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# UC DAVIS LAW REVIEW ONLINE

VOL. 53



SEPTEMBER 2019

## Rodrigo's Rebuke: Orinary Violence and U.S. Border Policy

*Richard Delgado\**

INTRODUCTION: IN WHICH RODRIGO ENCOUNTERS ME IN THE MIDDLE  
OF MY DAILY EXERTIONS

I had been pressing hard against the cushioned bar of the leg-lifting machine in the rehabilitation wing of the local hospital and scrunching my face up with the effort, when a familiar voice caused me to halt suddenly.

“Professor, I see you’re doing much better.”

I lowered my leg, still trembling from the exertion, and looked around to see none other than my good friend and colleague Rodrigo Crenshaw,<sup>1</sup> standing just inside the entry door a few feet away and smiling broadly.

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<sup>1</sup> See generally Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) [hereinafter *Chronicle*] (introducing Rodrigo). The son of an African American serviceman and an Italian mother, Rodrigo was born in the United States but raised in Italy, where his father served at a U.S. outpost. *Id.* at 1357-59. Rodrigo is the half-brother of famed civil rights super-lawyer Geneva Crenshaw, a heroine figure created by Derrick Bell. See DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 18 (1987). Rodrigo graduated from the small base high school, then attended an Italian university (“the oldest in the world, Professor”) and law school, graduating fourth in

“Your physical therapist told me I could say hello.<sup>2</sup> She said you were almost finished for the day.”

I eased myself out of the cushioned seat and caught a glimpse of the therapist tapping something into her computer. She looked up and mouthed, *See you Friday*.

“I am indeed better. In fact, I was going to do one last set on that machine over there,” I said, pointing to an ominous-looking contraption a few feet away. “But I’m glad to skip it since Marcia thinks I’ve had enough. What brings you here?”

“A demonstration at the courthouse in support of a student at my school. The government is trying to deport her. A group of us came to show solidarity.”

“How awful,” I said. “She’s not a citizen, I gather?”

“No. Her parents brought her here from Guatemala when she was two. She’s a top student, on the law review in fact.”

“What are her chances?” I asked, getting up and rubbing my leg, a little sore from the exercise.

“Not good,” he said. “The government keeps saying she has to return to Guatemala and apply from there, which could take years.<sup>3</sup> Our dean

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his class. Delgado, *Chronicle, supra*, at 1359-60, 1360 n.7. We met when he sought me out, on his sister’s recommendation, on a return trip to the States to explore LL.M. programs in preparation for a career in law teaching. *Id.* at 1359. Over the years, we met many times at conferences, in airports, and during family trips discussing a host of topics, including affirmative action, see Delgado, *Chronicle, supra*, at 1375; love, see Richard Delgado, *Rodrigo’s Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CALIF. L. REV. 387, 392-415 (1993) [hereinafter *Third Chronicle*]; the economics of discrimination, see Richard Delgado, *Rodrigo’s Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183, 1195-98 (1993); postcolonial theory, see Richard Delgado, *Rodrigo’s Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1691, 1695-1718 (2007) [hereinafter *Corrido*]; intersectionality, see Richard Delgado, *Rodrigo’s Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247, 1261-65 (2011); the politics of coalition, see Richard Delgado, *Rodrigo’s Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 648-52 (1993); capitalism, see Richard Delgado, *Rodrigo’s Equation: Race, Capitalism, and the Search for Reform*, 49 WAKE FOREST L. REV. 87, 90 (2014), and many other topics over the following years. Rodrigo and his friends are fictional characters, composites of persons I have known and not to be identified with any of them in particular.

<sup>2</sup> See Richard Delgado, *Metamorphosis: A Minority Professor’s Life*, 53 UC DAVIS L. REV. ONLINE 1, 22 (2019) (describing the Professor’s accident).

<sup>3</sup> DEP’T OF HOMELAND SEC., INSTRUCTIONS FOR APPLICATION FOR PERMISSION TO RE-APPLY FOR ADMISSION INTO THE UNITED STATES AFTER DEPORTATION OR REMOVAL, 5-6 (2018), <https://www.uscis.gov/sites/default/files/files/form/i-212instr.pdf> (explaining the conditions for re-entry into the U.S. after exclusion or deportation).

has offered to testify on her behalf, and the university counsel is giving her advice.”

“My car is just outside,” I said. “I’d like to hear more. Do you have time for a bite? There’s a little place around the corner that makes excellent sandwiches. Exercising makes me hungry, and Marcia says I need to push the protein.”

Rodrigo looked at his watch. “I do. The van doesn’t leave until five.<sup>4</sup> I was hoping to run my latest thesis past you. It’s about immigration.”

#### I. IN WHICH RODRIGO EXPLAINS THE NEED FOR A THEORY OF BORDERS AND BORDER SECURITY

Moments later we were seated in a comfortable booth in the homey diner. I waved at a doctor seated in the far corner who I knew from my time in the hospital.

We scanned the menu, printed in neat handwriting on a blackboard above the counter. “What are you thinking of having?”

“The Southwest grilled chicken with lettuce, tomato, and avocado sounds good,” he said.

We gave our orders to the polite waiter (“I’ll have the same”), then I said, “So, immigration policy has been on your mind?”

“It has,” he said. “The news has been full of stories, many of them shocking. The Administration just announced its intention to raid homes in several big cities and deport millions.<sup>5</sup> They also said that they wouldn’t be accepting any more asylum applications at the border.”<sup>6</sup>

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<sup>4</sup> Rodrigo teaches law in the state next to mine. Richard Delgado, *Rodrigo's Portent: California and the Coming Neocolonial Order*, 87 WASH. U. L. REV. 1293, 1294 (2010) (discussing attitudinal changes in American society as a result of demographic shifts). On his adventures in the LL.M. program and on the academic job market, see, e.g., Delgado, *Third Chronicle*, *supra* note 1, at 388-92; Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581, 1584 (1993).

<sup>5</sup> See Maria Sacchetti, *Trump Administration to Expand Its Power to Deport Undocumented Immigrants*, WASH. POST (July 22, 2019), [https://www.washingtonpost.com/immigration/trump-administration-to-expand-its-power-to-deport-undocumented-immigrants/2019/07/22/76d09bc4-ac8e-11e9-bc5c-e73b603e7f38\\_story.html](https://www.washingtonpost.com/immigration/trump-administration-to-expand-its-power-to-deport-undocumented-immigrants/2019/07/22/76d09bc4-ac8e-11e9-bc5c-e73b603e7f38_story.html); see also Molly Hennessy-Fiske et al., *Despite Weeks of Threats, ICE Raids Begin with a Whimper Yet Still Stoke Fears*, L.A. TIMES (July 14, 2019), <https://www.latimes.com/local/lanow/la-me-ice-raids-immigration-trump-20190714-story.html> (discussing the latest wave of raids).

<sup>6</sup> See Santiago Pérez, *New U.S. Asylum Rule Strands Thousands at Southern Border*, WALL ST. J. (July 16, 2019), <https://www.wsj.com/articles/new-u-s-asylum-rule-strands-thousands-at-southern-border-11563285772> (describing a recent Administration policy “that seeks to effectively close the border to the vast majority of the 18,700 asylum seekers on Mexico’s side”). The Administration is also considering cutting back on refugees allowed into the country to escape famines and war. Julie Hirschfield Davis

“They’re still separating children from their families,”<sup>7</sup> I added, “and declining to exercise discretion, even with those brought here at a tender age and living exemplary lives.”<sup>8</sup>

“Like my student. It seems to be part of their zero-tolerance policy.”<sup>9</sup>

“Right. And the resistance seems to be getting nowhere. People gather at airports when Trump announces a travel ban,<sup>10</sup> demonstrate outside detention centers,<sup>11</sup> and write articles and op-ed columns deploring his policies.<sup>12</sup> Entire cities have stopped cooperating with federal enforcement authorities.<sup>13</sup> But the Administration just ignores them and goes on its way.”

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& Michael D. Scheer, *Trump Administration Considers a Drastic Cut in Refugees Allowed to Enter U.S.*, N.Y. TIMES (Sept. 6, 2019), <https://www.nytimes.com/2019/09/06/us/politics/trump-refugees-united-states.html>.

<sup>7</sup> Lomi Kriel & Dug Begley, *Trump Administration Still Separating Hundreds of Migrant Children at the Border Through Often Questionable Claims of Danger*, HOUS. CHRON. (June 24, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-administration-still-separating-hundreds-of-14029494.php> (discussing how family separation is still occurring even though the Administration repealed the formal policy).

<sup>8</sup> Isabel Fattal, *How Higher-Education Leaders Are Fighting for DACA*, ATLANTIC (Sept. 1, 2017), <https://www.theatlantic.com/education/archive/2017/09/how-higher-education-leaders-are-fighting-for-daca/538740/> (discussing how college presidents are backing undocumented students).

<sup>9</sup> Jason Zengerle, *How America Got to ‘Zero Tolerance’ on Immigration: The Inside Story*, N.Y. TIMES MAG. (July 16, 2019), <https://www.nytimes.com/2019/07/16/magazine/immigration-department-of-homeland-security.html>.

<sup>10</sup> James Queally, Javier Panzar & Matt Hamilton, *Protesters Block LAX traffic, Face Off with Police as They Rally Against Trump’s Travel Ban*, L.A. TIMES (Jan. 29, 2017, 12:23 PM), <https://www.latimes.com/local/lanow/la-me-lax-protest-20170129-story.html>; *Crowds Gather at US Airports to Protest Trump’s Immigration Ban*, GUARDIAN (Jan. 28, 2017, 11:21 PM), <https://www.theguardian.com/world/video/2017/jan/29/trump-refugee-ban-airport-protests>.

<sup>11</sup> See, e.g., Adam Gabbatt, *The Growing Occupy ICE Movement: ‘We’re Here for the Long Haul’*, GUARDIAN (July 6, 2018, 6:00 AM), <https://www.theguardian.com/us-news/2018/jul/06/occupy-ice-movement-new-york-louisville-portland>; Cleve R. Wootson, Jr., *A Protest Movement Shut Down an ICE Facility in Portland — and Is Spreading to Other Cities*, WASH. POST (June 25, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/06/25/a-protest-movement-shut-down-an-ice-facility-in-portland-and-is-spreading-to-other-cities>.

<sup>12</sup> See Dylan Rodriguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1602 (2019) (discussing community-based anti-prison activism in Chicago and Los Angeles); Zengerle, *supra* note 9 (criticizing harsh immigration policies).

<sup>13</sup> Bryan Griffith & Jessica M. Vaughan, *Maps: Sanctuary Cities, Counties, and States*, CTR. FOR IMMIGRATION STUDIES (Apr. 16, 2019), <https://cis.org/Map-Sanctuary-Cities-Counties-and-States>.

“When a congressional committee asks one of them to testify,” he added, “it simply ignores them, even when they issue a subpoena.<sup>14</sup> And if a federal court strikes down one of their programs, they just change course slightly or alter the rationale for the same program and dare the ACLU to sue them again.”<sup>15</sup>

“Here you are, gentlemen,” said the waiter, setting down our sandwiches. I noticed he had a slight accent and wondered if he might be an immigrant. “Can I bring you anything else? Maybe a *cafecito*?”

Rodrigo looked up. “Maybe later,” he said. “*Cuando terminamos con los sandwiches.*”<sup>16</sup>

The waiter nodded, and left. “Nice fellow,” said Rodrigo. “Bilingual, too. Where were we?”

## II. IN WHICH RODRIGO EXPLAINS WHY THE LEFT NEEDS A THEORY OF IMMIGRATION RESISTANCE

“You were mentioning a few areas in which progressive people were protesting but not getting anywhere because the Administration ignores them.”

“Much of the electorate sides with the resistance,”<sup>17</sup> he began. “But Trump’s base dislikes immigrants, so the Administration’s behavior merely excites them.”<sup>18</sup>

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<sup>14</sup> Natalie Andrews, *House Panel Votes to Hold William Barr and Wilbur Ross in Contempt for Defying a Subpoena Over Census*, WALL ST. J. (June 12, 2019, 10:01 PM), <https://www.wsj.com/articles/trump-asserts-executive-privilege-over-documents-on-census-citizenship-question-11560350472>; Jonathan Chait, *Trump Claims He Can Ignore Subpoenas Because Congress Is Mean*, INTELLIGENCER (Apr. 30, 2019), <http://nymag.com/intelligencer/2019/04/trump-subpoena-congress-lawsuit-oversight-deutschebank.html>.

<sup>15</sup> See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (upholding a travel ban aimed at Muslims following a series of lawsuits, injunctions, and amendments aimed at rendering it barely legal); see also *Timeline of the Muslim Ban*, ACLU WASH., <https://www.aclu-wa.org/pages/timeline-muslim-ban> (last visited Sept. 10, 2019) (describing the several different versions of the travel ban).

<sup>16</sup> Translation: “When we’re finished with the sandwiches.” “*Sanwiches*,” believe it or not, is how one spells sandwiches in Spanish.

<sup>17</sup> On the “resistance,” see Charlotte Alter, *How the Anti-Trump Resistance Is Organizing Its Outrage*, TIME (Oct. 18, 2018), [https://time.com/longform/democrat-midterm-strategy](https://time.com/longform/democrat-midterm-strategy; Khatya Chhor, Wonder Who's Fighting Trump? Meet the #Resistance); Khatya Chhor, *Wonder Who's Fighting Trump? Meet the #Resistance*, FR. 24 (May 30, 2018), <https://www.france24.com/en/20180530-who-fighting-trump-opposition-meet-resistance-resist-twitter-hashtag-grassroots-usa> (discussing how the U.S. resistance looks to foreign eyes).

<sup>18</sup> David Marcus, Opinion, *Trump Builds Base of Support Among Those Who Hate Immigrants*, EL PASO TIMES (July 27, 2019), <https://www.elpasotimes.com/story/>

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“Even with child separation,” I said. “I’ve been writing about that.”<sup>19</sup>

“I’d love to see your paper. I’ve noticed that much of the scholarship finds fault with particular aspects of the current system, such as the plenary power doctrine which interferes with judicial review in this area.<sup>20</sup> Other scholars point out that the current framework provides too little due process or violates international law.<sup>21</sup> And I take it that you critique family separation.”<sup>22</sup>

He looked up a little defensively, so I asked, “What’s wrong with that? Do you find this approach too scattershot? Too incremental?”

“I don’t want to be too harsh. Each of these authors targets some feature of the Administration’s current program. But they don’t explain why its basic premise is wrong. These writers seem to lack a theory.”

### III. RODRIGO’S THEORY: REVISIONISM IN ACTION

“I don’t see why you need a new theory to oppose something that is so obviously wrong,” I groused.

“One should always protest injustice,” he said, giving my arm a quick squeeze. “But if you don’t have a theory, someone who disagrees with you is apt to respond, ‘Well, they broke the law.’<sup>23</sup> For the man in the street, anyone who lacks papers is not supposed to be here. That puts immigrants and their supporters in a weak position when they complain of poor treatment.”

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opinion/2018/07/27/trump-builds-base-support-among-haters-immigrants-david-marcus/846149002.

<sup>19</sup> Richard Delgado & Jean Stefancic, *Lessons from Mexican Folklore: An Essay on Immigration Policy, Child Separation, and La Llorona* (July 1, 2019) [hereinafter *Llorona*] (unpublished manuscript) (on file with author).

<sup>20</sup> See Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 45 (2019) (showing how plenary power contradicts democratic principles and values).

<sup>21</sup> See, e.g., B. Shaw Drake & Elizabeth Gibson, *Vanishing Protection: Access to Asylum at the Border*, 21 CUNY L. REV. 91 (2017).

<sup>22</sup> Delgado & Stefancic, *Llorona*, *supra* note 19.

<sup>23</sup> Michael V. Ernest, Letter to the Editor, *Let’s Not Forget Undocumented Immigrants Are Here Illegally*, BALTIMORE SUN (June 21, 2019), <http://www.baltimoresun.com/opinion/readers-respond/bs-ed-rr-undocumented-immigrants-illegal-letter-20190626-story.html> (stating that undocumented immigrants have “broken at least one duly passed federal law” and thus deserve little consideration); see also President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> (showing how even President Barack Obama fell prey to the same reasoning).

"It's not true that no one has a theory," I said. "Juan Perea points out that upsurges of nativism occur when the economy is poor.<sup>24</sup> But maybe you think that only shows association, not causation."

"It does predict attitudinal variations," he said mildly. "A down economy makes some people feel insecure, and they take it out on the immigrants.<sup>25</sup> But not everyone reacts that way, so the correlation is less than perfect. And some oppose immigration even when times are good. A conceptual connection would be better. What I hope to do is explain why Trump is able to get away with what he is doing and why many people see nothing wrong with it."

"I'm all ears," I said.

"How about if I run the theory past you first. Then, I'll explain how it applies to Trump's program. Then, if we have time" — Rodrigo looked at his watch — "we can consider what it means for citizen participation and protest rights. Some cities are no longer cooperating with federal enforcement.<sup>26</sup> I'd like to show how this is perfectly legitimate."<sup>27</sup>

#### A. *Originary Violence*

"A three-part thesis. I hope you write about this sometime."

"I will," Rodrigo said, pushing his empty sandwich plate to the side. "My thesis is that immigration restriction and policy are aspects of originary violence.<sup>28</sup> And this is true for good times as well as bad. Are you familiar with the term, Professor?"

"I am. We senior citizens do try to keep up on our reading, you know. It comes from Jacques Derrida, does it not?"

"It does,<sup>29</sup> and Derrick Bell mentioned it in the last edition of his casebook.<sup>30</sup> It refers to a type of threshold coercion and differs from the kind that most legal scholars examine. Say I show up at your door and

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<sup>24</sup> Juan F. Perea, *Introduction* to IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 6-7 (Juan F. Perea ed., 1997); see also Thomas Muller, *Nativism in the Mid-1990s: Why Now?*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 105-64 (Juan F. Perea ed., 1997) (discussing the social forces, including economic anxiety, that fuel nativism).

<sup>25</sup> E.g., Muller, *supra* note 24.

<sup>26</sup> Griffith & Vaughan, *supra* note 13.

<sup>27</sup> In this passage, Rodrigo is offering the mandatory "map" of the ensuing article.

<sup>28</sup> See Richard Delgado, *Law's Violence: Derrick Bell's Next Article*, 75 U. PITT. L. REV. 435, 436 (2014) [hereinafter *Law's Violence*] (discussing originary violence and explaining the term).

<sup>29</sup> Jacques Derrida, *Force of Law: The "Mystical Force of Authority"*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 5, 47 (Drucilla Cornell et al. eds., 1992) (discussing originary violence).

<sup>30</sup> DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 600 (6th ed. 2008).

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identify myself as your neighbor. A group of us have decided to form a neighborhood watch, and I'm the president. And I'm here to ask you to trim your bushes back sharply, because a criminal or someone up to no good could hide in them. If you don't, we will come back with clippers and cut them ourselves. The first act is a case of ordinary violence."

"You mean when you showed up at my door and told me that you'd formed a neighborhood association and I'd better obey your orders?"

"Right," he said. "Or there would be trouble."

"And ordinary violence is the kind that follows if I don't do what you tell me I have to do.<sup>31</sup> Namely, you will show up with some of your friends and give my shrubbery a very bad haircut."

"Exactly. The law does ordinary violence when it sentences someone to prison or orders her to do something she was not otherwise inclined to do, such as pay her taxes or have her child vaccinated.<sup>32</sup> It also perpetrates a psychological variation when it holds the threat of reprisals over the heads of average citizens, even those who are law abiding.<sup>33</sup> Each of these is a case of ordinary violence.

"*Ordinary* violence is different," he continued. "It's the kind that occurs when the law first announces itself and serves notice of its intentions.<sup>34</sup> In my example, it occurs when I ring your doorbell and announce the neighborhood watch and its implications for your hedges. Acts of this kind come before and are logically prior to the types of coercion that ensue, such as sentencing a violator, ordering him to pay a fine, or fix his hedges. And the trappings of due process, equal protection, trials, the right of counsel, the consent of the governed, and tiers of review — what we call 'justice' — come into play only in connection with this second kind of violence. One of their purposes is to conceal the initial act of violence and persuade ordinary citizens to go along with it, meekly and without complaint, believing themselves good citizens when they do. Even when they lose, they convince themselves that justice was done and resolve not to be a 'sore loser.'"<sup>35</sup>

"So, if I follow you, violence comes first and justice later, not the other way around. If so, it strikes me that Derrida and Robert Cover may have been on the same page, since they both held that law writes on a field

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<sup>31</sup> Delgado, *Law's Violence*, *supra* note 28, at 436-37 (discussing the two types of violence).

<sup>32</sup> *Id.* at 437.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (noting that ordinary violence sets in when the law first announces itself and explains its intentions, namely to rule the populace).

<sup>35</sup> *Id.* at 438 (noting that most citizens, on learning what the law is, immediately concede its authority).

of pain and death.<sup>36</sup> The difference is that for Derrida it writes twice.<sup>37</sup> And I imagine you think that this is true for immigration as well?"

"It is. Especially there. And I'm sure you can guess why."

B. *Watchtowers and Men with Guns — Immigration Regimes and Ordinary Violence*

The waiter showed up and asked if we wanted to see the dessert menu. When we said yes, he handed us two copies. My companion opted for the flan. ("My mother used to make it. It's delicious.")

We gave the waiter our orders — "I'll have one, too," I said — and continued as follows:

"First, a little more about the concept," he began. "Countries start up when a group of people who believe themselves united in destiny draw up a border, a line on the ground or etched on a map. They then build a string of watchtowers along this line and post armed guards inside with orders to fire on intruders who try to cross without permission.<sup>38</sup> If a group already living on the land, for example, Indians or Maoris, makes trouble, the new rulers enact laws — the Discovery Doctrine, Manifest Destiny, the Allotment Act, *terra nullius* — that allow them to remove the uncooperative people.<sup>39</sup> Control over the borders strikes everyone as a vital incident of nationhood and an essential ingredient in the formation of a nation."

"As Donald Trump keeps reminding us,"<sup>40</sup> I said.

"After forming themselves," he continued, "some nations, like Switzerland, have been relatively peaceful and did not seek to expand their borders or make war on enemies, while others, like Germany under the Nazis or South Africa under apartheid, were aggressive toward other nations or some of their own citizens. But each, including

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<sup>36</sup> Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1991) (noting that much of law is violent).

<sup>37</sup> That is, once when the law declares its sway over citizens; then, a little later, when it brings violators before the dock.

<sup>38</sup> Delgado, *Law's Violence*, *supra* note 28, at 444. With colonialism, of course, an outside force dictates the lines. See Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT'L L. 1, 2-3 (2010) (discussing the "Durand Line").

<sup>39</sup> *Terra nullius* is a good example. See *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 (Austl.) (repudiating the longstanding basis for European dispossession of native land rights in Crown territories).

<sup>40</sup> See David Flint, *No Borders, No Country*, THE SPECTATOR (Feb. 23, 2019), <https://www.spectator.co.uk/2019/02/no-borders-no-country> (attributing this saying to Donald Trump).

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the peaceable ones, was violent in its inception, its originary act. Granted, some founding acts have been more violent than others and ignored traditional borders, religions, ethnic enclaves, languages, mountains, and rivers, and told everyone to get used to it.<sup>41</sup> Those nations whose originary laws were most violent have often exhibited histories of great brutality, paranoia and militarism, constant revolutions, discontent over borders, and civil rights offenses against minorities.”<sup>42</sup>

“Like South Africa,” I said. “Or the United States during westward expansion. I see the parallel you are trying to draw between originary violence and current U.S. immigration policy. To a desperate immigrant trying to get here with their kids to escape military governments or dangerous neighborhoods back home, the two seem equally arbitrary, equally unfair. But can’t immigration laws be more or less just?”

### C. *Originary Violence and Lawmaking*

“Only with very great effort. Let me explain. Once nations come into being, one of their first tasks is to enact laws, which they think will make everything better. This introduces a second type of originary violence. For the law, you see, cannot justify itself. Justificatory tools such as due process, social contracts, consent, even constitutional conventions, follow the announcement of the laws rather than precede them.<sup>43</sup> This announcement arrives by fiat, an imposition, or act of will. Someone says, ‘Let’s have a new government and some rules. We will meet at Philadelphia or someplace. Afterward, we’ll announce what we have done and let everyone know that they are expected to go along

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<sup>41</sup> Delgado, *Law’s Violence*, *supra* note 28, at 441-42.

<sup>42</sup> The Balkans, with their unstable borders, endless feuds, and massacres of tribal enemies, are a prime example. See, e.g., *Karlovac: The Renaissance Star-Shaped City at a Border and a Crossroads*, KARLOVAC, <https://www.karlovac.hr/the-city-star-3034/3034> (last visited Aug. 24, 2019) (describing a tiny walled city that has changed hands many times, owing to struggles between one empire or another over trade routes and access to a small river). And on the opposite side of the continent, see generally *GEOPOLITICS OF EUROPEAN UNION ENLARGEMENT: THE FORTRESS EMPIRE* (Warwick Armstrong & James Anderson eds., 2007). On the example of the Kashmir region, a much-disputed area on the India-Pakistan border, see, e.g., Nikhil Kumar et al., *India Parliament Votes to Change Kashmir’s Status and Give New Delhi More Control over Contested Region*, CNN (Aug. 7, 2019), <https://www.cnn.com/2019/08/06/asia/india-kashmir-union-territory-intl-hnk/index.html>.

<sup>43</sup> Delgado, *Law’s Violence*, *supra* note 28, at 446 (discussing this order of priority); see also Warwick Armstrong, *Borders in an Unequal World*, in *GEOPOLITICS OF EUROPEAN UNION ENLARGEMENT: THE FORTRESS EMPIRE* 1, 1 (Warwick Armstrong & James Anderson eds., 2007).

with it. We'll let them know that if they don't, they'll be sorry. We'll try them as lawbreakers or renegades. We'll call them Tories or other terms of contempt."<sup>44</sup>

"Or as Trump does with people he doesn't like, 'treasonous,'"<sup>45</sup> I interjected.

"Right. But first we'll provide them with an attorney and copies of the charges and the rules of evidence we will use during their trial. That way, we will get them to think it was all legitimate.<sup>46</sup> Everyone else will get the message — 'do not break our laws' — while we can pretend that it was all perfectly regular, even consensual. What civilized state would not have laws of some kind? We get them to say these things, or better yet think them. That way, we don't have to coerce them every time. They coerce themselves and believe that in doing so they are being good citizens."<sup>47</sup>

#### D. Violence, Jurisdiction, and Standing

"All that might be true for criminal law and procedure," I said. "How about on the civil side?"

"We see overtones of the watchtower there as well. Notice how much of civil procedure is concerned with place, just as borders are in nation-building. The law of personal jurisdiction, for example, beginning with *Pennoyer v. Neff*,<sup>48</sup> links a court's ability to hear a case with geography. A plaintiff must find the defendant or her property within the territorial

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<sup>44</sup> See, e.g., Aaron Blake, *Trump Keeps Throwing Around the Word 'Treason' — Which May Not Be a Great Idea*, WASH. POST (May 15, 2018, 10:07 AM), <https://www.washingtonpost.com/news/the-fix/wp/2018/05/15/trump-keeps-lowering-the-bar-for-what-constitutes-treason-which-may-not-be-a-great-idea> (discussing recent rhetorical excesses); see also *Karlovac: The Renaissance Star-Shaped City at a Border and a Crossroads*, *supra* note 42 (where national loyalties seemed to have shifted radically many times).

<sup>45</sup> Blake, *supra* note 44.

<sup>46</sup> Antonio Gramsci, *The Study of Philosophy*, in SELECTIONS FROM THE PRISON NOTEBOOKS 321, 333 (Quintin Hoare & Geoffrey Nowell Smith eds., 1992) (discussing the idea of false consciousness, in which an oppressed people begin to identify with their oppressors); see also GEORG LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS* 72 (Rodney Livingstone trans., MIT Press 1971); Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32, 36-37 (1982); *False Consciousness*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/social-sciences-and-law/sociology-and-social-reform/sociology-general-terms-and-concepts/false-consciousness> (last visited Aug. 24, 2019) (defining the idea and tracing its evolution from Marx to Gramsci and other radical theorists of class consciousness).

<sup>47</sup> See Gramsci, *supra* note 46; *False Consciousness*, *supra* note 46 (discussing hegemony and false consciousness).

<sup>48</sup> 95 U.S. 714 (1878) (discussing the basis for in personam jurisdiction).

confines of the state in which she hopes to bring suit and bring her or it before the court in the requisite way, or else the case may unravel later.<sup>49</sup> Territoriality is the touchstone — the law of jurisdiction is self-sufficient, with everything except the watchtowers. If you come to the wrong place, you must go back to where you came from and start over.”<sup>50</sup>

“Just as Trump told the four congresswomen.<sup>51</sup> And I guess you must think standing doctrine operates in much the same way.”

“It does. If you have suffered no ‘injury in fact,’ it is *not your place* to bring that suit.<sup>52</sup> Like an illegal alien crossing a border in between two watchtowers when nobody is looking, you are out of line. Another plaintiff might have the right credentials, but not you. As pristine a case of originary violence as anyone could imagine, dismissal for lack of standing is maddening to the plaintiff desiring, often legitimately, to fix a bad situation with the aid of a court. As with an undocumented alien who mutters to himself, ‘I could really do that job, lead a good life, if I could just get there,’ standing law says, ‘No, you are out of line. Apply to the guard at the watch-tower.’”

#### E. Pleading Rules

“It strikes me,” I said, “that even when someone makes it into court, he often encounters additional hurdles, especially in recent times. I used to teach civil procedure.”

“Then you must know about the new pleading rules. Cases like *Iqbal*<sup>53</sup> and *Twombly*<sup>54</sup> require that a complaint strike the judge as plausible — no more fancy new torts or civil rights complaints seeking redress

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<sup>49</sup> *Id.* at 720.

<sup>50</sup> Formerly, a plaintiff could invoke a court’s jurisdiction by satisfying a minimum-contacts test. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Recently that test has become much more stringent. Today, a court can dismiss a case if a plaintiff cannot show a serious contact within the state in question or find the defendant living or operating there. *See Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017); *see also BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (narrowing the scope of general and specific jurisdiction).

<sup>51</sup> *See* Katie Rogers & Nicholas Fandos, *Trump Tells Congresswomen to ‘Go Back’ to the Countries They Came From*, N.Y. TIMES (July 14, 2019), <https://www.nytimes.com/2019/07/14/us/politics/trump-twitter-squad-congress.html>.

<sup>52</sup> *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (discussing the injury-in-fact test for standing to sue).

<sup>53</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (requiring that pleadings accord with plausibility and commonsense).

<sup>54</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

against respected authorities or institutions.<sup>55</sup> We tell those plaintiffs to get lost.”

“We’ve been cutting back on Alien Tort Statute suits, too,”<sup>56</sup> I said. “Especially ones brought by foreigners, like Mayan villagers suing an American corporation for something they did in a pristine ecosystem somewhere.”

“So you see, Professor, all these gate-slamming measures limit entry to the court system at the very time immigration rules have been becoming stricter. They all preserve entry to ‘the club’ to those who have a time-honored stake in it. They are all aspects of the same thing.”

#### F. *Originary Violence and Immigration*

“Now I see what you mean by the two types of violence. But do immigration laws exemplify just the one kind, or both?”

“Both,” he said. “But most progressive writers focus on the second kind only — enforcement — ignoring the originary kind. For that, we need a new theory capable of explaining what’s wrong with cruel treatment even if an immigrant broke the law in getting here.”

“But back up a minute. Remind me, what’s so bad about originary violence? Don’t all nations have to have borders? Doesn’t every state need laws? You’re not a complete anarchist, are you, who believes that states, governments, and laws should not exist?”

“Not at all,” he said. “But I do believe that there’s a relationship between the two types of violence — originary and consequential. The more of the one, the more you are apt to have of the other.<sup>57</sup> You’ll have violent rallies that turn into shouting matches<sup>58</sup> and border enforcement officials whose social media exhibit outright hatred and contempt

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<sup>55</sup> Arthur Miller, *It Just Got a Lot Harder for Americans to Have Their Day in Court*, THE NATION (Sept. 24, 2015), <https://www.thenation.com/article/it-just-got-a-lot-harder-for-americans-to-have-their-day-in-court> (noting that changed pleading rules will make it harder for citizens to sue large corporations or the government).

<sup>56</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013) (denying extraterritorial application of the statute).

<sup>57</sup> Delgado, *Law’s Violence*, *supra* note 28, at 444-45.

<sup>58</sup> Jamelle Bouie, Opinion, *The Joy of Hatred*, N.Y. TIMES (July 19, 2019), <https://www.nytimes.com/2019/07/19/opinion/trump-rally.html> (discussing how some attenders of Trump’s rallies appear to revel in harsh rhetoric and threats).

toward women and children who show up on our doorstep.<sup>59</sup> You're likely to have gratuitous violence once the foreigners get here, too."<sup>60</sup>

"Sounds like a feedback loop. Can you explain how this happens?"

"I can. Consider societies that are deeply torn, with violent hatreds and fears going on between the dominant group and a subordinate one."

"Like the Balkans or South Africa."

"Yes, those and others. Then, on the other side, are relatively peaceful societies like Switzerland or Japan, which has so little crime it has few lawyers.<sup>61</sup> It turns out that societies whose originary act was unpopular or unusually violent exhibit much crime and disorder later.<sup>62</sup> One thinks of countries like post-World War II Yugoslavia and modern Afghanistan.<sup>63</sup> Then there's the U.S. war with Mexico that resulted in the acquisition of one-half of Mexico and left most Mexicans with bad feelings and second-class citizenship."<sup>64</sup>

"So you think that excessive originary violence in a country's founding leads to more-than-usual violence — police brutality, paranoia, internal pass laws, militarism, civil rights offenses, and brutal immigration laws — later?"

"I do. The more originary violence, the more of the other kind. Immigration laws are an aspect of originary violence. They all have to do with nation-building. Justice comes in later, if at all."

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<sup>59</sup> Zolan Kanno-Youngs, 62 *Border Agents Belonged to Offensive Facebook Group, Investigation Finds*, N.Y. TIMES (July 15, 2019), <https://www.nytimes.com/2019/07/15/us/politics/border-patrol-facebook-group.html>.

<sup>60</sup> See *Police Brutality, Misconduct and Shootings*, N.Y. TIMES, <https://www.nytimes.com/topic/subject/police-brutality-misconduct-and-shootings> (last visited Aug. 24, 2019) (listing events in each category).

<sup>61</sup> See Hiroyuki Kachi, *Japan Crime Rate Down, But Scams More Complex*, WALL ST. J. (Feb. 2, 2014), <http://blogs.wsj.com/japanrealtime/2014/01/15/japan-crime-rate-down-but-scams-more-complex> (noting the relatively low rate of crime in that densely populated country); Shozo Ota & Kahei Rokumoto, *Issues of the Lawyer Population: Japan*, 25 CASE W. RES. J. INT'L L. 315, 315 ("[T]he number of practicing attorneys in Japan, relative to the size of the general population, has always been the smallest among the major industrialized nations . . ."). It may be true that Japan, being an island nation surrounded by a large ocean, has little need for border control. This is, however, the very point: the more originary violence and its apparatus of watchtowers, borders, etc., the more violence of the secondary kind, including surveillance, imprisonment, and repressive laws.

<sup>62</sup> Delgado, *Law's Violence*, *supra* note 28, at 444-46.

<sup>63</sup> *Id.*

<sup>64</sup> AMY S. GREENBERG, *A WICKED WAR: POLK, CLAY, LINCOLN, AND THE 1846 U.S. INVASION OF MEXICO* 91-110 (2012) (discussing events leading up to the War with Mexico); Richard Delgado & Juan F. Perea, *Racial Templates*, 112 MICH. L. REV. 1133, 1133 (2014) (discussing the implications of Greenberg's book).

Rodrigo looked up at me expectantly. Suddenly, the full impact of what he was saying hit me. “So you mean,” I said slowly, “the law is highly unlikely to reform immigration abuses. And the reason is that immigration law — who gets in, and under what conditions — is a foundational aspect of the construction of a nation. Justice comes in only later — after Those Guys that we wanted walled out are told, in no uncertain terms, that they are not welcome here.”<sup>65</sup>

“Precisely. No one feels much urgency about reforming immigration laws and quotas because if we did, we would be, in effect, reforming ourselves. Most groups have a fine self-concept and feel no need to change. So, they don’t. And they resent anyone telling them that their country is, in its very nature, unjust. America thinks it is wonderful the way it is. France thinks the same. And so on.”

“And so that would explain why the idea that immigrants are violent criminals strikes many as plausible.<sup>66</sup> Trump asserts it almost without objection.<sup>67</sup> But they aren’t. Every study shows that.”<sup>68</sup>

“Without thinking, we heap violence against unauthorized entrants in much the same way a body with an immune system instinctively rejects that which it recognizes as foreign. Even if the newcomers are pious, hard-working folks with strong family values and work ethic.”

“Like the Latinos,” I said. “Most of the violence connected with them stems, not from the newcomers themselves, but local people who don’t want anything changing. They want to ‘make America great again.’ They consider anti-immigrant rallies and rhetoric as virtuous ways of showcasing one’s patriotism and *amour propre*.”<sup>69</sup>

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<sup>65</sup> I thought of the Immigration Act of 1924, for example, which ended immigration from Asia and restricted it for much of the rest of the world, especially Italians, then in disfavor. See Pub. L. No. 68-139, 43 Stat. 153 (1924).

<sup>66</sup> Matt A. Barreto, Opinion, *Trump Thinks He’s Still Winning on Immigration*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/opinion/trump-immigration-border-elections.html>.

<sup>67</sup> *Id.*

<sup>68</sup> Editorial, *Unauthorized Immigrants Are Overwhelmingly Law-Abiding. But it Won’t Stop Trump*, WASH. POST (June 2, 2019, 3:19 PM), [https://www.washingtonpost.com/opinions/unauthorized-immigrants-are-overwhelmingly-law-abiding-but-it-wont-stop-trump/2019/06/02/5f4f696a-8193-11e9-bce7-40b4105f7ca0\\_story.html](https://www.washingtonpost.com/opinions/unauthorized-immigrants-are-overwhelmingly-law-abiding-but-it-wont-stop-trump/2019/06/02/5f4f696a-8193-11e9-bce7-40b4105f7ca0_story.html).

<sup>69</sup> Conor Friedersdorf, Opinion, *This Flag is Your Flag, Not Trump’s*, L.A. TIMES (July 3, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-fridersdorf-flag-20180703-story.html> (noting the patriotic tone at many of his rallies); Dan Zak, *Fear and Gloating in Cincinnati*, WASH. POST (Aug. 2, 2019), [https://www.washingtonpost.com/lifestyle/style/fear-and-gloating-in-cincinnati/2019/08/02/a6055256-b51f-11e9-8949-5f36ff92706e\\_story.html](https://www.washingtonpost.com/lifestyle/style/fear-and-gloating-in-cincinnati/2019/08/02/a6055256-b51f-11e9-8949-5f36ff92706e_story.html) (noting shouts of “U-S-A”). On *amour propre* (self-love), see Christopher Bertram, *Jean Jacques Rousseau*, STAN. ENCYCLOPEDIA OF PHIL. (May 26, 2017), <https://plato.stanford.edu/entries/rousseau>.

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IV. WHEREIN RODRIGO EXPLAINS HOW TO REDUCE BOTH KINDS OF VIOLENCE

“Self-love,” I said. “So what’s your solution? Our nation is stuck with a degree of originary violence, including a revolution, slavery, Indian removal, and a war with Mexico. And it is suffering turmoil connected to immigration and the border. Since you say both kinds are linked, it would seem that there’s no easy way out.”

A. *To Recognize the Source Is to End It*

“The key thing,” he said, “Is to recognize that keeping people out is an act of originary violence, and that it is not self-justifying.<sup>70</sup> One can just as plausibly argue that an immigrant has a right to enter as that a pre-existing population has a right to keep him out.”<sup>71</sup>

“In one way of looking at it, that’s true. But what about one who has a contagious disease or is an axe murderer?”

“In that case, keeping him out is still an act of originary violence. But it’s justified violence, namely self-defense.<sup>72</sup> Which brings us back to Trump. He believes that any rational immigration policy would exclude Mexicans — his favorite whipping boys — because they are all murderers and rapists. But of course they’re not. Their crime rate is lower than that of resident U.S. citizens,<sup>73</sup> and they contribute more in payroll and property taxes than they consume in social services.”<sup>74</sup>

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<sup>70</sup> See Editorial, *The U.S. is Slamming the Door on Asylum Seekers*, WASH. POST (July 15, 2019), [https://www.washingtonpost.com/opinions/the-us-is-slamming-the-door-on-asylum-seekers/2019/07/15/98a2ed26-a746-11e9-86dd-d7f0e60391e9\\_story.html](https://www.washingtonpost.com/opinions/the-us-is-slamming-the-door-on-asylum-seekers/2019/07/15/98a2ed26-a746-11e9-86dd-d7f0e60391e9_story.html) (asserting that current immigration policy is both unjust and not self-evidently in line with traditional ideals).

<sup>71</sup> *But see* PETER H. SCHUCK AND ROGERS SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 94-103 (1985), arguing that Congress may deny citizenship for the children of undocumented aliens, that is, birthright citizenship. But this would, of course, be an unjustified act of violence of the originary kind. One might just as easily argue that an international body, such as the United Nations, has the right to proclaim the direct opposite. Both declarations would be acts of originary violence. Justice would enter only with the fine tuning, that is, once one accepts the major (violent) premise.

<sup>72</sup> That is, a case of defending oneself from a known carrier of a disease by keeping the person at arm’s length.

<sup>73</sup> *Unauthorized Immigrants are Overwhelmingly Law-Abiding, But It Won’t Stop Trump*, *supra* note 68 (noting the low rate of crime in this population group).

<sup>74</sup> See Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 2 (2006); Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law into the Breach Once More*, 21 N.M. L. REV. 219, 243 (1991) (explaining that undocumented immigrants “actually contribute more to public coffers in taxes than they consume in social services”); Alex Nowrasteh

“So something else must account for his hostile attitude,” I said.

“The first step is to realize that immigration, in his mind, is an exercise in originary violence and thus entirely illegitimate. The immigrant threatens to reshape the nation.<sup>75</sup> Since something about Latin American immigrants troubles Trump, he does not want the country — his country — starting to take on their character, instead of, say, Norway’s.<sup>76</sup> Some people like the Latinos, like their music, their food, their literature, their work ethic — find it appealing, charming even. He doesn’t.”

“Any idea why?”

“Yes, although a psychiatrist would undoubtedly have more to say. I think he doesn’t like the men because they — the young ones, at least — are good-looking, physically fit, and very male.”<sup>77</sup>

“Unlike a paunchy, not-very-attractive middle-aged fellow who is starting to lose his hair.”

“And as for the women, he knows that many of them are Catholic, faithful to their husbands, and devoted to their families.<sup>78</sup> Not someone to flirt or try to dally with if you are not used to rejection and like to get your way.”

“As he does.<sup>79</sup> Say, didn’t we discuss something like this once before?”

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& Robert Orr, *Immigration and the Welfare State: Immigrant and Native Use Rates and Benefit Levels for Means-Tested Welfare and Entitlement Programs*, 2018 CATO INST. 2-6, <https://object.cato.org/sites/cato.org/files/pubs/pdf/irpb6.pdf>.

<sup>75</sup> See generally BEYOND THE GATEWAY: IMMIGRANTS IN A CHANGING AMERICA (Elżbieta M. Goździak & Susan F. Martin eds., 2005) (demonstrating how immigrants enrich and change national culture).

<sup>76</sup> Patrick Chappette, Opinion, *Your Tired, Your Poor, Your Norwegians Only*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/opinion/norway-haiti-nigeria-trump-shithole.html> (noting that Trump once expressed approval of immigrants from this country).

<sup>77</sup> Delgado, *Corrido*, *supra* note 1, at 1722-23 (2007) (discussing the image of Latino workers and field hands); see also David Brooks, Opinion, *Marianne Williamson Knows How to Beat Trump*, N.Y. TIMES (Aug. 1, 2010), <https://www.nytimes.com/2019/08/01/opinion/debate-marianne-williamson.html> (positing that Trump’s problems with Latino immigrants stem from concern over his own masculinity and have to do with ego-formation).

<sup>78</sup> See Gretchen Livingston, *Among Hispanics, Immigrants More Likely to Be Stay-at-Home Moms and Believe That’s Best for Kids*, PEW RESEARCH CTR. (Apr. 24, 2014), <https://www.pewresearch.org/fact-tank/2014/04/24/among-hispanics-immigrants-more-likely-to-be-stay-at-home-moms-and-to-believe-thats-best-for-kids/> (finding that many Latino/a immigrants embrace traditional family values).

<sup>79</sup> Daniel Victor, ‘Access Hollywood’ Reminds Trump: ‘The Tape is Very Real’, N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/us/politics/donald-trump-tape.html> (discussing an incident in which Trump touted his own ability to secure sexual access to women).

“We did. It was a conversation about Ramon, Suzie, and a starlit night.<sup>80</sup> We talked about a triple taboo that afflicts Latino field workers in the minds of the ranchers.”<sup>81</sup>

“Now I remember. You were trying to explain why the foremen and crew chiefs often formed strong bonds of friendship and respect for the hard-working field hands who toiled in the sun to bring food to America’s tables.”<sup>82</sup>

“But the ranch owners did not,” he said.<sup>83</sup> “And they created a triple taboo to keep the two groups apart — particularly the strapping young field workers and their own daughters.”

“And so you think that Trump’s unconscious ideas of sexual attractiveness and its opposite play a part in his intense opposition to Latino immigration,” I said. “There may be something to that. But I can’t help thinking it isn’t all.”

“Well, there’s sadism,” he said. “He’s cruel toward those he senses oppose him, and tolerant, even lax, with those he believes are on his side. He loves power.<sup>84</sup> And likes exercising it in a cruel, even sadistic, way.<sup>85</sup> He hates apologetic men.<sup>86</sup> He detests nuance and surrounds himself with aides who agree with him and see the world in black-or-white terms.”<sup>87</sup>

“Not to mention his for-us-or-against-us philosophy that sees the world in terms of threats and conspiracies,” I added. “A number of

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<sup>80</sup> Delgado, *Corrido*, *supra* note 1, at 1722-23.

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

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See Karen Tumulty, Opinion, *The Real Reason for the Census Debacle? Trump Just Wants to Fight*, WASH. POST (July 10, 2019), [https://www.washingtonpost.com/opinions/the-real-reason-for-the-census-debacle-trump-just-wants-to-fight/2019/07/10/47d6665a-a25c-11e9-bd56-eac6bb02d01d\\_story.html](https://www.washingtonpost.com/opinions/the-real-reason-for-the-census-debacle-trump-just-wants-to-fight/2019/07/10/47d6665a-a25c-11e9-bd56-eac6bb02d01d_story.html) (noting his tendency to provoke fights).

<sup>85</sup> Adam Serwer, *The Cruelty is the Point*, ATLANTIC (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104> (noting how the current administration turns a blind eye to the cost, in human terms, of many of its policies); see also Richard Delgado, *J’Accuse: An Essay on Animus*, 52 UC DAVIS L. REV. ONLINE 119, 127-33 (2018).

<sup>86</sup> Charles M. Blow, Opinion, *Trump Detests Apologetic Men*, N.Y. TIMES (July 10, 2019), <https://www.nytimes.com/2019/07/10/opinion/trump-acosta-epstein-apologize.html> (suggesting that he equates masculine strength with toughness).

<sup>87</sup> Jordan Fabian, *Trump Moves to Install Loyalists*, THE HILL (Apr. 8, 2019, 8:21 PM), <https://thehill.com/homenews/administration/437947-trump-moves-to-install-loyalists> (noting that many of his staff have beliefs similar to his and are prone to agree with him, even when his instincts are poor).

psychiatrists think he lacks the stability to be leading a nuclear power.”<sup>88</sup>

Just then, our conversation came to a halt when an excited pair of students dashed into the restaurant with news of the judge's ruling. It seems that she had granted Maria, the Guatemalan immigrant, a stay on condition that she devote twenty hours a week to community service. Quick as a flash, she had asked the judge if she could work in Mexico teaching in a new school for deportees that a consortium of Mexican and American law schools had started up.<sup>89</sup> The judge said she would think about it and asked for more information about the school.

Rodrigo deposited a few bills on the table and excused himself to join the happy throng of students and faculty who were headed home to celebrate. He promised to send me news of the judge's final ruling, a copy of his own draft on originary violence, and another on the U.S.-Mexico law school that the judge had promised to consider.<sup>90</sup> He thanked me for pushing him to think harder about his thesis.

“Just don't get deported again,”<sup>91</sup> I said as I deposited my share of the bill and gathered my gym bag to make my way out to my car. As I did so, I noticed that I was no longer limping.

#### CONCLUSION

As I drove home, I pondered what he had said. I thought his idea that originary violence preceded the other kind held merit, and I also agreed that nation-formation was a clear-cut case of it. I also agreed that immigration laws and quotas were acts of originary violence, inherently so, and as such were beyond ordinary justification. I agreed that Trump's immigration program was exceptionally violent, in both respects, and derived its power in the eyes of his followers through that very violence, which they reveled in. Many of them seemed to believe that the Latin Americans streaming through the border were evil people because they challenged our own conceptions of national identity.

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<sup>88</sup> See the recent book of essays on just this subject, Jeffrey D. Sachs, *Foreword to the Second Edition of THE DANGEROUS CASE OF DONALD TRUMP: 27 PSYCHIATRISTS AND MENTAL HEALTH EXPERTS ASSESS A PRESIDENT*, at xv, xx (Betty X. Lee ed., 2019) (analyzing his psychological ability to hold office).

<sup>89</sup> See Richard Delgado, *A U.S.-Mexico Law School for Deportees: A Response to Amy Kimpel*, 70 FLA. L. REV. F. 108, 110-12 (2018) (outlining such a school).

<sup>90</sup> I wondered if they would accept retired professors. I had visited Mexico numerous times on vacations and family trips and very much enjoyed the place, the food, the people, and the culture.

<sup>91</sup> See Delgado, *Chronicle*, *supra* note 1, at 1379 (describing his first deportation).

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I wondered what the implications of his theory were for activism and resistance. He had arrived at my gym in connection with the demonstration downtown, which gave me a clue to his thinking.

I didn't have long to wait. That evening I received a long text at home asking if I were coming to a certain event at his law school. The conference chair wanted to know if I would give a keynote address on any topic of my choosing. If I accepted, it would give Rodrigo and me the opportunity to discuss activism in the era of Donald Trump. I marked the date on my calendar and sent the chair an email accepting the invitation.