1998

Is American Law Inherently Racist Krinock Lecture Series

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IS AMERICAN LAW INHERENTLY RACIST?

RICHARD DELGADO*

&

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PROFESSOR KENDE: On behalf of Thomas M. Cooley Law School, I want to welcome you to the Krinock Lecture. My name is Mark Kende and I am an Associate Professor of Law here at Thomas M. Cooley. The Krinock Lecture is in honor of the distinguished service rendered by a former Dean of the law school, the late Robert Krinock. The Krinock Lecture is unique because it has been funded entirely by personal contributions form the faculty. Its purpose is to enrich the intellectual environment of the law school and the community by bringing in prominent speakers on law-related topics. This term, we are doing something a little bit different though with the lecture. Instead of just having one person giving a speech, we are having a debate. The topic of the debate will be: "Is American Law Inherently Racist?" We are honored to have two nationally renowned legal scholars join us this evening to conduct the debate. They are Professor Richard Delgado of the University of Colorado Law School, who will be arguing the affirmative side of the topic, and Professor Daniel Farber of the University of Minnesota Law School, who will be arguing the negative side, and I will be moderating the debate. Before I more fully introduce each of our speakers and describe their impressive credentials, I want to explain the format of the debate so everyone understands how we are going to do things. Initially Professor Delgado will make a two-minute opening statement followed by Professor Farber who will make his two-minute opening statement. Professor Delgado will then have twenty minutes to present his case in chief and after he has concluded, he will have five minutes to answer audience questions that are solely about his particular argument. Professor Farber will then have twenty-five minutes to present his responsive case in chief. He too will then answer audience questions for five minutes related solely to his

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remarks. Professor Delgado will then have ten minutes of rebuttal time to reply to Professor Farber. Professor Farber will follow with ten minutes of time, and then Professor Delgado will conclude with a five-minute statement. After the debate part of the event has concluded, Professor Delgado and Farber will answer questions for up to twenty minutes. This is basically the format of this debate.

Now let me introduce our distinguished debaters more thoroughly. Richard Delgado is the Jean N. Lindsley Professor of Law at the University of Colorado Law School, where he has taught classes in civil procedure, civil rights, and biotechnology and the law since 1990. He has also taught at Arizona State, Washington, UCLA, University of California at Davis, and Wisconsin. Professor Delgado graduated from the University of California at Berkeley Law School in 1974, where he served as the Notes and Comments Editor of the University of California Law Review. Professor Delgado is a prolific scholar having authored numerous books and more than one hundred law review articles. His books have won six national book awards including the American Library Association's Outstanding Academic Book (for his book "The Coming Race War"), four Gustavus Myers prizes for the Outstanding Book on human rights, and a Pulitzer Prize nomination. His award winning book "The Rodrigo Chronicles" is a dialogue between a law student and a professor.

Professor Delgado is most well known for being one of the leading commentators and authors in the field of race and law in America. He is considered one of the founders of the critical race theory movement, which argues that American law is based on racist assumptions and tendencies. He has appeared as a commentator about race on programs such as Good Morning America, the McNeil-Lehrer Report, PBS, and NPR. We are honored to have Professor Delgado arguing the affirmative side of the topic.

Daniel A. Farber is the Henry J. Fletcher Professor of Law and Associate Dean for Faculty at the University of Minnesota Law School where he has taught constitutional law, environmental law, civil procedure, and legislation since 1987. He was a visiting professor at the Harvard Law School during the spring of 1998 and has also taught at Stanford and the University of Illinois. Professor Farber graduated *summa cum laude* and first in his class from the University of Illinois in 1975, where he was Editor-in-Chief of the University of Illinois Law Review. He served as a law clerk to United States Supreme Court Justice John Paul Stevens.

Professor Farber has also authored numerous books and law review articles on constitutional law and environmental law topics.

He has authored a casebook on constitutional law and environmental law and has just had a treatise entitled "The First Amendment" published by Foundation Press. He is currently the Editor of the journal "Constitutional Commentary." Along with his colleague, Professor Phil Frickey, he has authored a leading book on public choice theory. Professor Farber's book "Beyond All Reason: The Radical Assault on Truth and American Law," co-authored with Professor Suzanna Sherry, is perhaps the most comprehensive critique yet of the critical race theorists. Professor Farber will be arguing the negative side of the debate.

On a personal note, I want to thank both speakers for being willing to come here to Cooley today, for braving this debate format, and for being so easy to work with. So if we could, I would like to give them a round of applause before we begin. Without further adieu, let me now turn the podium over to Professor Delgado for his two-minute introduction and to begin the debate.

INTRODUCTORY REMARKS

PROFESSOR DELGADO: Thank you Mark. As the first speaker, and I hope before the clock starts to run, I would like to thank Professor Kende and the faculty of Thomas M. Cooley Law School for sponsoring this debate, and of course for inviting me. It seems to me that in just the last few months and years, this country has returned to an examination of race in a way that did not characterize the ten or fifteen years just before that. All to our good, I think. I am thinking of books like William Bowen and Derek Bok's recently issued book,[1] evaluating twenty years of affirmative action. I am thinking, as well, of John Hope Franklin's Presidential Commission and its workshops and community events around the nation. You could see today's event as part of a series that reexamines this nation's oldest and perhaps most intractable problem—race. I would like to commend Thomas M. Cooley Law School for scheduling it.

Probably most of you know me through my writing on race and racism. You know, that way of disseminating one's ideas is a whole lot easier. You just stay at your desk and spin the ideas out and someone else takes it from there and publishes them. I am very happy, however, to be able to take part in a public event like this

1. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE UNIVERSITY ADMISSIONS (Princeton Univ. Press 1998).

even though it entails removing myself 2,000 miles from my home base and living out of a suitcase for three days because I think the whole thing is terribly important.

It struck me this morning that my friend Dan Farber over there has much the easier task of the two of us—purely in debate terms. For I am the one who has to prove a superlative—namely, that American law is *inherently* racist. Not just sometimes, occasionally, or often racist, but inherently so. I am reminded of those automobile executives who argued that a model of car was not inherently unsafe merely because it burst into flames upon light rear-end contact, since the rest of the time it provided safe transportation for American families at a price that they could afford. Or that character in the Russian novel[2] who did his landlady in, and then defended himself by pointing out all the good deeds he expected to do later in life.

To make today's question more manageable, not to mention easier for me, I will define a system as inherently racist if it is recurrently so—that is, it keeps coming back to the behavior time and again and for each of the different minority groups. And second, it does so for reasons seemingly imbedded in its very structure and makeup, its social DNA, so to speak. Particularly if you are White, I hope you will listen with an open mind to the evidence that I will present today during my case-in-chief. Some of what you hear may be unfamiliar—not in standard history or constitutional law textbooks. It may go against your sense that things are better today for persons of color, as indeed they are for some.

White folks tend to see, literally, fewer acts of out and out racism than their brothers and sisters of color do. A merchant who is in the practice of hassling well-behaved black teenagers in his or her store, will generally not do so if white shoppers are there watching. A police officer who routinely stops motorists of color driving through certain neighborhoods may refrain from doing so if a well-dressed Caucasian is in the back seat of the car. Talk of racism also makes people feel defensive and want to change the subject—perhaps to that other group's responsibility for their low estate.

Yet as recent events show, denial is rarely a successful, much less helpful strategy. Coming to terms with the continuing legacy of race and racism, fairly and openly, is the path to a stronger society and a legal system that we can all be proud of. Thank you.

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2. *See* FYODOR DOSTOYEVSKY, CRIME AND PUNISHMENT (Bantam ed. 1958).

PROFESSOR FARBER: When Suzanna Sherry and I wrote a book[3] about critical race theory, radical feminism, and some related movements, our greatest hope was to spark a dialogue. So I am especially pleased to have the opportunity to be here today to discuss this issue with Professor Delgado. Too often people on different sides of these issues simply send manifestos out that repeat their own point of view and do not really try to engage the other side. So I think this is a tremendously constructive occasion, at least I hope it will be.

I was very struck in his introductory remarks by Professor Delgado's statement that, in a sense, racism is part of the DNA of the American legal system, a sort of genetic flaw. I think that really is a fair statement of the heart of critical race theory. Although I understand the frustration that leads people to that conclusion, I continue to think that it is wrong. It underestimates our capacity to change the legal system, and it ignores important parts of our legal history. In the end, despite the good intentions of people who favor that view, this thesis of inherent racism will only interfere with public dialogue about racial issues and make it more difficult for us to confront our important racial problems today.

PROFESSOR DELGADO'S CASE-IN-CHIEF

PROFESSOR DELGADO: The man whose name graces this law school, Thomas M. Cooley, treatise writer and Chief Justice of the Michigan Supreme Court, also served for a time as founding dean of the University of Michigan Law School. An extraordinary figure, especially for his time, he opposed credentialism and class bias, and favored open access for legal education. He never denied admission to a Black, at a time when virtually all of the nation's law schools did, some continuing to do so as recently as the 1970s. And he graduated black lawyers more than 130 years ago, when the number of Blacks practicing law in the United States was fewer than twenty. A Burkean conservative, he nevertheless was a follower of Abraham Lincoln, who worked ceaselessly on behalf of farmers and the poor. He was listed by Roscoe Pound as one of the top ten judges of all time and not one to sweep important moral problems under the rug. It is worth speculating, it seems to me, on how he would have come out in the debates raging today on issues like affirmative action and

3. *See* DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON THE TRUTH IN AMERICAN LAW (Oxford Univ. Press 1997).

militarization of the United States border with Mexico. My guess is that he would be standing foursquare behind Blacks, immigrants, and the poor in their struggle for justice, equality, and respect.

The story one usually hears today about race and racial justice is what I call the triumphalist one. According to it, slavery was a terrible thing. But it ended with Lincoln's proclamation and the enactment of civil rights statutes this century and last. If African-Americans have not yet reached full equality, at least the law recognizes formal equality so that it is only a matter of time before they do. Some minority groups, according to the story, have risen. Others will follow when they adopt Anglo-American values of thrift, hard work, and family stability. Slavery may even have done African-Americans a favor, according to one recent writer, Dinesh D'Souza,[4] by bringing them here to this great land. Today black, brown, and Asian entertainers and sports figures are millionaires and well-accepted by majoritarian society, which pays money to see them perform. The black middle class is growing, it is said, so the need for affirmative action is fading. If anything, we may have gone too far in the opposite direction, disadvantaging white males of superior aptitude and credentials.

But coexisting with that upbeat story is a darker, less optimistic one. This story reminds us that slavery yielded an enormous economic boost to the South, and that oppression and economic exploitation did not end upon the North's victory in the Civil War. A regime of sharecropping and ruthless "Jim Crow" laws instead kept Blacks separate but in no way equal.

Forbidden from intermarrying with Whites, a prohibition that was not eased, legally, until *Loving* v. *Virginia*[5] was decided in 1967, Blacks who marry Whites today face social barriers so strong that only a handful—a few percent—do. During slavery, Blacks were forbidden from even learning to read and write, and so were excluded from exposure to literature, which was then replete with arguments about freedom and the rights of man. After emancipation, few school districts, and even fewer universities and colleges, would admit Blacks to white schools. Even today, the legal profession contains less than five percent black lawyers and one percent black judges.

Ambitious and upward-striving Blacks—especially ones with

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4. *See* DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY (Free Press 1996).

5. 388 U.S. 1 (1967).

political ambitions—were firmly discouraged. Ones who eyeballed white women, like Emmett Till, were lynched to send a message to others. African-Americans made some inroads in sports and the military, but were permitted to go only so far, especially in the officer ranks. During World War I, many Blacks made gains both in the services and in civilian war industries, but in a telling but little known incident, the United States Military persuaded the federal government to send an official directive to the government of France. Many U.S. soldiers were stationed in that country during that war, where the French treated the African-American ones in egalitarian fashion. This caused consternation among the others, which filtered up the chain of command until the United States finally asked the French authorities to instruct their people to stop relating to black soldiers on terms of equality. The directive explained that it made American white soldiers uncomfortable to see the French shaking hands and making friends with Blacks or inviting them into their homes. The directive, in effect, instructed the French on how to be racist. It implied that this was expected of them and was the least they could do to advance the war effort.

Although formally racist laws are now forbidden, African-American disadvantage persists on dozens of fronts, including credit, home purchasing, average income, infant mortality, longevity, and educational attainment. Covert studies employing testers, one white and one black, but otherwise identical, show consistent discrimination when Blacks try to rent a house, buy a car, buy a house, or apply for a job. Handicapped even when they try to sue for redress for discrimination, Blacks and other minorities of color find the judicial system stacked against them. Although laws on the books ostensibly give them the right to recover for provable discrimination, judicially created burdens of proof, intent requirements, *res judicata* laws, and defenses such as business necessity make recovery much harder than for any other civil cause of action such as negligence, battery, defamation, or breach of contract. Many minority persons realize this and never bother to sue, reasoning, "What's the use?"

In the late 1960s, many colleges, universities, and businesses began using affirmative action, which helped a few of color rise to middle class status and provide financial security for their families. Today, even those modest programs are under attack by conservative think tanks and legal foundations abetted by a judiciary that seems bound to restore things to the way they were when the Supreme

Court, in *Dred Scott v. Sandford*,[6] said that Blacks have no rights that Whites were bound to respect. Search and seizure law, ratified recently by the United States Supreme Court, holds that a black or brown motorist or pedestrian may be stopped on suspicion in a white neighborhood simply by virtue of being who they are.[7]

Other nonwhite minority groups have fared little better at the hands of American justice. Asian-Americans came to this country, not in chains like Blacks, but to build the nation's railroads and dig its mines. When these projects ended, Asians became surplus labor—their presence a source of irritation to local Whites. Because of their thrift and industry, many had opened businesses, such as laundries and farms that competed successfully with those of Anglo-Americans. The United States then passed racist immigration laws that virtually ended Asian immigration, laws that were upheld by the United States Supreme Court in the *Chinese Exclusion Case*.[8] In that case, Justice Harlan, who had dissented courageously in *Plessy v. Ferguson*,[9] the "separate but equal" case, joined in an opinion that portrayed Asian-American people as clannish, inassimilable, and inferior.[10] The inability to help their wives and women friends to immigrate caused a serious imbalance in the Asian population, which quickly dwindled to a pool of aging solitary men. By the time of World War II, numbers had risen, especially of Japanese on the West Coast. But Wartime Exclusion Order 9066,[11] issued on flimsy and fabricated evidence, signed by the President of the United States and upheld by the United States Supreme Court,[12] removed West Coast Japanese families to internment camps where they spent the war behind barbed wire. Many lost farms and businesses.

After a long campaign, the United States Congress finally passed a limited reparations bill,[13] which came too late for many Japanese

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6. 60 U.S. 393 (1856).

7. *See* Whren v. United States, 517 U.S. 806 (1996).

8. 130 U.S. 581 (1889).

9. 163 U.S. 537 (1896).

10. *See Chinese Exclusion Case*, 130 U.S. at 595–609; *see also* Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

11. *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942).

12. *See* Korematsu v. United States, 323 U.S. 214 (1944).

13. *See* Civil Liberties Act of 1988, Pub. L. 100-383, 101 Stat. 903, *reprinted in* 50 U.S.C.A. §§ 1989–1989d (West 1998) (declaring an official apology, urging the President to pardon those convicted who had refused to accept the discriminatory treatment, and appropriating funds for restitution of $20,000 to each individual of Japanese ancestry who was confined, relocated, or deprived of liberty or property).

who had already died of old age. In recent years, many Asian-Americans, particularly of Japanese or Chinese descent, have improved their situation and have earned advanced degrees, particularly in science. But, by a perverse maneuver, mainstream society deemed them a model minority, deserving of no more help. When one looks behind the statistics supposedly indicating Asian success, one finds that certain Asian groups, particularly Indochinese and Filipinos, are living in abject poverty. Even with the two model groups, Japanese and Chinese, high household income often masks extended families with many adults living under one roof, all working at jobs, such as pharmacist, dentist, teacher, or lab technician. Studies also show that Asian-Americans, like Blacks and Mexicans, who attain a high educational level, such as a Ph.D., do not reap the same rewards as Whites who possess the same degree.

Speaking of Mexican-Americans, or Chicanos (my group), most people know that our lands in the Southwest, once part of Mexico, were seized in a war of naked aggression. The Treaty of Guadalupe Hidalgo, which ended that war, guaranteed persons of Mexican descent living in California, Texas, Arizona, New Mexico, and parts of Colorado and Utah the right to retain their land, language, and culture, and to become United States citizens. As with Native-Americans, however, these treaty rights turned out to be worth little more than the paper that they were written on. American authorities set up land registration offices and rules that the Mexicans just happened to find impossible to meet. Conniving developers and lawyers cheated many out of their ancestral lands that the thrifty and industrious Mexicans had developed into farms for generations with irrigation, land tenure systems, wells, and roads. During the "Jim Crow" period when Blacks were being discriminated against in the South, signs in Texas said, "No dogs or Mexicans allowed." Mexicans were called "greasers," "spics," and "wetbacks"—uppity ones were lynched. When their labor was necessary for farming or work in the kitchens and restaurants of large cities, official programs, called *bracero* or guest worker regimes, brought in Mexicans by the thousands, who then were expected to conveniently disappear when the harvest was in. During the depression years and later, American authorities would order roundups, during which tens of thousands of Mexican-looking people, some of whom turned out to be legal United States citizens here for generations, were captured and summarily deported. Like the Japanese, they too lost everything—although at least they did not have to live behind barbed wire.

When school desegregation finally came for African-Americans, schools in Texas and the Southwest cynically declared that Mexicans were white and used them to integrate schools so that a public school with fifty percent Mexicans and fifty percent Blacks was certified as integrated. In Colorado, which many consider a bastion of clean living and racial fairness, conditions for migrant laborers in the sugar beet industry were some of the worst anywhere. During the 1920's, the state was ruled by the Klu Klux Klan, its governor a member, as were a majority of legislators and countless mayors and chiefs of police. During that time, it goes without saying that Colorado was not exactly a welcoming state for Mexican-Americans, Jews, or Blacks moving to the great, free West. But even after the Klan period ended, a depression-era governor decided that too many Mexicans—probably no more than five or seven percent at that time—were living in the state. So he blockaded the southern border of the state to prevent Mexican or Chicano people from entering. Mexican-American people today still talk about that episode, although it is the sort of thing that you tend not to find in the official history books. Even today Colorado enjoys at best a guarded reputation in the Latino community.

Throughout the United States, Latinos today suffer from some of the worst poverty and school dropout rates of any minority group and enjoy even less political influence than Blacks, who have at least their share of big-city mayors and a vibrant and effective congressional black caucus—this, even though the numbers of both groups are nearly the same and Latinos will pass Blacks within about seven years as the largest minority group in the United States. Today, this country is the most economically divided nation in the developed world, with the largest gap in income and wealth between the wealthiest and poorest sectors. It also has infant mortality, access to health care, and incarceration rates worse than those of some totalitarian or emerging countries. Our jails are mostly black and brown, and black men who commit capital offenses against white victims are thirteen times more likely to be sentenced to death than Whites who kill Blacks. Jurors routinely award smaller damages for the death or loss of a limb for persons of color. Jurors who speak Spanish are eliminated from jury duty, even though they may have Ph.D.'s in English literature, out of the concern that they may not listen to the stumbling Spanish of a court interpreter. English-only laws, enacted by referendum in more than twenty states, are thinly-veiled attacks on Spanish-speaking Americans and Asians. Only recently did a court strike down one of these as a violation of the

First Amendment.[14] Of course, hate speech, a means by which some Whites assault and insult Mexicans, Blacks, gays, and women, is highly protected. The First Amendment, you see, is a precious right.

Bilingual education is under siege so that children who speak absolutely no English will not be able to learn in their native language beyond a certain point. Dishonest ads depicting Mexican women sneaking across the border to give birth to babies in parking lots, and pseudo scholarship put out by conservative so-called think tanks whip up anti-immigrant sentiment in support of measures, federal and state, targeting immigrants, some of them legal residents who are entitled to be here and hold down valuable, thankless jobs.

Large numbers of Mexican-American people in Texas live in colonias, shantytowns of tarpaper and tin houses, with open sewage, pollution from nearby factories, and no running water. No zoning laws operate, so that a battery factory could go up next to somebody's house. Texas law does not require the counties to supply basic amenities, and the shady developers who subdivided and sold the lots to working poor families with the promise that water would be brought in as soon as possible skip town or conveniently forget their promises.

Conditions in rural areas are not much better. Migrant Latinos who pick grapes or move from region to region with the crops live with little field sanitation, in cramped and uncomfortable shacks provided by the growers, and are exposed to high levels of pesticides, insecticides, and other dangerous chemicals. The environmental justice movement has only belatedly begun to turn attention to these hazards, as well as the sitting of obnoxious waste facilities, sewage treatment plants, dumping of radioactive tailings on Indian reservations, and other such biohazards imposed on minority and poor communities. Rigorous environmental laws protect the residents of Beverly Hills and keep the nation's parks and playgrounds pristine for the largely suburban membership of organizations like the Sierra Club. But only recently have environmentalism and environmental law focused on lead paint, rats, and toxic waste.

I do not mean to slight other groups that have felt the sting of racism, but time is short and I have other ground to cover. Jews were intensely demonized when they first immigrated here and were treated as a non-white group. Until very recently, many universities and professional schools imposed quotas to keep their numbers small, and

14. *See* Ruiz v. Hull, 957 P.3d 984, 987 (Ariz. 1998) (en banc).

elite law firms refuse to hire or advance them to partnership. Today, many private social clubs, where much business is transacted, still refuse to admit Jews. Like Mexican-Americans, Native-Americans had their ancestral land unceremoniously seized, the courts rationalizing this practice under the fiction that it was not really owned until the white man got here. Indians who resisted were killed or forcibly marched thousands of miles away and resettled on barren lands. Ironically, those lands, in some cases, turned out later to contain mineral wealth. The Indians were simply relocated a second time. Most present day Americans meet Indians mainly through sports mascots such as the Braves, Chiefs, or Redskins.

The situation of Native-Americans, like that of the other three minority groups I have mentioned today, seems actually to be getting worse, with the percentages of children living below the poverty level, of marriageable men in prison, and even numbers of college undergraduates actually standing at lower levels today than they did twenty years ago. Theories of biological inferiority and genetic inability are once again rampant and respectfully listened to, while even liberals like Daniel Moynihan and James Q. Wilson talk of a culture of poverty and broken window theories, under which any expression of minority cultural self-assertion such as loud radios or enjoyment of life needs to be stamped out.

Although my case-in-chief ends for each group with the present, I have been at pains to sketch histories, since the past is what gives present day racism its social meaning; since we sometimes need to remind ourselves how much we have to live down; and to illustrate why the past still lives, at least on an emotional and cultural level, in the groups who have been subject to such mistreatment. As the country becomes more diverse and the potential for racial conflict heightens, it becomes even more imperative to understand ourselves and our histories. As someone put it, those who refuse to understand the lessons of the past are destined to relive them.

I will be back in my next time slot to address the one remaining issue: Inherency.

AUDIENCE COMMENTS AND QUESTIONS

AUDIENCE: Is the great divider in our society color or is it more based on economics in your view?

PROFESSOR DELGADO: I think both are terribly divisive factors. We need to work on both at the same time. I think that it is an

evasion to think that one can deal with the problems of poverty by simply working for racial justice as much as it is an evasion to think that one will work for and accomplish racial justice by dealing with the problems of the poor. These are twin problems in an afflicted society. They both seem inherent, or at any rate intractable, but they require different strategies since black and brown poverty is different from white poverty in several respects. It tends to last longer; it tends to last forever. White families who are poor tend to remain poor for only one or two generations; their children then rise. Not so for black and brown families, without affirmative action and other forms of help. The sons and daughters of middle-class professionals of color, like myself, can fall precipitously from middle-class status, just like that. So there is something different about poverty and color that requires separate strategies. I admit that the problems overlap, but they are separate problems and they may require separate strategies and treatment.

AUDIENCE: If we accept the premise that American law is inherently racist, what can be done about it? Where do we start? And related to that, how can an inherently racist law be made unracist, or are we just doomed to a perpetual battle to decrease the level of racism in our laws?

PROFESSOR DELGADO: No. I don't think that it is a dispiriting or an overly pessimistic view, if one accepts the position—as I do, that American law is recurrently, inherently racist any more than, it is enervating to accept the proposition that the human body, let's say, is inherently frail. From which it follows then that one ought to take reasonable measures. One ought to wear safety belts, one ought to vaccinate children, and one does not simply give up from the recognition that something is inherently a difficulty or a problem. Vigilance is what is called for, not giving up. So no, I do not take the position that the inherent racism that seems to inflict our society requires any sort of surrender. Quite the contrary, it requires all of our efforts if we are to be the society that we can be and that we are in other respects. I will address this point later in my talk.

AUDIENCE: Why do I, a Latina-Chicana, make fifty-five cents out of the white man's dollar?

PROFESSOR DELGADO: I am going to address that question not

to you personally, but to you as an emblem of a larger group of people, all Chicanas. You do so in part because of chauvinism, because you are female. You, not individually but your class, do so because of race and racism. It is convenient for the labor pool to have people like you, me, and others of color, who are, from time to time, unemployable. It is convenient for society, from time to time, to have people like you and like my father—available to work at jobs that other folks would not accept because they are dangerous, because they are poorly paid, or because they are disagreeable. It is convenient for society to have a labor pool like you and to demonize you as an inferior group, as a convenient way of allowing blue-collar whites, working-class whites, to feel superior to at least someone, and thus deflect attention from those who are oppressing both groups. It is the industrialists and the millionaires who really run things, and who are making a dollar, if not a thousand dollars, per dollar that everyone else makes. I will argue later in my presentation that it is not accidental that you, not you personally, but your group and my group, are in the condition that we are in. Thank you.

PROFESSOR FARBER'S CASE-IN-CHIEF

PROFESSOR FARBER: As I was getting ready to leave for the airport, my wife gave me a final piece of advice about this debate. She said, "Don't be too reasonable." Nevertheless, I would like to begin by stressing some common ground that I think may get lost because the debate format naturally encourages us to take adversarial positions. In reality, Professor Delgado and I share a great deal in our views of law and American society. Both of us see the issue of racial inequality as being central and requiring the most serious possible attention. Both of us reject the conservative dogma of color blindness, and both of us, as I think will be shown tonight, believe that one imperative need is for dialogue and discussion of this topic if we are to make any progress. So we do have something in common. But we also have a fundamental disagreement, I think, a disagreement that is illustrated by the fact that we are on the opposite sides of this debate about the inherent racism of American law. As Professor Delgado said in his introductory remarks, critical race theory's view is essentially that racism is embedded in the DNA of American law. And that in effect, racism is not merely a widespread blemish on American law, but is instead, a radical infection that goes right to the heart of the legal system.

I disagree with that for reasons that I will hopefully make clear.

I think that this thesis rests on a one-sided view of the legal system. I think that it is based on a misunderstanding of some of the fundamental principles of the system. I think in the end, despite what I know are Professor Delgado's good intentions, that the inherent racism position (and critical race theory, in general) risks being more destructive than constructive in terms of advancing our national conversation on race. I noticed that Professor Delgado postponed the issue of inherent racism, or the inherency of racism, until his next ten minutes. I may also put off, to some extent, my discussion of that point as well, though I will refer to it briefly.

Let me begin with the vision of the American legal system that Professor Delgado presented in his first twenty minutes. I do not intend to deny the reality of the dark side of American law in American legal history, and that dark side has indeed been very bad at times. Nevertheless, I think one might equally point to some more positive aspects of American legal society, and that we get only a skewed and incomplete picture if we focus only on one side of the picture: if we ignore the Thirteenth,[15] Fourteenth,[16] and Fifteenth[17] Amendments; if we ignore *Brown v. Board of Education*[18] and the work of the Warren Court; if we ignore the Civil Rights Acts of 1964,[19] 1965,[20] and 1990;[21] and if we ignore or minimize the commitment to affirmative action that many American institutions, especially educational institutions, have had for the past two decades. I do not think you have to be a triumphalist to think that these are important developments—you only have to be a realist.

Similarly, as serious as the problem of racial inequality remains in our society, it is also unrealistic to ignore the considerable amount of progress that has been made. Consider the emergence of the black middle class in the last generation or generation and a half, and the

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15. U.S. CONST. amend. XIII.

16. U.S. CONST. amend. XIV.

17. U.S. CONST. amend XV.

18. 347 U.S. 483 (1954).

19. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

20. Civil Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

21. Civil Rights Act of 1990, S. 2104, approved by the Senate on October 16, 1990, 136 CONG. REC. S15396 (daily ed. Oct. 16, 1990) and the House on October 17, 1990, *id.* at H9994–95 (daily ed. Oct. 17, 1990). However, President Bush vetoed the measure, characterizing it as a "quota bill." *See* Statement on the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1031 (Oct. 20, 1990).

integration of important American institutions such as big-city police forces, which are important in the day-to-day lives of many minority people. The military has sometimes been described as the most successfully integrated institution in American society. We all know, as well, that the number of minority lawyers has risen substantially. In state and federal legislatures, there was no such thing as a black caucus in Congress thirty or forty years ago, because there would not have been enough black people present to call a caucus. And do not forget the considerable evidence of sharp changes in white attitudes over that period in a more favorable and tolerant direction.

It is true that there is much in our history that we can only look back on with a feeling of shame, but there is also much to be proud of that we should not forget. I also think that the accusation that the American legal system is inherently racist lacks perspective in the sense that it seems to imply that there is something specifically American about this problem. If you look around the world, societies virtually everywhere are struggling with the problems of ethnic and cultural pluralism, and are trying to find ways to incorporate diverse groups into their governing structures. I think if you look around the world, including even countries like France which Professor Delgado referred to, it is far from clear that we are doing worse than the others. In some ways, I think we are doing considerably better than most.

You can always paint a picture of despair by only focusing on the things that go wrong, and much of the critical race theory literature that I have read along those lines reminds me a great deal of the work that is being done by people at the opposite end of the political spectrum. If you read Robert Bork's latest book "Slouching Toward Gomorrah,"[22] it reads exactly like Derrick Bell,[23] only in reverse. While Bell sees an inherent flaw of racism that we can never overcome and that will haunt us forever, Bork sees an inherent flaw of egalitarianism that we can never overcome and that has corrupted all aspects of our society. Both of them can point to some evidence. If you only look at the evidence on one side of the thesis it begins to look persuasive; but when you look at the evidence as a whole, I think you see a much more complex picture.

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22. *See* ROBERT BORK, SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (Regan Books 1996).

23. *See* DERRICK BELL, FACES OF THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (Basic Books 1992).

I think the inherency part of the thesis is perhaps the most significant, so I want to say a few words about that now, although I will probably need to come back to that after Professor Delgado's next segment.

It seems to me the most powerful criticisms of our society or our legal system are that it does not live up to its own ideals. For example, how could Thomas Jefferson, the author of the Declaration of Independence, also have been an owner of slaves? That puts the question in stark terms. How can a legal system that prides itself on equality still allow some of the outcomes that Professor Delgado has detailed? I think those are powerful criticisms. But what I find most disturbing about much of critical race theory is the argument that it is not the performance that is the problem—it is the ideals. That it is not that Jefferson did not live up to the Declaration of Independence, it is that the ideals of the Enlightenment, the ideals of the Declaration of Independence themselves are inherently and "genetically" flawed, that are themselves inherently racist. That, as Professor Delgado has said before, "normal legal discourse" is itself racist—or, as Alex Johnson has said, that ordinary, supposedly neutral standards of merit are secretly color coded for Whites only, or are presented in a white voice.[24]

One of the primary tasks that we took on ourselves in the book was to try to both document the academic support for that position and then to try to explain why we considered it to be so fatally flawed. It obviously resonates with a lot of postmodernist and post-critical legal studies scholarship. There is a sort of trendiness to talking about the social construction of reality. But when you put aside all the philosophical jargon, it seems to be there just really is not much to support the thesis, and I will return to that later.

Finally, and I think perhaps this is the most significant practical problem, the inherent racism approach is not a step toward bringing us to seriously confront the problems that our society has. In fact, I think it is taking us down a false path. The dynamics of the concept of inherent racism has several unfortunate effects. First of all, among even its adherents, it leads to a kind of "witch hunt" mentality, in which people are constantly searching for more and more subtle forms of racism among themselves, among their opponents in the legal system generally, and so forth. As a result, people invest their time combing the Internal Revenue Code for deductions that might seem

24. *See* Alex Johnson, *The New Voice of Color*, 100 Yale L.J. 2007 (1991).

more favorable to one group than another group, rather than looking at what is the stark and overwhelming problem—not how people's income is taxed but who is earning how much and why. So we become more and more obsessed with looking for more and more subtle flaws.

Furthermore, at least in the hands of some of the practitioners or adherents to this position, it leads to a breakdown in debate, even both among people who are essentially on the liberal side of the spectrum and in disputes with their opponents. For example, consider the attacks on liberals like Randy Kennedy, a black professor on the Harvard Law School faculty. We see how people, who are in some sense fundamentally allies, who all support affirmative action and think racial problems are very important, find it impossible to hold a discussion because of this search for motives, hidden agendas, and biases. We see the same thing within critical legal studies in which two figures in the movement, Mark Tushnet and Gary Peller, bludgeoned each other in the pages of the Georgetown Law Journal[25] about their motivations and potential racism, etc. I do not think that is the way we can move forward.

This thesis also has been destructive of dialogue with outsiders, with the rest of American society, with people who are not already believers in critical race theory or the inherent racism of American society and law. For example, at my own law school, a young member of our faculty, Jim Chen, wrote an article about racial intermarriage[26] that was considered to be inappropriate by some other minority group members. An entire issue[27] of the Iowa Law Review was published, dedicated not only to criticizing his views, which I think was entirely appropriate, but to speculations about the kinds of twisted motives that could lead a member of a minority group to take a position other than the approved critical race theory position. That is not the way for us to move forward. We also see this in the attacks, of which we heard a distant echo from Professor Delgado earlier, on Daniel Moynihan, who has been a staunch liberal, strongly concerned about minorities during his entire career, and yet has been anathemized for making what were considered to be politically

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25. *See* Colloquy, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992); Colloquy, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313 (1992); Colloquy, *Reply*, 81 GEO. L.J. 343 (1992).

26. *See* Jim Chen, *Unloving*, 80 IOWA L. REV. 145 (1994).

27. *See* Colloquy, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996).

incorrect statements. I do not think this is going to lead us forward.

And finally, what I fear the most is the response that seemed to be implied by one of the audience questions earlier. If it is true that American society is inherently racist, doesn't that mean that it is essentially hopeless? Now this conclusion does not logically follow from that premise, any more than it logically follows that if certain character traits have a genetic basis then it is hopeless to do anything about them. But nevertheless, we all recognize that when we are talking about individuals and biology, these genetic theories tend to discourage the idea of reform, and tend to reinforce, as a matter of social reality, the view that any bad behavior that we see is just inherent. I think we can expect to see the same kind of thing when we are dealing with the sociological equivalent involving the claim that there is this inherent genetic flaw in American society. You can see this most clearly in Derrick Bell's writings, which are redolent of despair and which, in that respect, curiously resemble Robert Bork's writings, who is similarly convinced that the genetic flaws of American society will prevent it from ever achieving his vision of justice.

It is true that we cannot afford to forget our history. It is true that much of that history is unfortunate, if not worse. But it is also true that if we remain totally obsessed with the flaws of the past, fixated on their inevitability, we are unlikely to be able to move past them and move forward. And in particular, it seems to me that if we approach today's problems primarily as an issue in finger-pointing, in blaming somebody or another, or in finding the culprit, then we are not likely to be able to unite our society in a quest toward attacking those serious problems.

AUDIENCE QUESTIONS AND COMMENTS

AUDIENCE: If American law is not inherently racist, how do you explain the fact that African-Americans comprise fourteen percent of the population but compose fifty-two percent of the prison population?

PROFESSOR FARBER: First of all, I should say I am not, by any means, an expert in criminal law. So I am prepared to be educated. What I am giving you is my best understanding of what I think I know right now. I think there are a couple things going on there—some of them are flaws in the legal system and others are not.

One of my colleagues, Mike Tonry, is an expert in the criminal

justice system and sociology. He has argued fairly persuasively that the war on drugs, which began in the 1980's, has had a seriously damaging effect on Blacks. Now I do not think that it is at all clear that this was intended. In fact, it turns out that some important congressional support for the war on drugs came from black members of Congress. Nevertheless, in retrospect, it seems to me that if you look at the disparate impact that the program has caused versus its achievements, there is really serious doubt about whether the whole thing has been well advised. I do not view that as being an indication of an inherent flaw in the system. I do think that it is a possible indication of a policy mistake—what may be a very serious policy mistake. So that is part of the problem that certainly has contributed very substantially to the rapid growth in the racial discrepancy in the prisons over the last fifteen or twenty years.

The other half of the equation is that by most measures, which most criminologists accept, there is more crime in the inner cities than there is elsewhere. Much of that crime is committed by Blacks against Blacks. If you trace it back far enough, racism had something to do with creating that situations. It is not clear to me, however, if you could wave a magic wand and eliminate everything that Professor Delgado thinks is a sign of racism in our legal system, that this situation would go away. Sometimes, whatever the origin of a problem was, once it exists, it takes on a life of its own. So I think it is a somewhat complicated issue, and that the legal system has been less than ideal in the way that it has responded to some crime problems. But, I do not think that is the whole story.

AUDIENCE: Isn't the legal system being used today to undo the progress you point to? Doesn't the legal system elevate white expectancies over affirmative efforts towards racial equality? Aren't recent court decisions, barring remedial efforts by government, another example of this?

PROFESSOR FARBER: I would not try to paint the triumphalist picture, in which things were terrible but now, in every day and every way they are getting better and better. We have had periods of success and periods of failure. Some new developments in the last ten years go in what I think is the wrong direction. I think that is unfortunate. But, I would not excuse these developments on the grounds that they are nothing more than the expression of some inherent flaw in the entire system. The people who made those mistakes should not be allowed to claim that alibi. Instead, those mistakes

need to be confronted on their own terms and hopefully corrected.

AUDIENCE: Given evidence of widespread discrimination in employment and housing, do you believe that discrimination by law enforcement personnel is widespread? Isn't the way law enforcement personnel sometimes act a sign of a racist legal system?

PROFESSOR FARBER: Do I think that there is some racism, or even widespread racism, by law enforcement personnel? Well, I would not be surprised. Do I think this would prove there is something inherently flawed in the very heart of the system? No, I think it shows that the system is not living up to its own aspirations. I also think that we need to be careful of jumping to the conclusion that bad outcomes are always due to discrimination. While it may be true that law enforcement officials are biased, it is also true that the percentages of people convicted of various kinds of crimes against victims correspond fairly closely to the descriptions that you get from the victims themselves in surveys by criminologists. There may be bias—and the bias is bad—but the bias may not be the full explanation of what is going on.

REBUTTALS AND CLOSING REMARKS

PROFESSOR DELGADO: You know it seems to me that the war on drugs is part of the story, but only part of it. It all depends on what you decide to criminalize. For example, if you criminalize ingestion of crack cocaine much more harshly than that of the powdered kind, then of course you are going to get a hugely disparate result out of enforcement of the drug laws. If you decide that white-collar crime is not really criminal and go easy on people who are guilty of embezzlement or S&L fraud that bilks the public out of literally billions of dollars, the same thing will happen. If you decide that white-collar crime that takes the form of defense procurement fraud or manufacturing of inherently dangerous products like DES or Pintos—if you decide that these are not crimes, even though they cause in the aggregate more loss of life, more pain, more injuries, more deaths, or more lost dollars than all inner-city crimes or street crime put together, then you will have a disparate impact, and you may be willing to entertain the possibility that it is not just accidental.

Well, to this point, today's debate has proceeded along fairly predictable lines. I have pointed out patterns of racism in American legal history, while Professor Farber has emphasized times when that

system has lent a helping hand. Please bear in mind, though, that a legal system, like a defective car, may need an overhaul, even if it is capable at other times of driving and serving perfectly well. A system is inherently racist if two things are shown. First, that discrimination is a recurring theme like a soundtrack in a movie or a leitmotif in a musical composition, silent at times perhaps but always there, always returning. This, I believe, I have shown. Second, that the reason for its persistence is inherent in the culture. I did not say biology of course, but *culture*. In that respect, consider three things.

One. Consider how racism takes different forms at different times, like one of those characters in a science fiction novel or movie. In one era, it is blatant, open, and in your face. In another, it is subtle, institutional, embedded in seemingly neutral rules like a University of Colorado at Boulder requirement that all first-year students live in a campus-residence hall: that is a neutral rule. However, many students of color from Denver, thirty-five miles away, would prefer to live at home and commute saving the money, avoiding some of the "Animal House" features of dorm life that go against Latino culture, and looking after their younger brothers or sisters who may be flirting with drugs or gangs. In another era, racism takes the form of gentlemanly learned tracts with hundreds of footnotes debating whether folks of color are genetically inferior. The players, the arguments, and the rationalizations may vary over time, but the gap in brown/white earnings, life expectancy, and social well being remains about the same as though obeying some unseen law.

Two. Notice how when courts and other official policy makers relax, or even decide to help minorities, this happens more to advance white self-interest than to help the supposed beneficiaries. For example, *Brown v. Board of Education*, the case that Professor Farber held up as the crown jewel of American jurisprudence, decided in 1954, came down just as many U.S. servicemen and women of color were returning to civilian life from military service, where many of them for the first time had experienced a relatively racism free environment. Many of them probably would not have returned meekly to shining shoes and regimes of "Yes sir" and "No sir." For the first time in a while, the possibility of real racial unrest loomed in the United States. At the same time, we were in the early stages of a cold war against the forces of godless, ruthless communism. It scarcely would have served U.S. purposes well had the front pages of world newspapers continued to show pictures of Emmett Till lynchings and southern sheriffs with cattle prods. *Brown* and other breakthrough cases occur not so much out of generosity or moral

imperative, but out of a need to advance white self-interest. Later, when the celebrations died down, the great law reform case was inevitably cut back quietly by lower courts or impeded by administrative foot-dragging or delay. Today, more black school children attend segregated schools than when *Brown v. Board of Education* was decided.

Finally, consider how improvements for one minority group are often accompanied by worsening treatment of another. When *Brown v. Board of Education* struck down school segregation, eliciting great and deserved rejoicing, the United States government was ordering "Operation Wetback," a massive deportation program for Mexican-looking people. Only two years later, an article[28] appeared in Duke Law School's Journal of Law and Contemporary Problems approving the whole thing and urging more of the same. Reconstruction, which saw great gains for African-Americans, saw the enactment of viciously anti-Asian immigration laws, in part as a sop to white southerners concerned that caste might turn out to mean little after all. *Korematsu v. United States*,[29] which upheld Japanese internment, was decided only ten years before *Brown v. Board of Education*. During World War II, we were a little nicer to Blacks, Mexicans and Indians, needing them on the front and in war plants, but turned our backs on Jews fleeing the holocaust. And, finally, recall how Justice Harlan, author of that ringing dissent in *Plessy*,[30] joined in a virulently anti-Asian opinion in the *Chinese Exclusion Case* only a short time later. Well, I don't know about you, but for me a pattern begins to emerge—like a figure in a photograph in a darkroom tub. Four centuries, four racial groups, three mechanisms. Does that pattern warrant the conclusion that something inheres in American culture that renders people of color recurrently *one down*? I am afraid so.

PROFESSOR FARBER: I thought I would begin by saying a little more about the criminal justice system since that came up. I think the discussion illustrates some of the problems that we fall into in this kind of debate. One would think from much of the literature, at least in law reviews, that stringent law enforcement against drugs and street crimes is a majority culture imposition. One might also get the

28. *See* Eleanor M. Hadley, *A Critical Analysis of the Wetback Problem*, 21 LAW & CONTEMP. PROBS. (1956) (approving of "operation wetback").

29. 323 U.S. 214 (1945).

30. *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting).

impression that if members of minority groups had their way, those police would be pulled off the streets and instead would be patrolling the halls of Microsoft and General Motors looking for antitrust violations or consumer frauds. The reality is quite different. There was a Gallop Poll, for example, in 1993 that reported the following about public opinions among Blacks: eighty-two percent thought the courts in their area did not treat criminals harshly enough, seventy-five percent of Blacks favored putting more police on the streets to combat crime, and sixty-eight percent favored building more prisons so that longer sentences could be given.[31]

The crack cocaine law, which I think Professor Delgado and I both disapprove of, originated in the House Committee on Narcotic Abuse and Control, which was chaired by a black congressman from Harlem. So, even when a racial impact may seem problematic to some of us, it does not necessarily follow that it should be interpreted as simply one group dominating another. This has also been true historically in America with immigration, in which immigration restrictions have been favored both by xenophobic natives and also by recent immigrants and their descendants, who are disturbed by the disruption and competition from further immigration. And that has been true both today and as far back as the early 1900's, when unions fought for restrictions on immigration to protect American workers. The dynamics of these things are just a lot more complicated than the simple reference to racism makes it appear.

Indeed, the whole idea of racism begins to lose any kind of core meaning when we get to the point of saying that a rule about dorm residence is racist because it is opposed by some minority students. It may be a bad rule. (I know when I was an undergraduate I thought it was terrible to require students to live in the dorm, but not for exactly the same reasons.) One of the problems with the rule might be that it has particularly ill effects for minorities. But it seems to me that when we get to the point of pointing the finger of racism in that kind of situation, we have debased our vocabulary. What vocabulary do we have left with which to talk about Rodney King, when we have used up the word racism to talk about a dorm residence rule? I just do not think that this kind of finger-pointing is constructive. I doubt if it advanced deliberations over the dorm rule in Colorado to have charges of racism being made, as opposed to a discussion of the

31. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 305–06 (Pantheon Books 1997).

merits of the situation. Again, I do not impugn the motives that have led Professor Delgado and others to make these charges. I think in many ways it is entirely understandable. But nevertheless, I think it is just taking us farther away from solving our problems.

PROFESSOR DELGADO: Well, the image of finger-pointing and shaking one's finger and looking for things that are not there is a powerful one. No one wants to be accused of fabricating or of whipping up hysteria over something that does not exist or is well on its way out. But it seems to me that an equally powerful image is that of the willfully blindfolded individual, refusing to see what is there, the Panglossian individual who takes the position that we live in the best of all possible worlds; that things are getting better and better; that few measures, little vigilance, and little effort are required. It seems to me that in a society with a history like ours, if one is to make an error, it needs to be on the side of over-vigilance rather than the other.

I am reminded of a television program, Larry King Live, which I saw just before setting out on the trip here. I think it was on Friday, when the son of George Wallace appeared. I believe it was Wallace's eightieth birthday, or something of this sort; I missed the first few minutes of the program. But the son, an overwhelmingly charming, intelligent, seemingly well-educated, forty- or fifty-year-old fellow, in response to the question as to whether his father had been a force for evil in the South—a force for racism—before his accident and religious conversion, blandly insisted that the opposite was the case. I do not think it is because Junior was racist or would ever have ordered federal marshals out or spoken the inflammatory words that his father did during the months and years right after *Brown v. Board of Education*; rather, I think it is for two reasons. One, because you can always find another explanation, you can always find another reason why things are the way they are. And the young fellow on the program did that in elaborate and almost persuasive fashion. When his father did this thing or that thing during his regime, it was not because he disliked black people or wanted to resist desegregation. It was rather because he was trying to preserve Southern culture. He was seeking to protect an important point having to do with political autonomy. He was trying to keep peace and order. He was trying to send carpetbaggers and outside agitators home. He was doing anything other than trying to set back the cause of African-American advances and liberation.

Now it seems to me that one can always do that. And it seems to me that it is doubly tempting to take that position as Professor Farber has, to some extent, done today, if one is doing it in connection with an institution or a region or a country or a person that one genuinely loves. The young man on the television program genuinely loved his father. It was easy to see that. And indeed, after his accident and change of heart, even Jesse Jackson, who was also on the program, loved the man and forgave him.

Now all of us love our society on one level or the other and we are loath to apply hard terms like "racist" or "inherently racist" to it. But sometimes, as with children and parents, the course of true solicitude for an institution calls for pointing out its defects, facing up to them squarely, and trying to do something about them. That is all I have been arguing here today. That is all critical race theory stands for, and I believe that, as a society and as a legal institution, we will be the better off for the collective self-examination that I have urged and that many in American society are going through today. Thank you.

GENERAL AUDIENCE QUESTIONS AND COMMENTS

AUDIENCE: I recently read an article about the hiring practices of the United States Supreme Court, where Whites, more importantly white males, were the ones getting the clerk jobs, while very few minorities are hired. How can the Court justify these actions when they themselves are supposed to uphold racial justice laws?

PROFESSOR DELGADO: Professor Farber was a clerk for the United States Supreme Court—he might want to comment and then I could say a few words when he is finished. Where there any minority clerks in your year?

PROFESSOR FARBER: No, there weren't. I do not know how deeply committed I am to defending the hiring decisions of the current Justices. They never ask my advice about whom to hire, so I do not feel deeply involved with that. I think that there are a number of mechanisms that are operating here. In fact, I think some of them raise some really interesting issues the critical race theorists have sought to address. In the case of some of the Justices, I think it is conceivable that personal bias has played a role, but I think it is very unlikely for any of the Justices who have been on the Court in recent years. However, I think there are some other factors that we

can point to. One is the kinds of criteria that have been used to hire clerks. I think some of these are good indicators related to merit while others seem to be worthless. The typical Supreme Court clerk is somebody who was an officer on the Harvard or Yale law reviews, got extremely good grades in law school, and clerked for a high-power United States Court of Appeals judge. The percentage of minorities who have those credentials is disproportionately low. So, I think that, at least historically, this is a good part of the explanation.

Now, to what extent should we try to defend those standards? It seems to me that that is a significant question. The fact that they lead to disproportionate outcomes does not seem to be enough in itself to condemn them. But, I think that the Justices ought to be prepared to think about whether in fact those standards measure something that is relevant to the job of being a United States Supreme Court clerk. At least to some extent, they clearly do. For example, the work done on law reviews, in terms of research and writing, has a significant resemblance to the kinds of roles that law clerks play in writing opinions. Clerking for a court of appeals judge is a very relevant practical experience. So, if this were a Title VII case and we were asking whether those credentials could be justified despite their disparate impact, I think the answer might very well be "yes." One of the things that I find constructive about critical race theory is that it leads us to ask those questions. Some of the criticisms that Professor Delgado has made of standards of merit can lead us to look at those standards with a fresh eye and ask: "Are they really serving their purposes? Do they really benefit society?" I guess what I find disturbing about this critique is the assumption that the answer must be "no," that if there is a disproportionate impact then the problem must lie with the standard and that if we only had the right standards then problems would disappear.

PROFESSOR DELGADO: I think that that record on the part of the United States Supreme Court is absolutely indefensible. What's more, it is not even in their self-interest to maintain the pattern that they do in the hiring of all white clerks. Let me give you a couple of examples. At the University of Colorado Law School where I teach, and this is true in many schools around the nation where I travel and speak, the students of color, admitted with entering LSATs and grade point averages considerably lower, in most cases, than those of the others, after graduation do as well as those others and in some cases better. Our bar passage rate for students of color is in the eighty plus

percentile. For all students, it is in that range as well. But then after graduation, the record compiled by our students of color is even slightly better than those other extremely talented classmates who are white. The percentage who go on to prestigious jobs like clerkships, law teaching, and commissionerships in state or federal governments is slightly higher. A recent book by Derek Bok[32] followed tens of thousands of affirmative action admittees in the United States to see how they are faring after graduation. The answer is that they are doing just fine. So I would argue that for the Supreme Court to take a monochromatic class of Supreme Court clerks year after year after year today is indefensible with all of that talent that is out there as evidenced by post-graduation accomplishment statistics, partnerships earned, prizes won, law review articles written, and other standard measures of academic and legal merit.

Indeed, I would argue that if the Supreme Court had a greater variety of clerks, by including more women and members of color, it would issue better opinions. I will just mention one case—the *Kulko*[33] case that you take up in civil procedure. In that case, the Supreme Court denied personal jurisdiction to a California divorcee whose husband, living in New York, simply unloaded two children on her by sending them to California. Under the California Long-Arm Statute, the California courts held that she should have jurisdiction based on the adequacy of those contacts. At stake was whether she would be able to maintain her action for a modification of the child support arrangements in California or would have to travel all the way to New York to get jurisdiction over her ex-husband. In a fairly ruthless opinion, the United States Supreme Court held that she would not have jurisdiction,[34] in part, because the husband was not intentionally availing himself of the forum of California. I would maintain that had the Supreme Court at that time had a single woman Justice—especially a divorced one—their analysis would not have been so cursory and they would have at least found it a more difficult case. And so with dozens of cases that come before it, raising issues of social equity for African-Americans, people of color, the poor, workers, and women, if the Court loosened up a little bit, it would be dispensing a better class of jurisprudence. I think that hiring a more diverse body of clerks is a good place to start.

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32. *See* BOWEN & BOK, *supra* note 1.

33. Kulko v. Superior Court of Cal., 436 U.S. 84 (1978).

34. *See id.* at 101.

AUDIENCE: From the point of view of critical race theory, what are the best strategies for improving our society? What kinds of specific things should be done? I gathered from the most recent comments that perhaps changing the composition of the Court, in terms of its law clerks, would at least make some contribution in your perspective. Does critical race theory embrace the idea that disparate impact alone should be enough to raise discrimination issues? And would that be a good strategy or are there other specific strategies that you would recommend?

PROFESSOR FARBER: It is important to distinguish between disparate impact and intent. But my own view of the anti-discrimination statutes, and probably to some extent that of constitutional law, is that intent should not be the only factor. There are situations in which a severe, unjustified disparate impact ought to be enough to get the courts to intervene. There are also some cases where the disparate impact is so strong that I think it does lead to an inference about intent. But sometimes even when the disparate impact is due to inattention or other benign causes, nevertheless, something should be done about it. So I am not one to defend, all the way down the line, the Supreme Court's current view of the role of intent.

PROFESSOR DELGADO: On the question of whether critical race theory has any sort of agenda, set of action points, or guide points for the future, it seems to me that the criticism that the movement has spent too much of its energy on pointing out flaws in liberalism may actually be true. If you go up to the average Crit and say:

> Suppose I agreed with all your critical assessment and suppose we were able magically to fix all of that. You, Crit, advocate doing away with the intent requirement. You, Crit, advocate strengthening affirmative action. You, Crit, advocate this, that, and the other. Suppose all of that were accomplished—all of the bad social structures that you were attacking fell by the wayside, then what would you want to do next? What would be your action program?

And the movement has just begun considering what those steps would be. I think that one theme, that as a sort of chronicler of the movement, I find emerging in critical race theory literature, which is a wholly desirable one, is a focus on the way the law is actually practiced and what people are beginning to call "critical clinical legal education." It is an emerging body of critical theory that examines the way lawyers and their clients interact that asks difficult theoretical

questions about such things as: How does a lawyer construct a client's story? How does a lawyer understand who the client is? How and when does the client need to serve as a stand-in for a larger community, so that the things that one does in helping get this client off do not stigmatize and damage the entire community of which he or she might be a part—say the Vietnamese community. It seems to me that these are issues that are about to be on the front burner of critical theory and have a direct bearing on how we lawyers practice law and how we in law schools teach it.

PROFESSOR FARBER: Well, I guess I applaud the statement that critical race theorists spend too much of their energy on attacks on liberalism. Especially since many liberals consider themselves to be an endangered species in today's political world anyway. In his closing remarks, Professor Delgado diplomatically suggested that I was sort of Panglossian—convinced that this is the best of all possible worlds and so on. I think it is probably true that those of us who love our society, or who love the law, have a tendency to look for the good parts. But there is also a sense in which I think critical race theory itself is too Panglossian. The message of critical race theory seems to be that if only disparate impact was adopted, etc., etc.; if only lawyers were doing the right thing in their community; if only Whites got their act together and stopped being racists—then everything would be fine. In some ways, I think that is a fairly optimistic vision. The reality is that—however our current problems got going, and however much the law may be failing to address them—those problems would not go away simply by making changes in the legal system or in what lawyers do. In one sense, critical race theory is making things too easy, and too hard in another, by pretending they would.