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Richard Delgado

*University of Alabama - School of Law*, [rdelgado@law.ua.edu](mailto:rdelgado@law.ua.edu)

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## CRITICAL LEGAL STUDIES AND THE REALITIES OF RACE—DOES THE FUNDAMENTAL CONTRADICTION HAVE A COROLLARY?

*Richard Delgado\**

One structural feature of human experience separates people of color from our white friends, accounting in large part for our differing perceptions in matters of race. This structural feature, which dwarfs almost everything else, is simply stated: white people rarely see acts of blatant or subtle racism, while minority people experience them all the time.

Few acts of clear-cut racism come into the field of vision of most white people;<sup>1</sup> when they do, they cause a deep impression.<sup>2</sup> Minorities, by contrast, live in a world dominated by race.<sup>3</sup> We experience racial treatment every day of our lives.

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\* Chapman Distinguished Visiting Professor of Law, University of Tulsa School of Law; Professor of Law, University of California-Davis. J.D., University of California-Berkeley (Boalt Hall), 1974.

<sup>1</sup> Because much racism is covert and one-on-one, only the victim and the perpetrator observe it. Moreover, racism is often subtle. Consequently, absent some special reason for increased sensitivity, unaccustomed observers may easily miss it. Even perpetrators may, through insensitivity or ignorance, be largely unaware of the racist character of their actions. Finally, these days, the racism which reaches the white majority may seem more remote than in the past. There are few news stories of cattle prods and lynchings, almost none in our own "backyard." The acts of racial brutality which we do see on our TV screens are usually in places like South Africa, conveniently "over there." Although it still evokes feelings of empathy, such racism—because of its invisible, distant or impersonal character—may fail to arouse in members of the white majority any sense of urgency or personal responsibility.

<sup>2</sup> See Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 Harv. C.R.-C.L. L. Rev. 329, 330 (1988). Some whites, of course, are *not* deeply impressed, but in fact perpetrate acts of racism. Delgado, *Words that Wound: A Tort Action for Racial Slurs, Epithets and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982); Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 Rutgers L. Rev. 673 (1985).

<sup>3</sup> See, e.g., Address by C. Pierce, Unity in Diversity: Thirty-Three Years of Stress, Solomon Carter Fuller Lectures, American Psychiatry Association Meeting, Washington, D.C. (May 12, 1986) (transcript on file with *Harvard Civil Rights-Civil Liberties Law Review*) (blacks are frequent victims of "microaggressions," described as those "subtle, minor, stunning automatic assaults . . . by which whites stress blacks unremittingly and keep them on the defensive, as well as in a psychologically reduced condition"). See also K. Clark, *Prejudice and Your Child* (2d ed. 1963); J. Comer & A. Poussaint, *Black Child Care: How to Bring Up a Healthy Black Child in America* (1976); Pettigrew, *supra* note 2, at 687, 690.

We are bathed in it. A high percentage of our social interaction is tinged by it.<sup>4</sup> And, when we meet with others of color, we trade stories of racial treatment and how our friends are dealing with it.<sup>5</sup> Race is a recurring reality of our lives.

This structural feature—that most white people see relatively little racism, while minorities are on the receiving end of a great deal of it—has two consequences, one experiential, the other political.

The experiential consequence is that even the most sympathetic, left-leaning whites, like the authors of the two response articles in this issue,<sup>6</sup> are constantly having to learn and relearn what racism is. Alan Freeman, for example, movingly recounts how he was shocked to see a black bar examinee from out of town emerge from a test center and try unsuccessfully to get directions from the crowd of test-takers milling around on the sidewalk. No one would look at or pay attention to him. The crowd simply melted aside, no one willing to meet his glance or answer his anxious question.<sup>7</sup>

A sizable body of social science literature indicates that this type of situation is quite common.<sup>8</sup> In the typical study of “helping” behavior,<sup>9</sup> the experimenter stages a minor accident of some type: a black woman spills a bag full of groceries; a black motorist stands by an apparently immobilized car. Few passersby stop to help. The same experiment is repeated with white victims; many volunteers come forward to help.<sup>10</sup> When Alan Freeman was confronted with a real-life version of one of these incidents, he was surprised and angered. His anger was completely appropriate. But the incident would have surprised few members of minority groups. We expect, and steel ourselves for, this type of experience in our daily lives. When we go to

<sup>4</sup> See sources cited *supra* note 3; Delgado, *supra* note 2, at 135–49; see also D. Bell, *Race, Racism, and American Law* (2d ed. 1980).

<sup>5</sup> See Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?* 22 Harv. C.R.-C.L. L. Rev. 302, 304–07, 314 (1987).

<sup>6</sup> The two articles are Freeman, *supra* note 2 and Horwitz, *Rights*, 23 Harv. C.R.-C.L. L. Rev. 393 (1988).

<sup>7</sup> Freeman, *supra* note 2, at 329.

<sup>8</sup> See, e.g., Gaertner, Dovidio & Johnson, *Race of Victim, Nonresponsive Bystanders, and Helping Behavior*, 117 J. Soc. Psychology 169 (1982).

<sup>9</sup> By “helping behavior,” social scientists mean the responses of human beings to others in distress.

<sup>10</sup> Gaertner, Dovidio & Johnson, *supra* note 8.

an unfamiliar city or start out on an automobile trip, we are careful to bring maps and anticipate any sort of mechanical breakdown. White people do this too, of course; but we do it motivated by fear and concerns for self-preservation, not merely to avoid an inconvenience.

Recently, a law professor at an eminent school where I gave a talk mentioned in the discussion period that he had asked a Hispanic student for an example of how racism affected her. She said that few people held doors open for her. The region in which the school is located has a tradition of courtesy; people open doors for each other. The professor, who was white, was surprised at and skeptical of the student's assertions. Few of us would be, for few doors (metaphorical or literal) are opened for us in life.<sup>11</sup> When affirmative action opens doors for a token few—generally those of us who need it least—many whites bristle: an unqualified member of a minority group is getting ahead. Other whites, more secure in their positions, lapse into complacency, believing that the problem of closed doors for minorities has been solved for all time.

The structural feature—that minorities experience racial incidents much more often than whites observe them—has a second effect. It colors legal and political theorizing, causing members of the two groups to strike different balances and trade-offs. For example, consider Duncan Kennedy's famous fundamental contradiction: we both need, and fear, others.<sup>12</sup> According to his theorem (which seems to me true), Western societies struggle to promote two values that are in tension—community and security. It is difficult to have both. Communal arrangements—ones high in sharing, trust and love—lack the formal structures (rights, rules and enforcement) that protect individuals from one another and the state. Yet, if one opts for formal structures, one seemingly risks a pinched, lonely, alienated

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<sup>11</sup> See, e.g., D. Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* 140–61 (1987) (the Chronicle of the DeVine Gift, showing that affirmative action is intended as a pressure valve to assure that just the right small number of blacks and other minorities advance—not too many, as this would be threatening, nor too few, which would be destabilizing).

<sup>12</sup> Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buffalo L. Rev. 205, 211–13 (1979). Kennedy has since retreated from his own formulation. See, e.g., Gabel & Kennedy, *Roll Over Beethoven*, 36 Stan. L. Rev. 1, 15, 18 (1984).

life—that of the jealous right-guarder who rarely intersects in any deep way with his or her fellow humans.<sup>13</sup>

White leftists almost always resolve this dilemma on the side of community.<sup>14</sup> They would rather take the risks of a certain amount of informality and structurelessness—the occasional risk of hurt or injustice—in return for the “intersubjective zap” possible in true community.<sup>15</sup> Except when one of them loses a tenure battle—in which case they cry out for formality, hearings, and due process (just like everyone else)—they will gladly forfeit those things in return for human connection. Freeman’s long, personal and unusually honest reflection on his own growing up illustrates this preference.<sup>16</sup> Alan, and many like him, are hungry for community. They had it fleetingly in the glorious days of the 1960’s. (We did, too.) With effort they can perhaps regain it now.

We, by contrast, would set the balance much further toward protection and formality.<sup>17</sup> Our principal fear is not coldness, alienation or lack of community. We have community, of a sort, (courtesy of racism) in our common victimhood.<sup>18</sup> When we get together, we hug, laugh, exchange horror stories and talk until late at night.<sup>19</sup> What we want, rather, is protection—the protection that comes from rules, rights, institutions, guardians, legal recourse.

Recall Freeman’s example of the black bar examinee who could not get street directions from the passing crowd.<sup>20</sup> That frantic, abandoned young man *was a member of a community*,

<sup>13</sup> See Delgado, *supra* note 5, at 303–06; Kennedy, *supra* note 12.

<sup>14</sup> Delgado, *supra* note 5, at 303–06, 315–20.

<sup>15</sup> See Gabel & Kennedy, *supra* note 12, at 4, 54 (“intersubjective zap” occurs “when the barriers between the self and the other are suddenly dissolved”).

<sup>16</sup> Freeman, *supra* note 2, at 297.

<sup>17</sup> See, e.g., Williams, *Alchemical Notes: Reconstructed Ideals From Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401, 406–09 (1987) (recounting the author’s experiences in seeking an apartment in New York City).

<sup>18</sup> Delgado, *supra* note 5, at 313. This community may be “local,” based on negative inputs (misfortunes), and reactive in nature rather than intentional. Yet, it has certain attributes of true community: it reaffirms self-worth while offering the benefits of social aggregation. See A. MacIntyre, *After Virtue* (1982); M. Sandel, *Liberalism and the Limits of Justice* (1982); cf. Note, *A Communitarian Defense of Group Libel Laws*, 101 Harv. L. Rev. 682, 682 (outlining vision of community—shared conception of the good and common identity—as basis for laws prohibiting group libel).

<sup>19</sup> Delgado, *supra* note 5, at 313.

<sup>20</sup> Freeman, *supra* note 2, at 330.

the community of test takers congregated on that sidewalk. Those pouring out of the exam room must have been in a state of high excitement. Many must have spoken to each other, even to strangers, with relief and nervous exhaustion. "What did you think of that property question?" "Can you believe we have two more days of this?" Stranger must have met the sympathetic glance of stranger, questions and answers flying around the lobby and street, the momentary bonding that unites survivors of any ordeal.

Yet that transient feeling of community did not extend to the lone black. No one came to his aid; fellow-feeling failed him. And so, as I have pointed out in a series of articles,<sup>21</sup> informality once again worked to the disadvantage of the member of an outgroup.<sup>22</sup> Sadly, the black would have fared better in almost any formal, rule-bound situation: for example, sports ("Say, man, can you tell me which way is the visiting team's locker room?"), or the Army ("Excuse me, Corporal, I'm new here, which way is the Enlisted Men's Club?").<sup>23</sup> Minorities know this by a kind of sixth sense—informal settings increase the risk of dismissive or racist treatment. Formal ones (in our society, at least) reduce those dangers.<sup>24</sup>

And so, I offer a corollary to Kennedy's maxim. In its original form, it holds that in every Western society there exists

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<sup>21</sup> Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis. L. Rev. 1359 [hereinafter *Fairness and Formality*]; Delgado, *supra* note 5; Delgado, *ADR and the Dispossessed: Recent Books on the Deformalization Movement*, 13 Law & Soc. Inquiry \_\_\_\_\_ (1988) (forthcoming).

<sup>22</sup> It could be argued that the community of test-takers was not a true community but the mere welding together of disparate individuals in the face of a common danger. They all knew that when the danger subsided, they would go their separate ways. A true community, it might be argued, would have protected the black. One difficulty with this argument is that it borders on tautology—if a community fails to protect its members it was not a true community in the first place. A more serious difficulty is that the argument rests on a misguided premise: the notion that true community would provide comparable benefits to both minority group members and members of the white majority. This assumption is mistaken. When community becomes more informal and free-flowing, when more barriers are lowered or removed, vulnerable groups face greater risks. See *Fairness and Formality*, *supra* note 21.

<sup>23</sup> See Moskos, *Success Story: Blacks in the Army*, Atlantic Monthly, May 1986, at 64.

<sup>24</sup> See, e.g., *Fairness and Formality*, *supra* note 21. I can, however, imagine societies where public values are so bad that official formality would be worse than the occasional kind treatment one might receive in informal settings. South Africa under apartheid, Nazi Germany or the American South during slavery might be examples.

within individuals a tension between community and security, or between informality and formality.<sup>25</sup> I believe that in racially divided societies, like ours, there is a further split: members of the majority race will generally prefer informality, minorities formality. Whites will want community. We will want the safety that comes from structure, rights and rules. They will want free-flowing, uninhibited, interpersonal relationships with all the barriers down. We will settle for safety, even if this means that some of the barriers must remain up.<sup>26</sup>

Freeman says the solution is not formality, but struggle.<sup>27</sup> He may be right. Yet, who is likely to win that struggle, to have his or her views heeded?<sup>28</sup> The very need for struggle indicates that community in the sense of shared visions has yet to be fully formed, or, if formed, has begun to weaken.<sup>29</sup> Freeman, notably, is willing to engage in that struggle, listen respectfully to what the other side is saying and, when necessary, admit error. Recently, a newsletter he edits published an article written by another person that contained what Hispanic adherents of CLS considered an outrageous anti-Mexican slur.<sup>30</sup> Three Chicano

<sup>25</sup> See Kennedy, *supra* note 12.

<sup>26</sup> A dim ray of hope may brighten this rather bleak conclusion. It is that the security which minorities want (even more than they want community) and the community which white leftists want (even more than they want security) are not just in opposition; they may drive each other together in an endless dialectical chain. For, one seeking true security (say, a black) could seemingly find the purest form of it in a group which accepts, loves and values him or her. After all, who fears serious harm in a setting like this? Moreover the security and respect for personhood that stem from being a rights holder, *see* Williams, *supra* note 17, may be essential preconditions for a Third World person's entry into a community of mixed race. In addition, once these communities are established, rules and rights may prevent backsliding. Their existence reminds us that we are supposed to be a community that respects and values each of its members. Finally, a member's invoking these rules may presage that community has begun to break down: this warning may enable us to repair the breach and move to yet higher levels of community.

<sup>27</sup> See Freeman, *supra* note 2, at 331. Horwitz says the solution lies in getting us to see our mistake, the "false consciousness" that makes us think rights are good. Horwitz, *supra* note 6. See also Delgado, *supra* note 5, at 309-10 (exploring concept of "false consciousness"); Gabel, *Reification in Legal Reasoning*, 3 Res. L. & Soc. 25, 25-27 (1980) (defining "false consciousness").

<sup>28</sup> Minorities may be less assertive or self-confident than others. Past efforts at ruleless, informal "struggling" may have taught us that we are rarely taken seriously.

<sup>29</sup> See *supra* note 26 (community and security both attract and repel each other).

<sup>30</sup> Reprinted in Newsletter of the Conference of Critical Legal Studies, May 1987, at 2-4 (article, originally printed in the Newsletter's December 1986 issue, reviewing Bremen, Germany, conference and including the line "A German without a theory is like a Mexican without a gun").

professors wrote an open letter decrying the slur.<sup>31</sup> Instead of dismissing the complaint (“Those hot-headed Chicanos are at it again”), as some did, or reacting defensively (“Can’t they take a joke?”), Freeman and his co-editor met with the authors, struggled with them, and ultimately admitted error. Community was restored, perhaps on a higher plane than before.<sup>32</sup>

Freeman, however, is an unusually open, honest and loving person.<sup>33</sup> Sad experience has taught most of us that we cannot always rely on the reflexive good will of white friends and colleagues—and I do not just mean when our automobile overheats or we need directions on the street. We sit, lamentably, tragically, on opposite sides of a great divide, one not of our choosing. And given where we sit, we want safety, while they want community.

Call it the fundamental contradiction, sub-two.

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<sup>31</sup> Open Letter to Conference on Critical Legal Studies by Jose Bracamonte, Richard Delgado & Gerald Torres (Jan. 6, 1987) (on file with *Harvard Civil Rights-Civil Liberties Law Review*). See also Newsletter of the Conference on Critical Legal Studies, May 1987, at 1-2.

<sup>32</sup> See *supra* note 26.

<sup>33</sup> Furthermore, Alan Freeman writes articles that are full of insight and extraordinarily helpful to our cause. His current article, like his previous ones, provides a powerful critique of failed liberal premises and programs, offers a clearly etched and utterly convincing set of reasons why minorities should join in critical legal studies' general attack on hierarchy and offers a thoughtful argument in favor of coalition-building among outgroups. His ending, quoting the full “Battle Hymn of the Republic,” is worth the price of admission alone. Wouldn't it be nice if more of us wrote this way?



