance premiums, the economies of scale, and the pervasive network of business connections, realities forged in the long history of economic racial oppression. And new understandings inform voting rights cases like *Miller*. Electoral success, it emerges, is fairly traceable not only to the longstanding public obsession with race, but more specifically to well-documented official actions creating minority neighborhoods while simultaneously precluding the possibility of minority electoral districts. In a cultural context marked by racial hegemony, merit is not merely contingent, it is racially biased. Thus informed, Rodrigo exclaims, "Merit sounds like white people's affirmative action!" (p. 6).

In offeriug a counterstory to the traditional tales of meritocracy, *The Rodrigo Chronicles* articulate a particularly compelling version of the postmodern indictment of western culture. At a theoretical level, it presents a challenge to the conventions of modern western thought; to the linear conception of rationality; to the relentless drive toward the unity and coherence of thought; to the ultimate exclusion and suppression of cultural beliefs that fall outside the scope of modernity's forged trnths.[88] Delgado notes the irony of the modern condition, that the relentless equation of progress and coherence has left us with only the illusion of each. Thought is uuified only in its obliteration; modernity is indeed "dominant but dead."[89] He illustrates modernity's crisis with

88. "Their principal advantages were linear thought, which lent itself to the development and production of weapons and other industrial technologies, and a kind of messianic self-image according to which they were justified in dominating other nations and groups" (p. 10).

89. Jürgen Habermas, *Modernity—An Incomplete Project*, *in* THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE 3, 6 (Hal Foster ed., 1983).

the modest example of the legal academy. It is Rodrigo who begins the exchange:

> And take your field, law. Saxons developed the hundred-page, linear, densely footnoted, impeccably crafted article—saying, in most cases, very little. They also brought us the LSAT, which tests the same boring, linear capacities they developed over time and that now exclude the very voices they need for salvation. Yet you, Matsuda, Lawrence, Torres, Peller, and others toss off articles with ridiculous ease—critical thought comes easy for you, hard for them. I can't, of course, prove your friends are genetically inferior; it may be their mindset or culture. But they act like lemmings (p. 13).

The Professor is not unmindful of the implications of Rodrigo's assault. "[Y]ou're sure to find yourself labeled as racist," he warns. "Maybe we both are—half the time I agree with you" (p. 13).

The Rodrigo Chronicles' assault on modernity takes on a practical aspect as well, for it is equally an assault on meritocracy's veneer of neutrality. Racial bias, *The Rodrigo Chronicles* insist, pervades the system of rewards and punishments. Regarding the latter, Rodrigo notes that the story of crime systematically elides two tales: the contemporary tale of "white collar" crime—corporate crimes, military crimes, non-criminalized tortious harms, crimes that are, in demographic terms, "white" in more than their collar—as well as the history of state acquiescence in the criminal and quasi-criminal cartels of western European immigrant groups. "So crime," the professor asks, "was a path of upward mobility for other immigrant groups, but one that was denied for us?" "Correct," Rodrigo replies. "For African-Americans alone this avenue was closed. Society decided to repress, not tolerate, crime from our group" (p. 172).

And, of course, bias also runs rampant through the meritocratic scheme of rewards. The average income of black Americans is approximately sixty percent of the average income of white Americans,[90] and even with equivalent educational credentials, black Americans have significantly lower income potential and prospects for employment advancement.[91] The net worth differences among racial groups are sim-

90. David R. Francis, *Why the Black-White Wealth Gap Is So Big,* CHRISTIAN SCI. MONITOR, July 28, 1995, at 9.

91. *See* Tom Wicker, *The Persistence of Inequality,* N.Y. TIMES, Mar. 8, 1992, § 7 (Book Review), at 24 ("Among men with four years of college, blacks earn $798 for each $1,000 of income

ply staggering: as of 1990, the date of the last census, the median net worth of white households was $44,408, compared with a $4,604 median for black households.[92] In the educational arena, black students are more likely than white students to be suspended, expelled, failed, and shunted into remedial education classes.[93] America's black citizens are significantly underrepresented as recipients of bachelors, masters, and doctoral degrees.[94]

In 1988, the average life expectancy for African-Americans was 69.2 years, a decrease from the historical high of 69.5 years in 1985, while life expectancy for whites remained constant at 75.6 years.[95] Significant interracial differences exist in virtually all measures of health: in rates of infectious diseases, chronic ailments, infant mortality, and access to preventative health care.[96] In its review of a variety of studies examining the provision of medical services in cardiology, internal medicine, renal disease, and obstetrics, the American Medical Association's Council on Ethical and Judicial Affairs concluded that

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earned by whites at the same level of education; black college men earn only a few dollars more than white men who went no farther than high school.").

92. Shelia M. Poole, *Working Hard—For Yourself,* ATLANTA J. & CONST., Sept. 4, 1995, at E1.

93. *See, e.g.,* Sylvia T. Johnson, *Test Fairness and Bias: Measuring Academic Achievement Among Black Youth, in* BLACK EDUCATION: A QUEST FOR EQUITY AND EXCELLENCE 76, 77-84 (Willy D. Smith & Eva W. Chunn eds., 1989); KENNETH J. MEIER ET AL., RACE, CLASS, AND EDUCATION: THE POLITICS OF SECOND-GENERATION DISCRIMINATION 4-5 (1989).

94. Jeannie Oakes, *Tracking in Mathematics and Science Education: A Structural Contribution to Unequal Schooling, in* CLASS, RACE, AND GENDER IN AMERICAN EDUCATION 106-08 (Lois Weis ed., 1988).

95. Robert Byrd, *Heart Disease, Homicide Help Cut Blacks' Life Expectancy,* SEATTLE TIMES, July 26, 1991, at B4.

96. The infant mortality rate is almost twice as high for blacks than for whites. Ellen Berlow, *Another Crisis for African Americans,* WASH. TIMES, June 26, 1994, at C6. Blacks are at a signifieantly high risk for getting cancer, AIDS, and cardiovascular diseases, among other diseases, and have substantially lower survival rates than whites. *See* Suzanne P. Kelly, *Blacks at Higher Risk for Cancer,* STAR TRIB., Dec. 8, 1991, at 1B, 3B (The American Cancer Society conducted research between 1978 and 1981 which "found that [the] cancer rate for blacks was 372.5 per 100,000, compared with 335 per 100,000 for whites" and that "[t]he overall five-year eancer survival rate for blacks is 38 percent, compared with a 52 percent rate for whites."); Rebecca Perl, *Resurgent TB Strikes Minorities Hard,* ATLANTA J. & CONST., May 1, 1992, at A2 (minorities accounted for approximately 70% of the 25,700 tuberculosis cases in 1990); Cristine Russell, *AIDS Is Leading Killer of Blacks 25 to 44,* WASH. POST, June 28, 1994, at 7 ("AIDS has replaced homicide as the leading killer of African Amerieans aged 25 to 44."); Monte Williams, *This Research Group Fights to Reduce Blacks' Vulnerability to Disease,* CHI. TRIB., Sept. 5, 1990, § 7 (Style), at 16 ("Deaths from diseases of the heart are 40 percent more frequent in blacks.").

black Americans receive less aggressive medical treatment than their white counterparts.[97]

And this gloomy review barely scratches the surface.[98]

1. *The Story of Equality*

In the conventional story, by contrast, the assorted hierarchies produced by meritocracy's scheme are not unjust at all. They are, rather, the inevitable product of the marriage of two principles: equality and liberty. Upon their union, equality is transformed into "equality of opportunity," and, thereafter, ceases to have much independent meaning. To the complaint, "I am not equal," meritocracy replies "but you are free," and equality, disempowered, stands mute.

One might imagine a world in which equality and liberty could indeed be redundant: a world, perhaps, without bias, or at the very least, one that blesses its inhabitants with the infallible ability to detect bias, and an inexhaustible willingness to root it out. But, as *The Rodrigo Chronicles* points out, ours is not such a world.

Racial bias, in truth, infects this nation's governing structure, and we appear either unable or unwilling to fully confront it. The self-evident truths declared by the Declaration of Independence apparently were not universal ones; indeed, the convenient exception for chattel slavery would be memorialized in the founding document itself, producing what Derrick Bell refers to as the "Constitutional Contradiction."[99] The social compact, in short, was a useful myth, but it did not embrace all of the people. The rule of law, meanwhile, designed to en-

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97. *See* Council on Ethical and Judicial Affairs, American Medical Association, *Black-White Disparities in Health Care*, 263 JAMA 2344, 2345 (1990); *see also* Katherine L. Kahn et al., *Health Care for Black and Poor Hospitalized Medicare Patients*, 271 JAMA 1169 (1994).

98. The myriad examples include: the tragic violence against members of minority groups, *see, e.g.*, Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926 (1993); the ways in which formal access to public housing, employment, and education institutionalize separatism and frustrate the achievement of meaningful equality, *see, e.g.*, David Blair-Loy, Comment, *A Time to Pull Down, and a Time to Build Up: The Constitutionality of Rebuilding Illegally Segregated Public Housing*, 88 NW. U. L. REV. 1537, 1539 (1994) (public housing in Chicago is "deliberately placed in black areas to prevent black families from moving into white neighborhoods via public housing") (citation omitted); and the development of legal constructs which entrench racist perceptions as justifications for actions that would otherwise be criminal. *See generally* Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994) (evaluating the acceptance of race-based arguments in self-defense cases). For a general review of institutional racial bias, see Hayman & Levit, *supra* note 25, at 677-709.

99. BELL, *supra* note 84, at 26.

force its terms, seems to have been faithful only to the interests of the select few. Two Reconstructions have failed to fulfill the nation's promise of equality; the Supreme Court's latest race cases have removed all doubt of that. "We need," Delgado suggests, "both a new myth and a form of coercion" (p. 51).

This is so, Delgado insists, because racial bias is now so thoroughly entrenched in our culture that neither the existing compact nor the rule of law can be counted upon as a cure. Indeed, the old myth and the old form of coercion are deeply rooted in the very bias they are expected to redress. "Legal and cultural decisions," he writes, "are made against a background of assumptions, interpretations, and implied exceptions, things everyone in our culture understands but that seldom, if ever, get expressed explicitly" (p. 63). Many of these implicit understandings are derived from, and now sustain, a pervasive scheme of racial subordination.

> [W]hite-over-black domination is a concerted system. Racism derives its efficacy from its insidiousness. Many whites don't realize this. They equate racism with isolated, shocking acts, such as lynchings or burning crosses. Most white folks, even ones of good will, perceive much less racism in the world than there actually is.... This concerted quality of racism enhances its malevolent efficacy, making it an ever-present force even for those of us with high professional status and wealth (pp. 76-77).

Racial bias is in fact a part and parcel of our culture, shaping the very language we use to commnnicate. "Speech is paradigm-dependent. But racism is a part of the paradigm" (p. 100).

Attempts to reconstruct the nation are not likely to succeed as long as they remain committed to the old myths and old forms of coercion. As Delgado writes, "Facially neutral laws cannot redress most racism, because of the cnltural background against which such laws operate. But even if we could somehow control for this, formally neutral rules would still fail to redress racism because of certain structural features of the phenomenon itself" (p.74). Thus, despite occasional successes in certain "contradiction-closing cases," (p. 80 & n.60) attempts to ensure equality through law remain doomed to fail. The Court's recent decisions are, in this sense, not at all anomalous: American law was not designed to ensure equality.

> Civil rights proponents still believe that the courts want to stamp out racial unfairness, that the optimal amount of racism in society is zero. But it's not. It's a properly low level, maintained by means of neutral rules that reach little conduct of significance, administered and interpreted by judges whose experiences ill equip them to understand the nature of the problem and who dispense victories as parsimoniously as possible (p. 81).

"So law works," Delgado concludes. "But it operates to preserve racial advantage, to maintain the status quo" (p. 81).

In *The Rodrigo Chronicles*, Delgado further illustrates the futility of modern civil rights and constitutional litigation as a tool for racial justice. Legal institutions are blind to internalized racism, legal doctrines distorted by the history of "race," and constitutional promises are rendered empty. And in one of *The Rodrigo Chronicles*' more despairing passages, Delgado makes it clear that radical new proposals are needed to eliminate the racial hierarchy:

> Law, perfectionism, free market economics, and other mechanisms now lock in the system of white-over-black supremacy the Constitution instituted two hundred years ago. There is no need for chains and laws enforcing separate-but-equal. It's all nice and neat, and I'm afraid the system is likely to go on forever (p. 160).

2. *The Story of the "Free" Market*

As Delgado suggests, the failure of the law reform movement to achieve equality should not signal a "reversion" to the unregulated market. In truth, law has enjoyed some success, largely in curing the racist excesses of a market that is hardly "free" at all. Legal economists tend not to fully appreciate the significance of racial bias in shaping market forces; for them, racism is either a market aberration that will eventually yield to the demand for efficiency, or an independent utility that the state can effectively tax, but never really eliminate.[100] But critical race theorists "treat racism as subordination, not a mistake, much less an idiosyncratic 'taste,' and struggle to understand its connection

100. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 24-27 (1992); GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 14 (2d ed. 1971).

with culture, history, and the search for psychic and economic advantage" (p. 22).

An economist might explain the durability of racial discrimination by noting that the market is impossibly skewed by imperfect information. As Rodrigo says, "All the economists say the market won't operate perfectly unless everyone has perfect knowledge. But the stigma-picture that white people hold of blacks operates as a screen" (pp. 25-26)(footnote omitted). Or, the economist might note, the information may not be "imperfect" after all. Some racists may be willing to purchase their racism even at the expense of efficiency. In some contexts, racists may even operate as cartels, dominating the market and preventing the efficient distribution of utilities.

But the racial critique combines these understandings and, in a sense, goes even deeper. As *The Rodrigo Chronicles* suggests, racial bias is not the exclusive province of overt racists. As a part of the culture, it is also part of the economic paradigm: it inheres in the criteria of merit and in the very concept of efficiency.

Thus, minority schoolchildren do not need desegregated classrooms only to protect against the funding biases of state legislators or school administrators; they need it to ensure that the broader cultural gap is both narrowed and realigned on a horizontal (i.e., nonhierarchical) axis.

Minority contractors do not need the assistance of affirmative action solely to overcome the racial biases of individual officials; they need it to overcome the systemic disadvantages, both "real" and perceived, created by the history of discrimination and the philosophical equation of short-term fiscal value with the public good.

And, minority electoral candidates do not need electoral protection just to overcome the biases of individual voters or electoral officials; they need it to counteract the combined effects of perpetual racial bloc voting and a political vision that increasingly equates democracy with simple majoritarianism.

There are, then, two parts to Delgado's racial critique in *The Rodrigo Chronicles*. The first is, in a sense, a critique of the criteria of merit and of market information. As Delgado explains, one pervasive effect of racial hegemony in each market—educational, social, economic, or political—is the divorce between perceived "merit" and minority talents, a divorce that law has helped maintain. The social compact

in this sense embraces "private" conventions—"white" conventions—and ensures that they will endure.[101] The Professor initiates the following exchange:

> "I understand that your favorite authors equate knowledge with power, hold that it is inseparable from social convention and practice. White people in that sense know us perfectly: the universality of the stereotypes, the way in which they are embedded in the very paradigm we require to communicate with and understand each other, means that the market in a way will operate perfectly—that is, with what passes for perfect knowledge."
>
> [Rodrigo:] "And will thus perfectly reinforce racial reality—whites over blacks . . ." (p. 26)(footnote omitted).

The second critique is rooted in political philosophy, or, as some would have it, in political morality. Within the Court's vision of the market, the effects of racism will eventually fade away as market forces maximize social profits. Individuals' market choices will force politicians to consider the needs of minorities; these market choices will also force inefficient schools to either reform or close. In this vision of the market, individual needs are naturally met by the maximization of profit. *The Rodrigo Chronicles*, on the other hand, suggest that the market is inadequate to cure racism because its operating principles are fundamentally at odds with some social needs. As Delgado notes, "[c]aregiving and the profit motive are incompatible" (p. 38); care, "by its very nature, . . . is needed by those who can least afford it" (p. 40). Delgado concludes that "the caregiving sector of a society should almost always be socialized, while the productive sector should be relegated to the free market economy" (p. 41). ("The idea is to relegate activities that lie on the caregiving side to intelligent socialist treatment, and ones on the productive side to aggressive laissez faire capitalism" (p. 43)).

And, as *The Rodrigo Chronicles* document, the need for care is most acute among certain racial minorities. "The essence of being a colonized people is to be both beyond love and excluded from the main avenues of economic well-being" (p. 47). Not all minorities, to be sure,

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101. The private (white) construction of merit has become the public arbiter of worth. As Professor Delgado has noted elsewhere, racial minorities more than understand the progressive critique of the public/private dichotomy: "We know, indeed we live, the bogus public-private distinction." Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 311 (1987).

are "beyond love." Delgado notes this curious phenomenon, ironic for the economist, all-too-predictable for the critical race theorist: "We shower love, affection, and indulgent treatment on minority group members who least need it—the middle-class, well-trained, and intellectually able" (p. 46).

Part of this indictment is directed against western culture. As Rodrigo observes, the "resurgences of nativism and other unlovely sentiments are not simply aberrations, Professor, but markers in what is generally a steady decline in civility and generosity and tolerance" (p. 148). And minority communities are not immune to the decline: "Our communal, loving instincts have atrophied from disuse. We are too caught up in a linear, production-oriented mentality" (p. 43).

In response, Delgado urges a rebirth of compassion. "The effort," he writes, "would be redemptive. As society integrates outsiders, achieves unity, so would the individuals engaged in that task. The social healing would be mirrored by a psychic, individual one" (p. 56). And there is a special role[102] for racial minorities and other cultural outsiders in this healing process: "We can perhaps redeem them—and ourselves—by working to reverse the process. In some ways, the greater sin is ours for having allowed ourselves to become slothful, uncaring, unloving, hedonistic to the point where we think the anguish of the inner cities is 'their problem'" (p. 57).

3. *The Story of Normativity*

The search for a "new myth" to replace the social compact has led some theorists to civic republicanism. This new myth is in a sense a very old one: its intellectual heritage in this nation dates at least to the anti-federalists. Contemporary civic republicanism updates the eighteenth century vision of community and civic virtue with a postmodern sensibility: its truths are dialogic, not foundational, the consequences of democratic exchange.

But *The Rodrigo Chronicles* suggests a wariness of the answer offered by some neo-pragmatists. This attitude is rooted, in part, in a skepticism toward the pragmatists' essentially modernist claim that a just community can be realized through unfettered dialogue culminating in

102. Delgado suggests that outsiders may be useful role models in this healing process: "I do think that Hispanic and black populations have done a better job at providing care, certainly for their dependent elderly, and probably for children and the mentally ill as well" (p. 44).

genuine consensus. Laudable in the abstract, the claim is largely belied by the reality of modern western culture. The critical race theorist, as a consequence, remains skeptical of her freedom to participate in the dialogue, and profoundly afraid that consensus will arrive only after her exclusion or domination.

Beyond this, *The Rodrigo Chronicles* express a concern with the quite impractical nature of much neo-pragmatic thought: its preoccupation with the theory of the good, and its reliance on the desiccated language of normativity. As Rodrigo notes, "one of the functions of normative discourse is to abstract problems, to translate them into something else" (p. 96). He goes on to illustrate:

> "A subsistence claim—'I'm hungry'—is answered by: 'All right, I'll talk with you about your hunger.'"
>
> "That's civic republicanism," [the Professor] said.
>
> "But there are other variations," Rodrigo continued. "For example: Hunger is bad. Its persistence must mean there is something wrong with society.'"
>
> That strikes close to home, I thought.
>
> "That's the left. The moderate right has its version too—'Well, let's talk about your responsibility to solve your own problem, to get a job, take care of your family, and so forth.' Or—'Let's improve the economy generally, so there will be more jobs for all.'"
>
> "So," I summarized. "We start with a simple human-needs claim: I'm hungry.' And this gets translated, swept up into various forms through standard normative dialog" (p. 96).

If Delgado's call for "compassion" seems somewhat utopian, it is not, at least, for being too abstract: the compassion Delgado calls for is directed toward the real needs of real people. Normativity, meanwhile, is directed at a higher, theoretical plane, and, as Rodrigo observes, "If you focus your gaze on the higher reaches, you avoid dealing with the pain below" (p. 92).

In the final analysis, then, it is not so much that normativity is morally bad, but rather that it is substantially vacant and functionally irrelevant. For Rodrigo and the Professor, normativity operates as a philosophical distraction from humanity's obligation to recognize and alleviate human suffering.

4. The Story of Subjectivity

A common problem pervades the philosophical commitments to meritocracy, to legalism, to the market, and to normativity: it is the congenital blindness of each to its biases. Each conventional story presents itself as detached, neutral and objective; it purports to transcend the subject, and render it irrelevant. These conventional stories are so thoroughly entrenched that their claim to objectivity now represents an ironic truth; as postmodernists might have it, the subject is now dominated and dead.

Delgado and the critical race theorists seek to resuscitate the subject by breathing into the individual the lived truths generated by cultural power. Not everyone, they remind us, suffers the delusions of neutrality; not everyone is blind to the effects of cultural hegemony. Those constructed as differeut—and whose differences are the reason for their domination—those who live, as Rodrigo says, outside the cultural bubble know that the couventional stories are just perspectives, forged by the cultural majority, now self-perpetuating, beyond critique, surrounded by the stale air of inevitability.[103]

There are few advantages afforded the cultural outsider, but one is the outsider's special insight: the ability to recognize the failures of the dominant culture and envision possibilities not described by the conventional stories. "Society," observes Rodrigo, "doesn't see—can't see—faults in the paradigm, the very structures by which we communicate, make ourselves understood, explain, understand, and construct reality" (p. 103). But cultural outsiders can; it is the corollary of the "second-sightedness" described by Du Bois,[104] and it presents, for Delgado, an intrigning hypothesis: "that social reform relies on the perspective of the outsider, the heretic who lives outside the culture and thus sees and is in a position to articulate its defects" (p. 102).

Rodrigo suggests cultural outsiders may, because of the adversity they face, possess a uniquely valuable intelligence: "Human intelligence and progress spring from adversity, from a sense that the world is not supplying what the organism needs and requires" (p. 130). The insiders, because of their empowerment, do not share this "critical edge." "[G]roups that are victors become complacent. They lose their

103. "You and I see these things because we are outsiders.... As outsiders, we can see the curvature and the downward drift, as those inside cannot" (p. 97).

104. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 3 (1973).

critical edge, because there is no need to have it. The social structure works for them. If by intelligence, one means critical intelligence, we become dumber all the time" (p. 131).

It is at least slightly ironic: the subjective perspective of the outsider, a perspective constructed through cultural domination and denied legitimacy by the forces of cultural hegemony, may in the end be the best hope for cultural salvation.

5. The Story of Race

The conventional story of race is an essentialist one. It is a story that understands race as something biological, innate, and immutable. Within this story, it is impossible to distinguish between the social, economic and political forces of racial exclusion, oppression and disadvantage on the one hand, and the claims of innate inferiority on the other. It is only within such an understanding of race that the Court is able to suggest that the commitment to desegregation is insulting, that affirmative action is stigmatizing, and that racial bloc voting is oppressive. It is only within such a story that the recognition of a minority perspective—a "black" voice, for example—is demeaning. While such an understanding of race informs the Court's recent decisions, it is not shared by Professor Delgado.[105]

The Rodrigo Chronicles join in the critique of essentialism by rejecting "the search for narrative coherence" (p. 113). Rodrigo and the Professor regret the attempt to reduce individuals to "race," or to reduce "race" to a single view. Too much, after all, is lost in the process: race is constructed at too many intersections, and in too many coutexts, to permit the suppression of dissonance both *within* and *between* racial communities. And the existence of discord *within* racial communities should not inevitably lead one to deny that differences exist *between* racial communities.

The Rodrigo Chronicles warn of the dangers of subordinating the minority perspective to a dominant viewpoint, even when that viewpoint

105. Delgado notes that hostility toward affirmative action, for example, results precisely from the stereotyping that its critics on the court claim to abhor:

> [A]ffirmative action, was so visible and controversial that it drew fire, assuring that all blacks paid the penalty of the benefits to the few—penalties in the form of stigma, hostility by the majority, and the overriding belief by whites that all blacks are so undeserving or so stupid that they require affirmative action to have a chance.

(pp. 119-20).

seems well-intentioned. Rodrigo cautions minorities against coalition-building by alignment with more powerful groups whose interests may be divergent. As a result of such alliances he warns, "You will march strongly and determinedly in the wrong direction, alienating yourself in the process" (p. 120).

"It's not just that the larger, more diverse group will forget you and your special needs," he continues. "It's worse than that. You'll forget who you are" (pp. 118-19). And it is everyone's loss. "Merging with the larger group causes you to forfeit a kind of sightedness. So it's bad for you. But it's also bad for the larger group because . . . the larger group loses an important source of criticism . . ." (p. 123).

However, while the minority voice plays an important role within the dynamic of change proposed by *The Rodrigo Chronicles*, it is equally important that this observation should not be taken to imply that there is just one minority voice, and that every member of a racial minority must speak with it. The black community, Delgado notes as one example, "is diverse, many communities in one" (p. 110). But life lived as a racial minority in America does tend to produce a distinct sensibility; for Delgado, this is simply an experiential reality. This distinct sensibility, however, is not the same thing as the story of essentialism told by the majority.[106] It is only an awareness that being a racial minority in America necessarily leads to a distinct point of view.

6. *History*

Criticism, of course, prompts resistance, particularly when it is directed at conventions that are both time-honored and widely embraced. To the dominant group and to the official powers, the criticism is noth-

106. The Court's race trilogy may well evidence this process of denial. At an institutional level, it is perhaps evidenced in the betrayal of Justice Thurgood Marshall's legacy. In his dissent in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), Justice Marshall wrote:

> It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured.

Id. at 400 (Marshall, J., dissenting). It may be apparent on a more personal level as well. *See infra* note 110.

ing less than a challenge to cultural traditions.[107] Mired in a conception of tradition that is both static and univocal, majoritarian forces ultimately respond with indignation and contempt to the call for change and pluralization.[108]

In law, the response is formalized in both method and doctrine. The selective invocations of originalism and intentionalism, of *stare decisis* and judicial restraint, coupled with the increasingly explicit reliance on "tradition" in areas of constitutional uncertainty, all ensure that the legal past will be the legal future.[109]

But, of course, it is a reimagined past, sanitized by the myopia of color-blindness, cleansed of dissonant voices. In this sense, the individual justices who wrote the assorted opinions in *Adarand*, *Jenkins*, and *Miller* are constructing not only the racial realities of the future, but also reconstructing the realities of the past. Gone from that past—and perhaps from their own pasts[110]—are the tensions of race, of gender, of class, and of power, tensions that mirror the perspectival differences of insiders and outsiders, tensions too painful to remember, but too vital to forget.

But they are forgotten, and willfully. What emerges is a jurisprudence of nostalgia based on the story of a cohesive past. In the face of

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107. Initially, the threat may not seem so immediate. The counterstories may be simply entertaining, the criticism fairly embraced by the cultural paradigm. But when it becomes clear that the call for change is real, and the changes demanded are fundamental ones, the resistance is certain to come. The Professor observes: "In the sixties, they loved us. We could do no wrong. Now, we are almost completely out of favor. These days, it's almost a sick joke" (p. 207).

108. For a discussion of the majoritarian transformation from tolerance and support to reaction and defensiveness, see generally Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025 (1994); Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061 (1994).

109. "[T]he legal system, in the U.S. at any rate, is past-oriented" (p. 151).

110. Some of the Justices who formed the consistent five-member majority in *Adarand, Jenkins*, and *Miller* might at one time have been, in different senses, cultural outsiders. Justice Thomas, for example, suggested as much when he said, "But for [affirmative action laws], God only knows where I would be today. These laws and their proper application are all that stand between the first 17 years of my life and the second 17 years." *Excerpts From Some of Supreme Court Nominee Thomas' Speeches, Writings*, CHI. DAILY L. BULL., Sept. 9, 1991, at 2. Despite their outsider backgrounds, Thomas and the other Justices have become insiders, and, in so doing, perhaps have lost—some might say actively shed—the crucial perspective they once held as outsiders. That perspective, for Delgado, is one outside the comfortable "bubble" of middle and upper-middle class white existence. Indeed, Delgado, writing with Jean Stefancic, suggests that a lack of experience enriched with "'outsider' cultures and perspectives [in judicial decisionmaking] plays a part in most cases of serious moral error." Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1958 n.176 (1991).

change, there arises a yearning for an imagined past, a beckoning back to a "history" constructed largely without the benefit of counterstories, to a simpler, more stable time when cultural discourse was not confounded by the sound of dissonant voices. "Conservative stories," suggests Rodrigo's Professor, "recall a distant past, which we remember in a rosy glow, when everything seemed to be better. Progressives and reformers urge us to move in directions we've never been. Stories like that raise anxieties. Why abandon the safe ground we're on for an uncharted future?" (p. 204).

7. Storytelling

The majority's stories about merit, equality, the market, normativity, objectivity, essentialism, and history are so deeply entrenched and so well established, that the outsider who cannot accept the truth of these stories is likely to despair. As the majority endorses these stories at the highest levels of judicial authority, the outsider may see no hope for positive change.

As a result, it is inevitable that the cultural outsider might weary of the struggle and might ultimately concede defeat. The majority points the way: the outsider's surrender is in effect a capitulation to the cynicism and despair of the majority, an attitude boru less of the inability to overcome racial inequality than an unwillingness to confront it. And so it is possible—indeed it is expected—that the outsider will learn to live with social exclusion, accept economic oppression, and tolerate political domination. "Unfortunately, this sort of thing is institutionalizing itself," Rodrigo observes. "Black despair is more the norm today than the exception" (p. 202).

But there is an alteruative response. Like Camus' rebel[111] and King's civil disobedient,[112] Delgado's cultural outsider offers the promise of eterual struggle: for each resistance there is a new reconstruction. For each story, there is a counterstory waiting to be told.

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111. ALBERT CAMUS, THE REBEL (Anthony Bower trans., Alfred A. Knopf, Inc. 1956); *see generally* Robert L. Hayman, Jr., *Re-cognizing Inequality: Rebellion, Redemption and the Struggle for Transcendence in the Equal Protection of the Law,* 27 HARV. C.R.-C.L. L. REV. 9 (1992) (discussing the transcendental and transformative properties of rebellion).

112. *See* MARTIN L. KING, JR., *Letter from Birmingham Jail, in* WHY WE CAN'T WAIT 77 (1964); *see generally* Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.,* 103 HARV. L. REV. 985 (1990).

Whether Delgado believes that the effort can be confidently grounded in the prospects for change is not clear. At times, Delgado seems confident that the struggle will produce results, that the counter-storyteller is indeed "contributing to the reconstruction of social worlds" (p. 24). As Rodrigo says:

> "They're our stigma-pictures, after all. We made them, we can unmake them. There's no objective inferiority of peoples of color to worry about, no reason why white folks must always be on top, no reason why all persons cannot have equal levels of dignity and respect. As soon as one sees this, one places oneself on the path of liberation. . . . We need not live in a world we do not like . . ." (pp. 33-34).

And as Rodrigo notes of the not-so-fictional Professor: "one or two of your recent things have had almost a—how shall I put it—spiritual quality?" To which the Professor demurs: "Well, optimistic, anyway" (p. 151).

At other times, Delgado seems less certain. Rodrigo initiates the following exchange:

> "The question is, if we could destroy that stereotype would things reverse—would the repression and cold treatment wither away, or would it return in yet another form and supported by yet another rationalizing structure?"
>
> "That's a tough question," [the Professor] replied. "It has to do with one's basic attitude to human nature, the fundamental goodness or badness of mankind. Some days, I think our people will not overcome, that we will never be saved . . ." (p. 188).

Ultimately, Rodrigo suggests, the question is a personal one. "And whether there's any point in struggling, I think everyone must decide for himself. The system does resist change, both practically and on a level of theory" (p. 149).

In the end, perhaps, it is clear only that whatever its effect, every story should be told. Regardless of their ability to effect real change, the outsider's stories have worth in and of themselves. Outsiders must continue to tell their own stories about merit, equality, the market, normativity, objectivity, essentialism, and history. "Our lives," Robert Williams writes in the preface to *The Rodrigo Chronicles*, "are the stories we are ultimately responsible for telling, and the richness of the stories we tell will be a reflection of the richness of the lives we live. . . . We are all Rodrigo, we are all Storytellers" (pp. xiv-xv).

II
STORYTELLING AS DOCTRINAL CRITIQUE

In contexts ranging from scholarship to pedagogy to lawyering, the legal academy has turned to narrative as a means of communicating, educating, and understanding.[113] It has not been an uncontroversial turn: the use of the narrative form in legal scholarship has been criticized on a number of fronts. According to its critics, experiential forms of argumentation lack normative content; they are unreliable or, at a minimum, unverifiable; they might convey atypical data; they are offered without the necessary investment of integrity and judgment. Ultimately, these critics conclude that narratives discourage further discussion.[114]

Defenders of storytelling say that these criticisms are misplaced in several respects: they apply a narrow view of scientific rationality to experiential endeavors, ignore the reasons why the narrative form was chosen in the first place (one of which is precisely to point out perspectival differences or experiences that are atypical of majority players), and overlook the ways in which the sharing of stories facilitates conversation.[115]

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113. There is a vast amount of literature on the use of narrative in legal scholarship. *See generally* Jane B. Baron, *The Many Promises of Storytelling In Law*, 23 RUTGERS L.J. 79 (1991); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Farber & Sherry, *supra* note 82; Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989); Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985). Scholars have also written about the ways in which storytelling—sometimes in the words of actual litigants who describe their experiences—can inform classroom teaching and "make real the actual human condition of the parties." Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61, 80 (1988); *see also* Judith G. Greenberg & Robert V. Ward, *Teaching Race and the Law Through Narrative*, 30 WAKE FOREST L. REV. 323 (1995) (describing their experience using narrative to encourage students to confront the Rodney King controversy); Judy Scales-Trent, *Using Literature in Law School: The Importance of Reading and Telling Stories*, 7 BERKELEY WOMEN'S L.J. 90 (1992) (describing the use of literature in a law seminar class). Others have explored the importance of attention to narrative as part of legal practice, particularly in understanding and communicating a client's position. *See, e.g.*, Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

114. *See* Farber & Sherry, *supra* note 82, at 826, 836-38; Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 252-60 (1992); *see also* Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yirasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994) (arguing that narrative, like politics, should not be confused with scholarship).

115. *See* Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 977-82, 1013-14, 1020, 1028-30, 1033-35, 1041-47 (1991); Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 261-66, 280-84 (1994); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content*

Storytelling has been successfully utilized to evaluate legal doctrines. In *The Richmond Narratives*,[116] Professor Thomas Ross explores the stories told in the plurality, concurring, and dissenting opinions in *City of Richmond v. J.A. Croson Co.*[117] Professor Michael Mello tells the stories of people on death row to illumiuate the dissemblings in doctrine that state-sponsored death is fair, painless, and humane.[118] Professor Derrick Bell's Geneva Crenshaw discusses various contradictions between the aspiratioual rhetoric of desegregation decisions and the minimalist holdings of those saine cases.[119] And Richard Delgado's Rodrigo muses that Supreme Court decisions such as *Metro Broadcasting, Inc. v. FCC*[120] and *United States v. Fordice*[121] are emblematic of a repressively tolerant legal atmosphere that every now and then offers small victories for civil rights litigants to "assure that there is just the right amount of racism" (p. 80).[122]

On the whole, however, narrative has not been sufficiently appreciated as an analytically valuable method for critique of legal doctrine. Indeed, the dissimilarities between narrative and traditional legal analysis go to the heart of a principal criticism of the method. Professors Daniel A. Farber and Suzanna Sherry, for example, specifically denounce storytelling for lapsing into anecdotes or idiosyncratic tales and ignoring the necessity of connecting those stories to either legal analysis or legal doctrine.[123] For Professor Mark Tushnet, stories are a potentially weak vehicle for mediating between particular experiences and general theoretical propositions, a balance required by constitutional adjudication and interpretation.[124]

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to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship, 79 IOWA L. REV. 803, 815-17 (1994); *see also* Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313 (1992) (analyzing Professor Tushnet's critique of the use of narrative by critical legal scholars).

116. Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 389-409 (1989).

117. 488 U.S. 469 (1989).

118. *See* Michael A. Mello, "Dear Deanna . . .": A Letter on a Lawyer's Life of Death (1996) (on file with authors).

119. *See* BELL, *supra* note 84, at 112-18.

120. 497 U.S. 547 (1990).

121. 505 U.S. 717 (1992).

122. According to Delgado, "Too much [racism] would be destabilizing—the victims would rebel. Too little would forfeit important pecuniary and psychic advantages for those in power" (p. 80).

123. *See* Farber & Sherry, *supra* note 82, at 847-54.

124. *See* Tushnet, *supra* note 114, at 258-59, 297-304.

Judicial opinions are one form of storytelling in that they recount events, selectively offer facts in a narrative framework, and sometimes draw moral conclusions about the human actors in the stories.[125] Legal decisionmaking is also, in significant respects, a truth-seeking endeavor. Judges try to ascertain what really happened from the accounts told by litigants and their lawyers. Then they attempt to render decisions which fairly and accurately portray law both as it is and as it should be when applied to the facts of particular cases. Over time, the development of a body of legal doctrine progresses as something of a conversational process, and academic critiques of doctrine attempt to move that discussion in different directions.[126] The question becomes, then, whether narrative critiques of doctrine—telling stories about the stories told in judicial decisions—can be an effective part of this dialogne; whether they can contribute to the evaluation and reconstruction of doctrine as a discursive enterprise. In what follows, we hope to offer several reasons why narratives in general, and critical race stories in particular, may in fact offer unique possibilities for meaningful doctrinal critique.

A. Narrative and Epistemology

Storytelling promises greater epistemological accuracy than conventional doctrinal analysis, even if it is simply the authenticity of uncertainty. Stories acknowledge that truth is ambignous, that knowledge is inevitably incomplete, and often partial.[127] They "portray . . . a world filled with contingencies, uncertainties—the stuff of human drama."[128] Stories may express hesitancy about the resolution of issues, acknowledging that some questions cannot be answered at this place and time in history.[129] They make readers more open to differing interpretations. And stories do this in a way that traditional doctrine-spinning cannot hope to achieve.

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125. *See* David R. Papke, *Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions*, 40 J. LEGAL EDUC. 145, 146-47 (1990).

126. *See* JAMES B. WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 264-68 (1984).

127. This comports with modern scientific epistemology, which suggests that all knowledge is probabilistic. *See* STEVEN SHAPIN & SIMON SCHAFFER, LEVIATHAN AND THE AIR PUMP: HOBBES, BOYLE, AND THE EXPERIMENTAL LIFE 24 (1985).

128. Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 689 (1994).

129. *See* BELL, *supra* note 84, at 26, 214 (in her quest for racial justice, Geneva Crenshaw travels to different places and times to seek answers and often leaves questions unanswered).

1. The Story of Determinacy

The narrative form teaches that understandings of events are necessarily tentative and probabilistic. Conventional doctrinal analysis, which comprises much of mainstream legal scholarship, promotes the belief that knowledge is certain, and that there are definitive right and wrong answers to most legal questions.[130] In some respects, stories have precisely the opposite intended effect. As Gerald Wetlaufer explains:

> If the purpose of a judicial decision is to close what has been open, the motive behind literature is likely to be the desire to open what has been closed. Thus, literature is likely to celebrate and explore the problematic, the uncertain, the ambiguous, the subjective, the irrational, the insoluble. It will, at least usually, acknowledge and examine the multiplicity of perspectives and the personal contingency of reality.[131]

This is not to say that stories are a more accurate reflection of the truth, but perhaps that stories are a more accurate reflection of *the reflection of* truth. Our perceptions, in other words, may be more faithfully captured in narrative form.

Of course, stories can be told in many ways. In *The Rodrigo Chronicles*, Delgado illustrates how storytelling in law can move beyond experiential narratives. For example, stories of a people are represented in collections of empirical data. At one point, Rodrigo's discussions with the Professor focus on "the black crime problem." Rodrigo details the myriad facets of "white" crime, from white collar crimes to government fraud and corporate misconduct: "marketing unsafe autos and dangerous pharmaceuticals, Love Canal, the Dalkon Shield, the savings and loan scandal, the General Electric price-fixing conspiracy . . . the Lockheed fiasco, Three Mile Island, asbestosis, and Agent Orange—you find that almost all the top executives were white" (p. 174). In the course of the narrative, Delgado documents the insidious nature of "white" crimes, hidden definitionally as something other than criminal behavior, and overwhelming in sheer numbers and reach. Delgado also uses statistics to make manifest implicit judgments

130. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992); Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978).

131. Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1564 (1990) (footnote omitted).

about people which result in devastating social consequences: what kinds of people are worthy of professional respect (pp. 4, 267-68) or the value of black lives—as indicated in health care statistics,[132] and the demographics of law enforcement.[133] Thus, Delgado tells of cycles of socioeconomic deprivation, scant institutional support, and systematic exclusion of those different from the white majority through the use of statistics as a shorthand for the personal truths of lived experience.

One common assumption is that stories are told to transmit truth, i.e., to accurately describe cultural traditions or customs.[134] However, some stories are not supposed to be truth in a unitary or finite sense, apart from offering the immediacy of experiential knowledge. Instead, these stories operate as catalysts to bring the political, cultural and social backdrop to the foreground in ways that traditional doctrinal analysis often does not. Storytelling offers the possibility of particularization and contextualization, and the cross-weaving and accumulation of particulars which are embedded in the best of narratives. In short, stories may challenge the view that truth is singular.

Professor Patricia Williams tells a story which illustrates this point:

> One summer when I was about six, my family drove to Maine. The highway was very straight and hot and shimmered darkly in the sun. My sister and I sat in the back seat of the Studebaker and argued about what color the road was. I said black. My sister said purple. After I had successfully harangued her into admitting that it was indeed black, my father gently pointed out that my sister still saw it as purple. I was unimpressed with the relevance of that at the time, but with the passage of years, and much more observation, I have come to see endless overheated highways as slightly more purpley than black. My sister and I will probably argue about the hue of life's roads forever. But, the lesson I learned from listening to her wild perceptions is that it really is possible to see things—even the most concrete things—simultaneously yet differently; and that seeing simultaneously yet differently is more easily

132. "Nearly half of all black children lived under the poverty level in a recent year.... Nearly half of all black babies were not fully immunized" (p. 201).

133. "Blacks have a three-times greater chance of dying from a policeman's bullet than do whites. The prisons are nearly one-half black. And murderers who kill whites are ten times more likely to receive the death sentence than ones who kill blacks" (p. 50) (footnotes omitted).

134. *See* Farber & Sherry, *supra* note 82, at 831-35.

done by two people than one; but that one person can get the hang of it with lots of time and effort.[135]

Storytelling, then, is not offered as a final exhortation on the ultimate truth of events. It is offered as encouragement to question, to shift perceptual framework, and to visit issues from different cultural, ethnic, economic, racial, and individual perspectives.

2. The Story of Objectivity

Some narratives may be presented as "true" accounts. When personal narratives are offered as what Professor Henry Louis Gates, Jr. has described as "autocritography"[136]—as a form of cultural criticism—their truth-value or typicality may be challenged.[137] However, a lesson can be learned from the challenges; they can become stories about intellectual oppression. Professor Robert Chang tells of the following story and its reception:

> I think about the American border guard who stopped me when I tried to return to the United States after a brief visit to Canada. My valid Ohio driver's license was not good enough to let me return to my country. He asked me where my passport was. I told him that I did not have one and that it was my understanding that I did not need one, that a driver's license was sufficient. He told me that a driver's license is not proof of citizenship. We were at an impasse. I asked him what was going to happen. He said that he might have to detain me. I looked away. I imagined the phone call that I would have to make, the embarrassment I would feel as I told my law firm in Seattle that I would not be at work the next day, or maybe even the day after that—until I could prove that I belonged. . . .
>
> . . . I usually keep these stories to myself because when I tell them to people, I often hear doubt in their voices and their questions. How do you know it was racism? How do you know that the same thing would not have happened to anyone else? They question the details. Did you really see the border guard smirk? How do you know that the service station was not out of gas? But I am ready for their questions. I have prepared answers.

135. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 410-11 (1987).

136. *See* Robert S. Boynton, *The New Intellectuals*, ATLANTIC MONTHLY, Mar. 1995, at 53, 62.

137. Abrams, note 116, at 978-80.

> The car before me at the service station got gas, and the white man in the car in front of me at the border crossing did not have a problem with his driver's license. Yes, I could see that far away; I have good vision. As the questions keep coming, I realize that people do not want to believe me. They do not want to see racism because it is ugly. They have learned or convinced themselves that such ugliness does not exist, at least not in such blatant forms, and not to Asian Americans.[138]

Chang's example presumably does not mean that stories should not be questioned; indeed, they should, and as we explain elsewhere, narrative is a genre that provokes inquiry.[139] It does mean that the selective questioning of certain stories in particular ways is itself revelatory.

Like all other stories, judicial decisions sort through facts, including some in the final rendition of events, sifting out some as unimportant, and denying the validity of others. Challenging the truthfulness of facts presented in judicial opinions often leads to a more complete understanding of events and issues involved in the cases. However, telling a story about a judicial decision does more than just point out omitted or underemphasized facts. A storyline offers a framework for the creation of meaning; it puts facts in a context.[140] Clients, witnesses, and factfinders understand facts and evidence by organizing them in story form.[141] The narrative form enables the understanding of contextual meaning because events are comprehended as part of a larger social construction, while events seen episodically are not.[142] A story about doctrine permits a unified, coherent, and meaningful account of background motivations behind the doctrine's shaping—it allows the chronicling of greed, power, and race.

Indeed, one important function of storytelling as doctrinal critique is to illuminate the social, economic, ethnic, class, and racial backdrop for the development of doctrine, including such features as the partiality

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138. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space,* 81 CALIF. L. REV. 1241, 1244, 1274, 1 ASIAN. L.J. 1, 4, 34 (1993).

139. *See infra* notes 167-175 and accompanying text.

140. *See* Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case,* 47 STAN. L. REV. 39, 49-51 (1994).

141. Jane B. Baron, *Intention, Interpretation, and Stories,* 42 DUKE L.J. 630, 660 (1992).

142. *See* 2 PAUL RICOEUR, TIME AND NARRATIVE 64-67 (Kathleen McLaughlin & David Pellauer trans., 1985).

of the judge as storyteller.[143] One of the earlier examples may be found in Professor John Noonan's historiography, *The Passengers of Palsgraf*.[144] Noonan's research reveals the slow process by which many of the background facts not found in the *Palsgraf* opinion came to light. Completely absent from the opinion but central to Noonan's story are the social, class, and economic backgrounds of the litigants, the lawyers, and the judges.[145] As Noonan sifts through the background political and social forces, what emerges are not rules about unforeseeable plaintiffs, but questions about how decisions come into being: "Was Helen Palsgraf's poverty and inability to present an overwhelming case, or the court's identification of Long Island with the needs of a mobile society the decisive factor? Were Cardozo's celibacy, paternity, and idealism important to the result? No cause acts alone, and the chain of causation is endless."[146] Noonan notes that previous analysts of *Palsgraf* had not "explore[d] the relation of Cardozo the man to the rule he had framed. . . . The person of Cardozo was recognized only to identify the man so firmly with the mask that the judge appeared merely to announce the truth."[147]

Too often, legal doctrine assumes the existence of a unified culture with a coherent set of traditions.[148] Stories, and the stories of their re-

143. *See* Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered,* 101 HARV. L. REV. 10, 75 (1987) ("Acknowledging partiality may cure the pretense of impartiality . . . . [W]e then have a choice of which partial view to advance or accept.").

144. JOHN T. NOONAN, JR., *The Passengers of* Palsgraf, *in* PERSONS AND MASKS OF THE LAW 111-51 (1976).

145. The facts Noonan points to are not those Judge Cardozo built upon in his renowned opinion on causation: that the plaintiff was standing at one end of the Long Island Railroad platform when a guard, trying to help a passenger board, dislodged a package of fireworks the passenger was carrying, which fireworks then exploded, creating shock waves that toppled a scale onto the plaintiff "at the other end of the platform many feet away." *Id.* at 111-12.

Instead, Noonan observes that Helen Palsgraf was a Brooklyn janitress who won a verdict in the trial court of $6,000, an amount that was fourteen times her annual income. Noonan also mentions that at this time in history railroad transportation killed and injured thousands of people each year. Noonan relates that Judge Benjamin Cardozo, one of the most celebrated jurists in America, was white, male, middle-aged, and a member of the upper middle class, as were all of the other judges on the New York Court of Appeals, and that he had attended an elite law school. Importantly, Noonan conveys that the Court of Appeals judgeships were elective offices. Noonan evaluates in Cardozo's *Palsgraf* opinion the judge's asserted desires to be loyal to precedent, justice, and social welfare, and his yearnings for certainty. *See id.* at 126-47.

146. *Id.* at 150.

147. *Id.* at 120-21.

148. *See* Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism,* 30 HARV. C.R.-C.L. L. REV. 57, 74-77 (1995).

ception, often excel in pointing out the lack of shared cultural understandings. In a 1987 article, Professor Charles Lawrence described his feelings when, as the only black student in a New York City kindergarten classroom, his teacher shared with the class the illustrated *Little Black Sambo*. "I am certain that my kindergarten teacher was not intentionally racist . . .", Professor Lawrence remarks, but "[w]e were all victims of our culture's racism."[149] Writing several years later, one reviewer objects to Professor Lawrence's interpretation: "The theme of *Little Black Sambo* is not racist. . . . Any racist association with the story is merely an historic and linguistic accident."[150] The distinction implicit in this comment, between what is really racist and what is racist only by "historic and linguistic accident," would, assuming it has any integrity or resonance at all, doubtless be of small comfort to a schoolchild.

Stories also create the awareness that any set of phenomena is open to a multiplicity of interpretations. Professor Robert Chang relates remarks of Judge Richard Posner using statistical evidence and success stories to support his conclusion that Asian-Americans are not discriminated against in employment.[151] Chang then explores the unique ways in which Asian-Americans are marginalized and excluded from the political and legal arenas. He couples narratives with economic data to explode myths about Asian-American economic superiority,[152] and he explains how the "complimentary" stereotype about Asian-Americans as a "model minority" is a damaging tool for oppression.[153] He shares stories of Asian-American garment and restaurant workers, Japanese-Americans interned in concentration camps, and recent immigrants facing barriers of language, bureaucratic culture, and social structure. The stories show how overgeneralized statements about racial or ethnic groups—abstract assertions that ignore the experiences of individuals within that group—can lead to a misapplication of constitutional doctrine.

149. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317-18 (1987).

150. Lloyd R. Cohen, *A Different Black Voice in Legal Scholarship*, 37 N.Y.L. SCH. L. REV. 301, 318-19 (1992).

151. Chang, *supra* note 139, at 1261-62 (1 ASIAN L.J. 1, 21-22).

152. *See id.* at 1261-63 (1 ASIAN L.J. 1, 21-23).

153. *See id.* at 1258-65 (1 ASIAN L.J. 1, 18-25).

3. *The Story of Impartiality*

Some have criticized narrative form for overstressing particulars and imperfectly mediating between the experience and the generality of theory.[154] We suggest instead that narrative form specifically recognizes that there is no sharp boundary between the particular and the general.[155] If we begin to think of stories not just as fictional or private tales, but as a conduit leading into the public domain, the particulars of a narrative become a way of operationally defining and illustrating general or theoretical propositions. For example, Patricia Williams' stories of her great-great-grandmother's experiences as a slave do much more than recount the personal events in the life of a nineteenth-century African-American woman. They give meaning to the Equal Protection Clause, tell about the emptiness and partiality of constitutional promises, and evaluate the implications of treating people as property for the cultural transmission of consciousness.[156]

Storytelling ostensibly promotes large gaps in a description of facts and events—that is, it might seem to be precisely the narrative form which permits writers to indulge in "partial" explanations or perceptions.[157] This observation may be accurate to some extent, but partiality as either incompleteness or bias is not exclusive to narrative style. Conventional doctrinal analysis is just as likely—perhaps even more likely given its dialectic form—to succumb to partisanship of position or in-

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154. *See, e.g.*, Abrams, *supra* note 115, at 978, 980.

155. Data from disciplines ranging from history to anthropology to neurophysiology indicate that perception and conception cannot be disassociated: particular observations and general theories interpenetrate in many ways. *See, e.g.*, HAROLD I. BROWN, PERCEPTION, THEORY AND COMMITMENT: THE NEW PHILOSOPHY OF SCIENCE 81-94 (1977); ARTHUR N. STRAHLER, UNDERSTANDING SCIENCE 106-09 (1992).

156. Williams demonstrates how identity is passed from one generation to the next, how the complex bundle of constitutional and property rights, social conditions, and cultural mores which comprised the racial identity of our ancestors lingers on, and continues to construct our own identities:

> When my mother told me I had nothing to fear in law school, that the law was "in my blood," she meant it in a complex sense. First and foremost, she meant it defiantly; no one should make me feel inferior because someone else's father was a judge. She wanted me to reclaim that part of my heritage from which I had been disinherited, and she wanted me to use it as a source of strength and self-confidence. At the same time, she was asking me to claim a part of myself that was the dispossessor of another part of myself; she was asking me to deny that disenfranchised little-black-girl who felt powerless and vulnerable.

PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 216-17 (1991).

157. *See* JAMES B. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 175 (1985).

completeness of argument.[158] And stories can be more or less complete or complex, depending on the level of particularity, the richness of detail, and the types of exploratory dialogue offered by the author.

158. Ironically, one recent critique of outsider storytelling may well illustrate this point. Professor Anne Coughlin professes skepticism about the transformative power of autobiographical narratives offered by cultural outsiders. *See* Coughlin, *supra* note 83. As a matter of theory, she notes, the autobiographical form may in fact legitimate the very liberal individualist *ethos* that outsiders generally reject; in practice, she concludes, outsider autobiographies are often really success stories, and implicit endorsements of meritocracy.

But Professor Coughlin's responsive story—told, to be sure, in the form of conventional critique—is oddly partial in at least three significant ways. First, it is partial in the sense that she selectively culls the vast library of outsider stories for stories of personal success. From these, she concludes that outsider autobiographies are stories not about oppression, but about individual achievement. Her process of induction, however, is decidedly partial both in her sampling and in her conclusion. As to the former, she omits the more obvious stories of suffering and oppression from her survey. As to the latter, she can interpret the stories she does choose to relate as "success" stories only by carefully highlighting some features and eliding others; among the more frequent casualties of her editorial decisions are, interestingly, the perspectives of the autobiographers. *See, e.g., id.* at 1301 (claiming that Professor Jerome Culp "never explicitly identifies the continuing racist injuries he suffers" after noting two sentences earlier that Professor Culp believes he is treated with "fear, suspicion, and disrespect" by white culture).

Thus arises a second sense in which she is partial. While she attributes to outsider scholars a number of "claims" we do not believe have been submitted, she dismisses what may be their most important claim, the claim that the outsider perspective contains distinct content. As to the former, we do not read minority scholars to say that storytelling is, in her words, their "special domain," *id.* at 1242, or that they have "unique cognitive claims" to the narrative genre. *Id.* at 1244. We do read minority scholars to say that storytelling may offer them special opportunities for communication, and a special hope for the reconstruction of a discourse that has too often been oppressive. Most importantly, perhaps, we read outsider storytellers as saying that their stories present distinct perspectives—distinct, that is, from the majoritarian story depicted in conventional discourse. Coughlin elides this last feature from the scope of her critique, maintaining that claims to an outsiders' perspective do not "represent a significant challenge" to conventional discourse in that they do not challenge "the political commitments of our legal system." *Id.* at 1237. But this odd divorce of form and substance reduces Coughlin's thesis to a tautology: the narrative form is indeed unlikely to be transformative if the narrative message can be so easily eluded.

Finally, Professor Coughlin suggests that outsider scholarship is plagued by a variety of manifestations of the same basic contradiction: scholars challenge the very traditions that sustain them. But she does not explain why this critique should be applied partially, only to outsider storytellers. In fact, the "contradiction" Coughlin identifies is no more than the dilemma faced by every reformer or cultural critic. Coughlin's contradiction is simply a variation on the absurdity that confronts Camus' rebel, or the "performative contradiction" that has led some theorists to suggest that it is impossible to be a practicing postmodernist. Critical race theorists themselves have described the dilemma: it is Delgado's "fundamental contradiction sub-two," Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have A Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407, 413 (1988); and it is the operative premise of Bell's "racial realism," his jurisprudence of Sisyphean struggle. *See* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992). Indeed, Coughlin herself cannot avoid the paradox. She dismisses the work of scholars within the conventions of legal discourse as insufficiently "radical" or "transformative," while

Furthermore, narrative has qualities that compensate for partiality. Storytelling not only makes possible, but demands, the consideration of a broad array of cultural, social, and economic factors. Indeed, critical race storytelling often reverses the field: foreground and background exchange places. In many critical race narratives, the social and cultural backdrops come into sharp focus, and the immediate or pressing question is seen through the complex lenses of race, class, and social context.

The storyteller's partiality is also offset in other ways. Narrative can escape some constraints of the power of perspective because it can avoid singular true accounts, and thereby open space for understanding.

> Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place. These matters are rarely focused on. They are like eyeglasses we have worn a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves.[159]

Perhaps in inviting responsive stories, storytelling diminishes the possibility that an "impartial" story will have excessive influence. The more accounts from different perspectives we tell and hear, the closer we come to synthesizing an authentic re-presentation of events.[160]

Finally, experiential stories are compelling as immediate accounts of events; some impartiality is traded for explanatory force due to a loss of breadth or typicality. As Derrick Bell says simply, "'People are moved by stories more than by legal theories.'"[161] In a fragmented, ideologically conflicted society, narrative is a form of discourse that moves people to listen rather than retreat.[162] Stories, indeed, carry the

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dismissing the radical and transformative stories as "only disruptive" and offering "no assistance or concrete instruction" for legal decisionmakers. We find no fault with irony, provided the privilege is shared more or less impartially.

159. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989) (citations omitted).

160. *See* Baron, *supra* note 113, at 83 n.23.

161. Rosemary L. Bray, *Teaching Whites What Blacks Know* (Book Review), N.Y. TIMES REV. BOOKS, Oct. 11, 1987, at 7.

162. *See infra* notes 167-175 and accompanying text.

ability to promote comprehension across differences of human experience.[163]

If each story is a partial viewing or, as is often the case, if the telling is intended to promote a particular perspective, how can storytelling be a superior method of critique? The easy answer, offered by critical legal studies, is that partiality is all we ever get: doctrine, the critique of doctrine, and the form of doctrinal critique itself are all manipulable stories.[164] The more complicated answer, which some scholars in the narrative movement explore, is that to the extent stories are rich with details and facts, they become more complete renditions, less partial, and thus more representative of the real world. The greater the multiplicity and intricacy of detail, the more that a story acknowledges the contextual contingency of meaning, the sharper the recognition of dissonance in visions, and the more respectful a story is of the complexity of reality.[165] Thus, while a story can provide a simplifying frame for description,[166] its structural form can also open events to multiple interpretations and offer possibilities for meaningful and comprehensive syntheses by readers.

B. Dialogue and Dialectic: Counterstories and Critical Inquiry

Use of the narrative form of doctrinal critique also offers unique possibilities for critical inquiry. Narratives urge us to think critically about who is telling the story, why certain facts are included and others omitted, and whether the social context, and characters' motivations and actions, are "realistically" portrayed. The dialogue is participatory in important ways: independent ideas are formed through the interactions between teller and listener.[167] In leaving responsibility for interpretation with the reader, stories encourage critical and reflective questioning.

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163. "There is no tolerance without respect—and no respect without knowledge. Any human being sufficiently curious and motivated can fully possess another culture, no matter how 'alien' it may appear to be." HENRY L. GATES, JR., LOOSE CANONS: NOTES ON THE CULTURAL WARS xv (1992).

164. *See* Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 805-32 (1991).

165. *See* Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 42-43, 72-79 (1994).

166. *See* W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 66-67 (1981).

167. *See* Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1684-88 (1989).

The form of much traditional doctrinal analysis involves a logical and evidentiary assessment of the merits of a given holding or set of holdings. Decisions are often reduced to shorthand descriptives.[168] The chain of reasoning used in a decision or in an area of law is evaluated for clarity, cogency, consistency with precedent, and normative correctness. Rules are positioned in antithetical stance to other established rules, texts, constitutional structures, or institutional operations. Conventional doctrinal critique puts the author in the didactic mode of instructing her readers on the definitive meaning of a body of doctrine. Arguments about doctrine are seen as pairs of warring opposites, and those arguments stem from a limited range of internal evaluative criteria. This conventional form of doctrinal critique—even, and perhaps especially in its grander normative moments—is ultimately deadening.[169] Doctrinal critique itself relentlessly perpetuates the same conversation, a scripted debate over a bounded set of antinomal choices.[170]

The discursive form of narrative—stories, anecdotes, parables, chronicles, dialogues, and poems—usually takes a much different approach. Stories often encourage a dialogic mode; they invite and welcome counterstories.[171] They stimulate readers to imagine and to reconcile different versions of the same set of events. Stories do not try to win over adherents as much as they try to engage and interact with their audience.

This is not to say that narratives lack explanatory value for the listener. On the contrary, narratives possess the unique ability to logically sequence or order events, instantiate general social perceptions in concrete form, reduce theoretical conceptions to familiar surroundings, and create paradigms within which listeners can understand the cultural significance of events.[172] For most people comprehend events in narrative

168. This occurs at a number of levels, whether the reviewer is a judge, a scholar, or a legal cataloguer. Some of this capsulization may be for ease of reference as much as anything else, but the condensation omits complexities of meaning, multiple decisional interpretations, and significant amounts of background content and context.

169. *See generally* Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991) (providing some critiques of the conventional form of doctrinal critique).

170. *See* J.M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831, 1837 (1991).

171. *See* Delgado, *supra* note 159, at 2440 ("Hearing stories invites hearers to participate, challenging their assumptions, jarring their complacency, lifting their spirits, lowering their defenses."). Yet, as Jane Baron cautions, there is "no guarantee that the stories will promote dialogue and exchange." Baron, *supra* note 115, at 282.

172. *See* Paul A. Roth, *How Narratives Explain*, 56 SOC. RES. 449, 456, 460, 469 (1989).

form.[173] In some sense, it is the very shift in argument form—abandoning legalistic form and embracing narrative structure—that encourages readers to see and understand events in different ways.

Sometimes counterstories do fall into the dialectical mode. Counterstories may directly challenge and attempt to unseat received wisdoms and standard or stock versions of events.[174] But counterstorytelling is a dialectic with a difference. By encouraging reflection on the ways in which narratives represent reality, storytelling drives critical inquiry. Meaning here comes not from syllogistic superiority, but from the story's success in persuading listeners that its images and values are consonant with lived experience.[175]

C. *Evaluating Stories*

Critics argue that storytelling is an inappropriate form for legal scholarship because there are few agreed upon criteria for assessing the validity or the merit of stories.[176] We suggest first that there may be viable criteria for the assessment of stories, and second, that stories can be useful evaluative vehicles even in the absence of an agreed upon set of criteria for evaluating the evaluative mode.

Professors Kathryn Abrams, Mary Coombs, and Edward Rubin have joined Professor Delgado in proffering evaluative criteria for stories.[177] Abrams stresses that the better stories elaborate their normative content.[178] Coombs suggests that outsider scholarship should be evaluated by its suitability for its chosen audience and its ability to advance the outsider community's interests, as well as its illuminative ability, clarity, and originality.[179] Rubin urges evaluators to look for normative clarity or coherence, persuasiveness, siguificance, and the applicability or relational ability of stories.[180] Delgado, through Rodrigo, offers the

173. *See generally* Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984) (explaining that people make sense of everyday events by utilizing "stock stories").

174. *See* Delgado, *supra* note 159, at 2413-15.

175. *See* ROBERT SCHOLES & ROBERT KELLOGG, THE NATURE OF NARRATIVE 82 (1966).

176. *See* Farber & Sherry, *supra* note 82, at 842-54.

177. *See* Abrams, *supra* note 115, at 1045-49; Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 713-15 (1992); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CALIF. L. REV. 889, 915-40 (1992).

178. *See* Abrams, *supra* note 115, at 1045-49.

179. *See* Coombs, *supra* note 177, at 713-15.

180. *See* Rubin, *supra* note 177, at 915, 919, 928, 935.

criteria of "[p]ungency, irony, insight, vividness. Illumination of a new perspective or angle of analysis. Narrative coherence" (p. 193).[181]

Yet, as Professor Jane Baron notes, all evaluative criteria are inevitably partial.[182] The criteria for evaluating storytelling cannot be determined unless the goal or objective of those criteria is ascertained. "Originality" in what way, for what purpose? "Pungency" about what? "Suitability" by what measure, and toward what ends? In short, we cannot articulate criteria for the evaluation of storytelling as scholarship generally, or storytelling as doctrinal critique in particular, until we know its purposes.

There are, unsurprisingly, a multiplicity of views regarding the appropriate objectives for legal scholarship.[183] Evaluative criteria follow from the objectives that are seen as most iinportant. Just as there is no agreed set of criteria for evaluating judicial decisions[184] or academic scholarship generally, there is no reason that a set of criteria for evaluating storytelling must be concretely established.[185] Indeed, storytelling is not toward one purpose; as storytelling itself suggests, intellectual activity does not have to be so limited. Depending on which objectives or purposes one views as most salient, different evaluative criteria come to the fore.

With or without a fully developed set of evaluative criteria, we suggest that storytelling as doctrinal critique is useful. The human appeal of stories is inescapable. It is galvanizing to talk about people in law, rather than about formal rules, standards, or doctrines. Evaluating cases

181. Many of these criteria are adaptations of particular criteria of rationality—explanatory power, depth, fertility, and extensibility—to the narrative genre. *See* Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method,* 58 FORDHAM L. REV. 263, 268-72 (1989).

182. Baron, *supra* note 115, at 270.

183. *See, e.g.,* Arthur Austin, *Deconstructing Voice Scholarship,* 30 HOUS. L. REV. 1671, 1671 (1993); Richard A. Posner, *Legal Scholarship Today,* 45 STAN. L. REV. 1647, 1656 (1993); Philip C. Kissam, *The Evaluation of Legal Scholarship,* 63 WASH. L. REV. 221, 223-30 (1988).

184. *See* Hayman & Levit, *supra* note 25, at 630-31 (suggesting that criteria for assessing judicial decisions range from internal logic, consistency with theory and precedent, the decision's empirical foundation, and the normative import of the decision). If such criteria are developed in the future, perhaps they should move in the directions of rationality and humanism. *See* Levit, *supra* note 181, at 268-72; Nancy Levit, *Defining Cutting Edge Scholarship: Feminism and the Criteria of Rationality,* 71 CHI.-KENT L. REV. (forthcoming 1996).

185. *See* Delgado, *supra* note 82, at 667 ("[T]he near impossibility of fairly treating new scholarly movements counsels against laying down evaluative criteria during those movements' early stages.").

through stories invites participation—the experiencing of anger, passion, love and terror—that a distant analytical stance does not.

D. Narrative and Praxis

Storytelling in jurisprudence promises to integrate theory and practice. It simultaneously mirrors the practice of law, bridges the gap between lived experience and law, and transforms the law. This happens in several ways.

1. Law as Dialogue

First, narrative theory describes law as a practice, as a variety of different dialogic exercises. Communicating with clients involves listening to client narratives.[186] Recounting the events described in those conversations to legal decisionmakers is another form of storytelling.[187] Indeed, the narrative movement says that doctrine is itself simply a story imagined by law about the nature of the world.[188]

It is in this sense that narrative offers one of the broadest possibilities to reformulate judicial practice. Implicit in the recognition by legal decisionmakers that they are telling stories is the possibility for greater appreciation of the human lives their decisions affect.[189] Narrative theory thus urges judicial decisionmakers to view their craft through a more empathic lens and to strive for authenticity in what are inevitably partial and incomplete representations of events.

2. Law as Storytelling

Narrative, then, offers a method for the critique and influence of judicial opinions unlike other schools of jurisprudence because it makes possible a new way of writing judicial opinions. Stories offer the opportunity to make law connect with life in a way that judicial opinions have, in the past, overlooked. First, the narrative form of discourse permits the author to express a range of emotions:

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186. *See* Alfieri, *supra* note 113, at 2118-23.

187. *See* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 27-32 (1990).

188. *See, e.g.*, Baron, *supra* note 115, at 283.

189. *See* David O. Friedrichs, *Narrative Jurisprudence and Other Heresies: Legal Education at the Margin*, 40 J. LEGAL EDUC. 3, 4 (1990) ("[S]tories vividly and powerfully compel readers, whatever their status, to confront their common humanity in a way that no other form of discourse can accomplish.").

> There are some things that just cannot be said by using the legal voice. Its terms depoliticize, decharge, and dampen. Rage, pain, elation, the aching, thirsting, hungering for freedom on one's own terms, love and its joys and terrors, fear, utter frustration at being contained and constrained by legal language; all are diffused by legal language.[190]

Second, narrative form is not confined or limited to formal legalistic arguments. Stories are real, or at least they are representations of more immediate reality. The use of stories in judicial opinions specifically suggests a broader praxis: a life-practice, a way of uniquely bridging the gap between law and reality.

Professor Jane Baron trenchantly questions whether storytelling will transform the legal system. She points out, first, that stories can as easily entrench the *status quo* as unsettle it, and also that stories are only effective if they are really heard.[191] But while storytelling as a jurisprudential movement is of recent vintage, there is siguificant evidence that stories are being listened to and used by those who shape legal doctrine.

In his dissent in *DeShaney v. Winnebago County Department of Social Services*,[192] Justice Blackmun crafted one of the most striking passages ever written in a judicial opinion:

> Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles . . . that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.[193]

Professor Mark Tushnet reads Justice Blackmun's story as an "improper invocation of particulars."[194] We disagree. Justice Blackmun tells the poignant story of Joshua DeShaney not only, and perhaps not even primarily, for its raw emotive appeal. The story is told to illustrate

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190. Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 903 (1989).

191. *See* Baron, *supra* note 113, at 100-03.

192. 489 U.S. 189 (1989).

193. *Id.* at 213 (Blackmun, J., dissenting) (alteration in original) (citation omitted).

194. Tushnet, *supra* note 114, at 301.

the human consequences of choices about how to interpret precedent. Far from being divorced from legal analysis, Joshua's story is a remarkable example of an ideological choice of decisional methodology. As Justice Blackmun explains, when faced with doctrinal indeterminacy—with precedents capable of more than one meaning—judges must determine the social directions in which existing law will be sent:

> Like the antebellum judges who denied relief to fugitive slaves, the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.[195]

Judges can choose, as the *DeShaney* majority did, to read prior constitutional cases in a stark syllogistic fashion. According to Justice Rehnquist's majority opinion, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."[196] The *DeShaney* Court thus held that state actors have no constitutional duty to take affirmative acts of protection if they have done nothing to incur such a duty.[197] But judges can also choose, as Justice Blackmun did, to read prior constitutional cases in a manner sympathetic to communitarian objectives. If the inquiry is driven by empathy—in legal terms, perhaps by an assumption that the Constitution is a countermajoritarian bulwark to protect the defenseless—we might draw quite different conclusions about the state's responsibility to protect abused children.

Read this way, Justice Blackmun's story of Joshua is a particular example of a general proposition about legal indeterminacy and political choices: a proposition that Professor Tushnet helped pioneer.[198] Justice Blackmun would not allow state actors to hide behind the

195. 489 U.S. at 212-13 (Blackmun, J., dissenting) (citation omitted).
196. 489 U.S. at 195.
197. *Id.* at 201-03.
198. *See generally* Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

"sterile formalism" of inactivity,[199] but instead would have recognized the social choices involved in labeling human conduct as activity or inactivity. That he chose narrative to make his point was no accident: it was the best way, perhaps the only way, to remind us that "legal" choices and "social" choices are, in the end, *human* choices.

Description in a story thus makes possible an understanding of the human condition that is simply unavailable in straight doctrinal analysis, which too often reduces human events to sterile evidentiary facts. Yet a story told well in a judicial opinion accomplishes more than simply the personalization of events. It connects emotive and rational moments by depicting how legal rules operate in context.

3. *Law as Re-vision*

Finally, storytelling encourages the reimagination of law. Professor Delgado and others suggest the power of narrative to give voice to the experiences of those outside the dominant groups.[200] Storytellers are not committed to any one substantive political or ideological position, but rather share a belief in the abilities of narrative to convey experiences and offer fresh perspectives.[201] And the stories themselves either describe an alteruative world or expose the world in ways that allow us to see and feel what is inadequate. To the extent that they expose injustice, the stories appeal to our innate sense of justice. As Toni Massaro observes, the understanding promoted by narrative may impel listeners to respond: "[A] concrete story comes closest to actual experience and so may evoke our empathic distress response more readily than abstract theory. Telling stories can move us to care, and hence pave the way to action."[202]

Some stories, *The Rodrigo Chronicles* are certainly among them, invite reaffirmation of the possibilities of a better world, even if we cannot articulate that world in the terms of conventional theory. The possi-

199. 489 U.S. at 212 (Blackmun, J., dissenting).

200. *See, e.g.*, Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Judy Scales-Trent, *Using Literature in Law School: The Importance of Reading and Telling Stories*, 7 BERKELEY WOMEN'S L.J. 90 (1992); Symposium, *supra* note 113.

201. Delgado, *supra* note 159, at 2414-15 ("Counterstories . . . can open new windows into reality, showing us that there are possibilities for life other than the ones we live. They enrich imagination and teach that by combining elements from the story and current reality, we may construct a new world richer than either alone.").

202. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2105 (1989).

bilities may be ignored by doctrine, obscured by dogma, or even suppressed by the totalizing, linear rationality that is the hallmark of Western thought. But in a story, we can dispel our usual obsession with the one reality and accept the multiple truths that life offers. When we hear a story, we can suspend our ontological commitment to "objectivity" and accept the possibility of "subjective" realities, of plural rationalities, of many lived truths. Storytelling, in a sense, overcomes the uncertainties of the postmodern age by embracing them: when we tell and hear stories, the "subject" still matters. Through stories, we deconstruct, reconstruct, and transform our law, our society, our selves. They may not be true, they may not be right . . . but there is something in the stories.

CONCLUSION

Perhaps we are tempted to rethink the notion that stories can matter in the real world because they seem not to have. In the last chapter of *The Rodrigo Chronicles*, Delgado makes clear that the manufactured worlds of narrative jurisprudence matter—even if they are not wholly representative of the world outside law. They matter in part because they unseat deeply entrenched and insidiously misleading conventional understandings of the way the world works, and in part because they give voice to our aspirations and give us hope.

Rodrigo, now a budding academic, worries that it would be professionally unwise to utilize narrative in his first effort at legal scholarship. The Professor fears that law reviews themselves might be transformed by a backlash to the narrative movement. Rodrigo observes:

> Cultural power always reasserts itself. You make gains, then when you least expect it, there's the backlash. And those who participate in the reaction don't see themselves as counterrevolutionaries at all. Rather, they're just trying to set things right. And so when the law reviews change structure, it will seem like a little needed infusion of rigor, of integrity. It will seem like a restoration, rather than a destructive movement aimed at aborting a host of promising social movements in the law (p. 209).

"The more things change," Rodrigo concludes, "the more they stay the same" (p. 209).

On this somber note, the Professor asks if the seeming futility of the struggle means that Rodrigo will abandon narrative analysis.

Rodrigo does not reply.

"But, Rodrigo, you can't do that. You *are* a character in a narrative. You would not continue to exist!"

"We are all characters in a narrative, Professor. We just fool ourselves into thinking that things are otherwise. Perhaps we want to escape responsibility for our own stories" (p. 210).

At this, the lights flicker out for a moment and Rodrigo seems to disappear. Yet, the detritus of Rodrigo is left behind—the empty espresso cup, the full plate of ideas. In the concluding passages of the book, fact and fiction blur, the real and the unreal unite in exhilarating coexistence, and storyteller and reader share the mystique and the power of narrative jurisprudence.