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A COMMENT ON ALEINIKOFF

RICHARD DELGADO*

I certainly welcome—wholeheartedly and without reservation—this article,¹ as I imagine will most of my colleagues of color, even the most jaded battle-scarred veterans who have been laboring in the trenches for years and have “seen it all.” It is comprehensive, compassionate, and impatient—just as racial circumstances in America today warrant. It is even more exceptional, if I can say that, for having been written by a white male lawyer in America in 1991.

Yet I have a sense of pessimism, verging on foreboding, over the likely impact that even such a fine article is likely to have. Let me explain why. Then I'll outline a program of scholarship and action that may increase the chances that the author's message and ones like it will one day be heeded.

The first part of Aleinikoff's paper shows with the aid of statistics and stories, that much racism persists today, nearly 30 years after the Civil Rights revolution of the 1960s.² Since this is so, judges and other institutional actors should modify their approach in race cases.³ In particular, once we realize how large a part racism plays in the lives and experience of persons of color, we should treat voting rights, university admissions, and a host of other issues differently from the way we do now.

I. WHY THIS ARTICLE WILL GET LESS ATTENTION THAN IT DESERVES

The difficulty is that people of majority race—the primary audience at which the article is surely aimed—are simply ill equipped to take in and absorb messages, bearing on race, of the type found in Professor Aleinikoff's opening section. Nothing physically prevents them from doing so; they simply don't. It comes hard for them for a number of reasons.

Reason number one: The data are always subject to interpretation, and many persons of the majority race, especially ones that have

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1. T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325 (1992).

2. *Id.*, Part II: Racism in America: The Fires this Time.

3. *Id.*, Part III: Constitutional Adjudication in the Context of Racism.

led a certain kind of life, seem disinclined to make the kind of interpretive judgment that Professor Aleinikoff wants them to make. For example, a reader might see the inner-tube incident as described by Professor Aleinikoff as an ordinary property, not racial, dispute, or one pitting the first-in-time principle against sharing, or as illustrating only something about youthful exuberance, or ignorance about language, or class, or any number of things.⁴ In a recent article written by a Critical Race Theorist, the writer describes his reaction at learning that his daughter had been made to read *Little Black Sambo* at school—a book he had been made to read as a child growing up just before the Civil Rights reforms of the 1960s.⁵ The author's point was the more things change, the more they stay the same. A white reader later took him to task for *labeling* the story racist—he had not found it racist, but instead had read it as a universal, and appealing, message about a child's triumph of good over evil.

Reason number two: Whites see little racism.⁶ This reason is related, causally I think, to the first. White people are less prone than we to see a given incident as racist, simply because they believe that there is little of that left in the world.⁷ Let's suppose you were walking in the mountains and off in the distance you saw a large hulking animal. It might be a woolly mammoth; it might be a bear. Many actors treat allegations of racism as they would a suggestion that there are still woolly mammoths stalking the slopes and valleys. Few acts of blatant racism are enacted right in front of them. Most store clerks, for example, are apt to keep any racist impulses they may harbor under wraps if a third person is watching.⁸ Further, people of color are like magnets. We attract whatever racism may be lying around.⁹ The rare instance of out-and-out racism that a white person does observe may strike him or her as *either* (a) shocking because isolated, or (b) trivial, because surely isolated. They then go through life thinking that racism has largely ended and all we need engage in is a mopping up action—careful, of course, not to overreach and infringe on the rights of “innocent” whites. Incidentally, have you ever wondered if

4. See e.g., Richard Delgado, *Zero-Based Politics and an Infinity-Based Response*, 80 GEO. L.J. (forthcoming) (1992).

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

6. See, 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, 407-08 (1988).

7. *Id.* (giving reasons for the different perspectives).

8. Jean Stefancic & Richard Delgado, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systematic Social Ills?* (Unpublished manuscript on file with the author).

9. *Id.*

the whites inconvenienced by racial remedies are innocent, what does that make us?

Reason number three: Racial optimism and its opposite. Caucasians often treat the dismal statistics about black poverty and despair with a kind of rosy-eyed optimism that strikes many of us as, well, strange. Statistics can lie, as everyone knows. But I have noticed that many conservative whites seem to believe that virtually *all* the statistics on the black condition lie, or else are somehow beside the point.¹⁰ So, even if someone like Alex Aleinikoff offers page after page showing discrimination against African-Americans in housing, education, the job market, and every other area in life, or provides table after table showing black poverty, despair, and early death, a certain type of white reader will say something like, "But just last week I saw a report that showed. . . ." Or will tell you he or she just met a Black assistant vice president in charge of personnel or community relations. Or, "What about Thurgood Marshall and Clarence Thomas?" The dismal train of statistics compiled by federal investigators simply won't persuade—won't stick in this individual's mind, while the single rosy statistic—for example, that there are today more Hispanic plumber's apprentices in Ohio than there were in 1949—will.¹¹ This mindset is one the things writers like Aleinikoff face.

Reason number four: The approach I've just mentioned in interpreting statistics extends to individual events as well. Many readers will refuse to believe an action was racially motivated (unless of course the actor or speaker was Louis Farrakhan or Jesse Jackson), unless the actor is carrying a sign saying "I Hate Blacks." An employer rejects a black and offers to hire a similarly credentialed white. It might have been that the black was wearing a yellow tie, or seemed nervous or evasive. Or he didn't volunteer answers as readily as the white, or spoke softly—or loudly. Or he seemed *too* anxious to have the job. The motivation of an employer or other discriminator is generally—maybe always—subject to interpretation. If you really don't want to see it, you won't.¹²

Reason number five (the most important one of all): The main reason most of Aleinikoff's readers will be unpersuaded by his factual case for the persistence of racism is simple self-interest. Discrimination is profitable—it offers psychic and pecuniary advantages to the group that is able to perpetrate it, that is able to use it to keep another

10. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499-503 (1988) (reasons for non-employment of minority firms may include factors other than discrimination).

11. On majoritarian optimism and black despair, see Richard Delgado, *Derrick Bell and The Ideology of Racial Reform: Will We Ever Be Saved?* 97 *YALE L.J.* 923 (1988).

12. Stefancic & Delgado, *supra* note 8.

group in a subordinate position.¹³ But, and this is the key thing, the fact and extent of the discrimination must be kept from consciousness as much as possible, at least in its *present* guise. Yesterday's racism is fine—everybody can join in condemning *that*. But not today's more subtle versions. One's own superior position must seem deserved—my class won out fair and square—therefore the existence of widespread, systemic discrimination that cuts down the competition and gives your group the edge must be downplayed.¹⁴ So, in a way, the root problem is *not* one of perception, not a sort of cognitive deficit that writers like Aleinikoff could address by patiently explaining to their co-religionists the way things are. The way things are is always a matter of perspective and positioning—and people instinctively choose an interpretation that benefits and affords them a privileged position. Sometimes ignorance is at least partly self-serving.

We arrange things so that we have just the right amount of racism—not too much, for that would be destabilizing, not too little, for that would disturb our superior position. We arrange legal doctrine, remedies, as well as our own perception of how things are—to strike just the right middle ground, to keep racism at the tolerable, but useful level.¹⁵

II. ALEX ALEINIKOFF'S NEXT ARTICLE: FRIENDLY SUGGESTIONS FROM A COMMENTATOR

The problem, then, is not a lack of knowledge. The problem is the prevailing mindset that enables people in the dominant group to sleep well at night, that allows them to hear the statistics without hearing, to perceive racism as something else.

A recent movement, the legal-storytelling school, attacks that mindset—that bundle of preconceptions, received wisdoms, narratives, and “ways things are”—against a background of which political and legal decisions are made.¹⁶ Writers like Derrick Bell, Mari Matsuda, Robert Williams, Alan Freeman, and myself have been using stories, chronicles and parables to show false necessity, self-servingness and inherent cruelty in the majoritarian account that most of us, including

13. Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

14. And similarly for the claim: “I (personally) won fair and square.” See STEPHAN L. CARTER, *CONFESSIONS OF AN AFFIRMATIVE ACTION BABY* (1991) (Author asserts affirmative action demeans high achieving professional Blacks by exposing them to this supposition that their status is undeserved).

15. Witness how quickly affirmative action has been discredited by a Supreme Court which took generations to bring us *Brown v. Board of Education*.

16. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

judges, carry around in our heads. We have been using tools, such as irony, humor, and personal narrative to mock, jar, and discomfit that standard account.¹⁷ Since that is the mindset that will meet, interpret, qualify, and disbelieve Professor Aleinikoff's otherwise fine analysis and recommendations, it behooves us to devote some attention to it.

Professor Aleinikoff, you are a gifted writer and observer. How about devoting some fraction of your formidable talents to teaching your colleagues *how* to unthink racist thoughts, how their assumptions and preconceptions bias them toward an account and a jurisprudence that will one day cause future generations to react in dismay. How about joining us in telling majority-race people the uncomfortable stories they need to hear, before they can *really* hear articles like your current one. Sometimes destruction is a necessary first step toward building a better and fairer world.¹⁸

17. *Id.*

18. *Id.* at 2412-17.

