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A Comment on Race and the Law

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I applaud *The Wayne Law Review* for holding its 2002 Symposium on the topic of "Race and the Law." The social realities of race have affected every aspect of American life in its history from personal social relationships, the formation of community, labor and business, and education, to name a few. Most important for the purpose of this Symposium are the ways in which race and race relations have influenced the development of American law.

I have the privilege of teaching a course on race and the law and from this have had the very rich experience of teaching a wide scope of subject areas. The subjects most expected to be covered include Constitutional law and theory, education law, criminal law and procedure, and employment discrimination, but we cannot leave out family law, environmental law, local government law, immigration law, international law of treaties, voting rights law, and First Amendment jurisprudence. The impact of race on the core subject areas of the law has been profound, yet it remains a struggle to find law teachers who will explore this relationship in the classroom or even to find discussions of race in the course materials.[1]

It now seems to me, having taught race and the law, that race is so central in the development of the panoply of legal subject matter that a course on race and the law ought to be unnecessary. Unfortunately it is the case that we, as lawyers and law teachers, get so caught up in reducing everything to principles and rules that we too often forget, or in the least obscure, the greater contexts from whence the law comes. The sterilization process that permits the absenting of race, and other social constructions, from the core considerations in the law allows us

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1. These are my personal impressions based on informal discussions with colleagues teaching at a variety of schools and a brief and informal survey of text books. I have even heard many anecdotes about teachers presenting *Korematsu v. United States*, 323 U.S. 214 (1994), completely divorced from race.

the illusion that the law *is* sterile, neutral, and of a higher nature.[2] The dimension of race, when accurately viewed, does not allow the actors in the legal system to treat the law in an isolated fashion.[3] Considerations of race ensure that we do not divorce law from social reality or view its application in an aseptic vacuum. To that end, in teaching and learning law in its fullest context to include race and other social constraints and considerations, we must be interdisciplinary, consulting such fields as history, political science, sociology, demography, statistical analysis, and economic theory, to name only a few.

The panelists of this Symposium, Professors Safranek and Torres,[4] seemed remarkably well-coordinated without having spoken to each other beforehand. Professor Safranek gave us a taste of history, focusing on some of the inconsistencies in the original Constitution and the hypocrisies in various interpretations as the nation developed, bringing us to the modern era. Professor Torres discussed examples of modern issues and provided a framework for moving forward.

Professor Safranek, in his historical critique of the Constitution, its Amendments, and the succeeding interpretations of them in the relevant case law, is very thorough, discussing not only the (in)famous

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2. Of course, I am speaking of natural law. *See* John M. Finnis, *Natural Law: The Classical Theory, in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 3 (Jules Coleman & Scott Shapiro eds., 2002) (describing natural law as "moral standards which . . . can justify and guide political authority, make legal rules rationally binding, and shape concept formation in even descriptive social theory"). *But see* Ronald A. Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 165 (1982) (giving what he calls a "crude description" of natural law: "Natural law insists that what the law is depends in some way on what the law should be"). Dworkin observes, "One label, however, is particularly dreaded: no one wants to be called a natural lawyer." *Id.*

I realize many law teachers would balk at the idea of being called a natural law theorist, but I nonetheless suggest that many of us, when we ignore the context from whence the law developed, its purpose or its enforcement, are in fact teaching from such a perspective.

3. It may not be clear where race is a relevant consideration, but it is preferable that we give it too much consideration than ignore it when it may shed light on society and law.

4. Though professor Torres did not write a piece for this Symposium issue, his remarks were based substantially on his book co-authored with Professor Lani Guinier. LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2002). My remarks in this regard are not intended to serve as a book review and only reference the parts of the book that I remember Professor Torres discussing during the Symposium.

cases, but also the not so well-known cases that bring greater insights into the social and moral conflicts of their time.[5] For example, he discusses the lesser known case of *Prigg v. Commonwealth*, a pre-*Dred Scott*[6] case that demonstrates the division between the states and that there was at least one alternative to the holding in *Dred Scott*.[7] He also discusses *Blyew v. United States* and the Court's wasted opportunity under the Civil Rights Act of 1866 to uphold the rights of blacks to be witnesses and to be meaningfully protected under murder statutes.[8]

Professor Safranek does a wonderful job of demonstrating how historically, racial injustice has influenced actors in the justice system in their warped interpretations and applications of law under the Constitution. Where I may disagree with Professor Safranek is in his assertion that "the most profound 'fights' over race in the courts and American law are over."[9] This proposition is quite dependent on definition. It is true that the ideological and moral conflicts were so deeply inconsistent in the writings and in the practice and enforcement that many would say the resolution of such conflicts, even in only the formal writings, is profound. However, the profundity is limited to the social change that had to occur in order to make the written and interpretive changes. The ideological inconsistencies are fairly obvious and in fact were understood by the framers at writing[10] and by judicial

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5. I do not fault Professor Safranek for focusing almost exclusively on the treatment of African Americans in his historical review. The sheer volume of material that could be addressed within the category of race is prohibitive. It is also true that the social history of Black Americans, especially with regards to the period and continued effects of slavery, make their role central to an understanding of the Constitution, of legal developments, and of American culture. Nonetheless, the black-white paradigm is insufficient to fully understand the development of American law. *See generally* Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997).

6. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

7. Stephen J. Safranek, *Race and the Law, or How the Courts and the Law Have Been Warped by Racial Injustice*, 48 WAYNE L. REV. 1025, 1031 (2002) (discussing *Prigg v. Commonwealth*, 41 U.S. 539 (1842)).

8. *See id.* at 1039-40 (discussing Blyew v. United States, 80 U.S. 581 (1871)).

9. *Id.* at 1059.

10. The natural law ideology of the Declaration of Independence and the institution of slavery were profoundly contradictory. The framers compromised by sacrificing the liberty of black slaves to preserve the union and their own property interests. *See* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 103-06 (2000) (citing III THE RECORDS OF THE FEDERAL

actors throughout history, as aptly described by Professor Safranek in his discussion of *Dred Scott*.[11] I believe the most profound "fights" will continue to occur around laws written as facially neutral that nonetheless have a pernicious intent[12] or around laws that are in fact neutral but nonetheless are enforced in differential ways.[13] Indeed, I will

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CONVENTION OF 1787 at 377 (Max Farrand ed., revised ed. 1966)), which discusses the reason the word "slave" was left out of the Constitution; Luther Martin, *Genuine Information, reprinted in* III THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 211 (Max Farrand ed., revised ed. 1966); *see also* Derrick A. Bell, Jr., *The Real Status of Blacks Today: The Chronicle of Constitutional Contradiction, in* AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 26-42 (1987).

11. Safranek, *supra* note 7, at 1031-37.

12. One example is in access to housing as Martha Mahoney describes:

> Racial segregation was systematically promoted during the 1930s, 1940s, and 1950s by federal programs like the Home Owners Loan Corporation (HOLC), which made loans to homeowners, and the Federal Housing Authority (FHA), which insured private-sector loans. These programs refused to lend money to blacks. They also actively promoted systems of restrictive racial covenants. The greatest impact of these federal agencies in structuring the market, however, lay in the ranking system–the origins of redlining–that the government used to rank communities in their eligibility for federally-financed or federally-insured loans.
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> Using these guidelines, HOLC and FHA actually refused to lend money or underwrite loans for whites if whites moved to areas where people of color lived. Private lenders adopted policies in line with federal guidelines. These programs reduced housing opportunities for blacks.

Martha Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1669-70 (1995) (emphasis in original) (citing CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 174-75 (1955), KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 190-218 (1985)); *see also* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 42-59 (1993) (discussing the role of HOLC and FHA discrimination in the construction and maintenance of the black ghetto).

Though redlining and housing discrimination became "illegal" by the Fair Housing Act of 1968, the effects continue in insidious ways. *See generally* Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051 (1998).

13. Take for example the enforcement of drug laws:

> The nation's war on drugs unfairly targets African Americans, who are far more likely to be imprisoned for drug offenses than whites, even though far more whites use illegal drugs than blacks, according to a new report by the advocacy group Human Rights Watch. . . .
>
> These disparities exist even though data gathered by the Department of

find the resolution of these matters more profound precisely because their impropriety is not so readily apparent.

Professor Safranek concedes that "those who continue to discriminate because of race in their conduct, through subtle and not so subtle means, will be able to do so."[14] Unfortunately this statement assumes that the public/private distinction is more meaningful than it is. Of course state action is of considerable significance in Constitutional interpretation. Nonetheless, it is also true that private individuals comprise the state in all of its functions and bring their individual biases with them, and it is the case that the government enforces, or chooses not to enforce, the actions or inactions of one or more parties within a given "private" dispute.[15] It is true that changing the "hearts and minds" of individuals within society is where we will affect the greatest change, but it is also the case that this will have the greatest impact on how the laws are written, interpreted and enforced.

> Health and Human Services show that in 1991, 1992 and 1993, about five times as many whites had used cocaine than blacks. . . .

Michael A. Fletcher, *Report: War On Drugs Sends Blacks To Prison*, WASH. POST, June 8, 2000, at A10. African Americans constitute approximately 13% of the U.S. population and 13% of its drug users; however, African Americans constitute 35% of drug arrests, 55% of drug convictions, and 74% of drug imprisonments. *See* Ira Glasser, *American Drug Laws: The New Jim Crow (1999 Edward C. Sobota Lecture)*, 63 ALB. L. REV. 703, 719 (2000) (citing U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 14 (1999)); *see also* Lisa Walter, *Eradicating Racial Stereotyping From Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 258 (2000) ("The anti-drug crusade, which has served as a useful political vehicle to rally support against the problem of crime in the inner cities–a problem in the eyes of society at large–primarily involves racial minorities.").

Also consider the statistical disparities surrounding the use of the death penalty concerning not only those who are executed, but all those for whom this form of "justice" is deemed required. *See* Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1391 (1988) (noting that based on empirical research on race and capital sentencing, the state places a higher value on the lives of whites than blacks). *See also infra* note 19.

14. Safranek, *supra* note 7, at 1059.

15. "[I]f enforcement of discriminatory covenants is state action, then the private sphere 'disappears,' since all private arrangements are dependent for their structure on enforcement of private law ground rules." Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology of Judging*, 36 J. LEGAL EDUC. 518, 541 (1986) (citing Shelley v. Kramer, 334 U.S. 1 (1948)); *see also* Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1198 n.320 and accompanying text (1989).

Some of the issues we still need to grapple with include disparities in policing, especially regarding racial profiling[16] and police brutality,[17] disparities in drug enforcement, both in the law as written and as enforced,[18] disparities in victim and perpetrator valuation from capital punishment and disparities in health care.[19]

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16. Racial profiling is prevalent in current society. *See, e.g.*, IRA GLASSER, 30-SUM BRIEF 30 (2001); René Bowser, *Racial Profiling in Health Care: An Institutional Analysis of Medical Treatment Disparities*, 7 MICH. J. RACE & L. 79 (2001); Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851 (2002); Gregory M. Lipper, *Racial Profiling*, 38 HARV. J. ON LEGIS. 551 (2001); Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717, 725 n.31 (1999); DJ Silton, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 LAW & INEQ. 53, 54 n.11 (2002) (citing HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 2000: EVENTS OF 1999 at 393 (2000)).

17. According to Amnesty International:

> Throughout the USA people are being injured and even killed by police using excessive force or deliberately brutal treatment. Police officers are punching, kicking, beating and shooting people who pose no threat, or are causing serious injuries, and sometimes death, by misusing restraints, chemical sprays or electro-shock weapons. Most reported incidents take place during arrest, searches, traffic stops or in street incidents.

Rights for All: Amnesty International's Campaign on the United States of America, Race Rights and Police Brutality in the United States of America (Sept. 21, 1999), *available at* http://www.amnestyusa.org/rightsforall/ police (last visited Jan. 29, 2003).

18. *See supra* note 12. *See, e.g.*, Taunya Lovell Banks, *Women and Aids—Racism, Sexism, and Classism*, 17 N.Y.U. REV. L. & SOC. CHANGE 351 (1989/90); Vernellia R. Randall, *Racist Health Care: Reforming an Unjust Health Care System to Meet the Needs of African-Americans*, 3 HEALTH MATRIX 127 (1993); Dorothy E. Roberts, *The Nature of Blacks Skepticism About Genetic Testing*, 27 SETON HALL L. REV. 971 (1997); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

19. *See* Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of Death Penalty*, 35 SANTA CLARA L. REV. 433, 434 (1995) ("Although African-Americans are the victims in half of the murders that occur each year in the United States, eighty-five percent of the condemned were sentenced to death for murders of white persons." (citations omitted)); *see generally* Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519 (1995).

A disturbing case on this point is the atypical capital sentencing of John William King in the Jasper, Texas murder of James Byrd Jr. It took the brutal killing of Mr. Byrd by King and friends chaining him by his ankles to the back of their pick-up truck and dragging him three miles for such a sentence to be imposed. *See* Rick Lyman, *Texas Jury Picks Death Sentence in Fatal Dragging of a Black Man*, N.Y. TIMES, Feb. 26, 1999, at

Both Professor Safranek and Professor Torres touch on Affirmative Action, but each have a different approach to the topic. Professor Safranek believes that we are at the point where reasonable minds interested in the elimination of racial discrimination can disagree as to the most appropriate means of reaching that goal. Professor Torres characterizes it as almost a guise covering the common interests of the relevant parties, regardless of race, the revelation of which could lead to justice, racial and otherwise. This characterization was a lead-in for Professor Torres' ideas for finding solutions to racial conflicts.[20]

Professor Torres, in his remarks, discussed the ideas captured in his book, *The Miner's Canary*, co-authored with Professor Lani Guinier. He first provided the framework for their central ideas for using "Political Race"[21] as a transformative tool within democracy, to "explore how racialized identities may be put to service to achieve social change through democratic renewal."[22] He described their project as one within the school of magical realism, giving voice to future possibilities.[23] Professor Torres grounded his discussion using the stories of grassroots mobilization provided in the third chapter of his book. He focused primarily on the stories that led to the "Texas 10 Percent Plan,"[24] a plan supported by cross-racial coalitions that ended up benefitting racial minorities and also all other Texans throughout the state.[25]

The Texas 10 Percent Plan formed in response to the *Hopwood* decision.[26] Coalitions, comprised of activists, legislators, academics, and others from around the state, formed to "resist the resegregation of Texas higher education."[27] The resistance efforts were initiated by people of color, but as it was revealed that university admissions were based on criteria closely correlated with economic wealth, it became clear that it was not only people of color who were disadvantaged by

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A1 (pointing out that this sentencing was only the second of a White for killing a Black since 1850 in Texas). *See also supra* note 12.

20. Professor Torres' ideas for finding solutions were not limited to race, but were intended to be useful in many kinds of conflicts, including those of gender, class, and sexuality, among others.

21. GUINIER & TORRES, *supra* note 4, at 11-31.

22. *Id.* at 11.

23. *Id.* at 22-25

24. *Id.* at 72.

25. *See id.* at 67-82.

26. *Id.* at 67-68 (citing Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996)).

27. *Id.* at 68.

traditional admissions standards.[28]

In the Texas 10 Percent Plan, the solutions were ones that changed the landscape, the definitions, and the rules of the game from the bottom up, from common interests across the community reflected in legislative efforts and not from the top down in legal pronouncements. The coalitions formed essentially confirmed Derrick Bell's interest convergence theory.[29]

Professor Torres also discussed racial hierarchies as exhibited by the delineation of jobs in any given slaughterhouse.[30] This sparked some audience discussion about how some labor and employment problems experienced by racial minorities have served as the impetus for labor initiative and change that benefit all workers in a given industry.[31] The consistent thread in these ideas is that meeting the needs of the most subordinated can serve the needs of the greater society.

The ideas presented by Professor Torres are very seductive, but I nonetheless have some cynical reservations. In *The Miner's Canary*, while the authors call for racial group identification—most strongly associated with the black plight, they also acknowledge that the current racial hierarchy and political power are distributed asymmetrically.[32] They focus primarily on creating coalitions of people with common interests beyond race as a means of finding solutions to common problems. By definition, these are people with a need, or otherwise, with something to gain. Thus, common interests can be found in any given situation; the real challenge is in maintaining coalitions across a variety of situations and across time. These coalitions can and do work, as they demonstrated with the Texas 10 Percent Plan and the road to it. However, Professors Guinier and Torres also acknowledge, as Frank Michelman put it: "in a winner-take-all society there is a strong resistance to being on the bottom. People in a position to keep someone beneath them will do so—including other people in their same

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28. *Id.* at 68-71.

29. *See* Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); *see also* GUINIER & TORRES, *supra* note 4, at 36.

30. GUINIER & TORRES, *supra* note 4, at 74-76 (discussing the exposé by Charles LeDuff, *At a Slaughterhouse Some Things Never Die: Who Kills, Who Cuts, Who Bosses Can Depend on Race*, N.Y. TIMES, June 16, 2000, at A1, A24).

31. *See id.* at 77-79.

32. *Id.* at 86.

racial group."[33] It is all well and good to repair fissures within communities of common interest,[34] referred to as "those in the mines," but what about convincing the holders of powers, perhaps known as the "mine owners," whose primary interest, irrespective of common interest with others, is to maintain and increase such power? Though I believe the proposed solutions are workable, perhaps some of the best hope we have, I also understand it will take a lot of work along with a little luck.

> CODA: Before I finished writing this comment I had the pleasure of hearing Professor Lani Guinier speak at the inaugural lecture of the Damon J. Keith collection of African American Legal History at Wayne State University. Thus, I was able to benefit from the personal insights and explanations of both authors of *The Miner's Canary*. These interactions increased my regard for their work and helped me come to the realization that even though we may not be able to convince those at the very tops of the relative power hierarchies to "share power," if everyone else can see their common interests and find new solutions, then those at the top will end up on the margins and perhaps then see a change in their interests. Collaborative efforts could work for a more meaningful and inclusive form of equity and justice. It will just take a lot of work.

Normally, I would write a conclusion at this point, but that seems too final for this Symposium. I prefer to regard this as part of the continuum of hope. My criticisms and cynicisms to the contrary, in addition to many other efforts, it is symposia like this that seriously consider our history and the promise of solutions and renewal that give hope for developing awareness, understanding, and ultimately justice.

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33. *Id.* at 85 (quoting Comments at the Fifth Annual Derrick Bell Lecture, New York University Law School, Nov. 10, 2000).

34. *Id.* at 86