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SYMPOSIUM ON STRATEGIES TO END POVERTY AND INEQUALITY

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Comments of
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ECONOMIC JUSTICE: THOUGHTS ON A TRANSFORMATIVE VISION FOR ECONOMIC AND SOCIAL EQULITY

Shelley, thank you so much for that generous introduction. I should tell you congratulations again on your accreditation. I was president of the Association of American Law Schools, an organization that sometimes does not recognize creativity. Before I became president of the Association of American Law Schools, I was on its executive committee for more than six years, during which time I voted on the accreditation of six sevenths of all American law schools. So, I have seen a lot of law school quality; I have seen a lot of the struggles that emerging law schools have; and I know how proud you must be to be accredited, because I have been on the inside of those accreditation discussions, and they are really quite searching and can be quite difficult for the targets.

My focus for these remarks will be transformative visions. Today the term "transformative" brings to my mind South Africa. I was in Durban this past December at a conference on socioeconomic rights. My presentation there explored the framework for comparing the United States to South Africa. My argument was essentially that we must be modest in making comparisons. When we pick up the text of the South African Constitution and wave it, as progressive Americans, we love to see that there is a right to housing; there is a right to water; and there is a right to health care, among other things, enshrined in that very modern constitution.[1] The much older American Constitution does not have anything like that. For those of us fighting poverty, we think that it would be great if it did. We suffer a constitution envy.

However, I have concluded that we must think more creatively about what we do have and about what Cass Sunstein calls our "constitutive commitments."[2] These commitments are, for example, displayed in what we Americans call the third rail of American politics, which not even a Republican president with a

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1 S. AFR. CONST. 1996.

2 Cass R. Sunstein & Randy E. Barnett, *Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue*, 53 DRAKE L. REV. 205, 215 (Winter 2005).

Republican Congress dare touch.[3] We have a number of commitments under the U.S. qc Constitution that are really quite substantial and are important for supporting socioeconomic rights, and therefore we have to keep that in mind when we are making these comparisons.[4]

Transformative vision, in my mind, would ultimately lead to some constitutional or major statutory change. However, the question in the meantime is: what do we do? The transformation that I dream of is not likely to happen in the near future, considering the current political composition of the legislative, executive and judicial branches.

I have thus focused my efforts. Accordingly, my comments for these remarks will be directed to an area where I could get my hands around something concrete, and where I could do something concrete. One of the things that I recognized as a legal scholar, as someone working at Georgetown University Law Center, is that most of today's American law students are being introduced to economic argument through the law and economics model of rational choice. That model of rational choice is devoid of all understanding of history – how we got to where we are today – and it is devoid of all understanding and empathy for the choices of people who have no choice, and the structures that keep them trapped in low-choice, low-mobility arrangements.

And so, I thought I would tell the story of how I came to write my casebook. I have a new casebook called *Economic Justice: Race, Gender, Identity and Economics*, which was published by Foundation Press at the end of last year. I am not a very good shill for my own products. I did not think of this as a shilling opportunity, and I still do not. So, I do not have a copy of the book to wave, but I wish I did because it looks like a torts casebook. It looks like all of those very traditional casebooks that you have. It is that blue casebook with the little red inset of Foundation Press. That casebook is really a part of my journey, and it is actually a part of an expression of my intellectual anger at the way in which the law and economics movement has taken over American legal education, and how our law students are introduced to economic argument without any reference to the history of racial segregation or how this history affects contemporary economic arrangements. Students today are not, for instance, being given an interdisciplinary portrait of educational opportunity – where 75 percent of children who come from families whose income is in the top quartile go to a four-year college, whereas only eight percent of children coming from families in the bottom quartile go to college. Those are quite important facts, which most law students today graduate without ever directly engaging. They are taught rational choice. They are taught the Coase theorem. They are taught ways of looking at economic real-

3 Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519 (Winter 1992).

4 *Id.* at 530-31.

ity, which do not include problems like the very severe economic maldistribution of resources.

So, I decided that I would put together a set of materials to teach law students about these economic realities. Hence, the economic justice casebook was born. I had some scholars say to me, "Why did you use the term 'economic justice'? That's an activist's term. Why not use something like intergenerational educational mobility?" Well, there were two things about this project that were not an accident. Economic justice was not an accident. I intended to engage with the community outside of the academy that has been pressing over many years for economic redistribution and change.

Second, the other thing that was not an accident about this casebook is its publisher. When I put ten years of work into creating this topic for American law schools, I thought, "what is the most hidebound, conventional, traditional casebook publisher that gives the imprimatur of authority simply by virtue of its decision to publish the work?" Of course, the first one that popped into my mind was Foundation Press. So, when I was ready to publish this casebook, I chose Foundation Press. They were the only ones that I submitted it to; and fortunately for me, they loved it, put a lot of resources into it, and went forward with the publication.

Now, little did I know at the time – in 2004 – that with that commitment to my publication, I would become in 2005 the first African-American lead author of a Foundation casebook in the country. I could sense the inequality. I did not have to look it up. I just closed my eyes, and asked myself which one of these publishers is like a club that is very much closed to the kinds of ideas that I care passionately about. That one popped into my head. I had not done this specific research, but like I said, when you have lived in inequality, you can sense it. So, it was not a surprise when someone later told me, "Congratulations, you are in this group."

I would like to tell you a bit about this casebook because I think it is opening the minds and the hearts of American lawyers. The process of getting involved in litigation, the process of getting involved in legislation, and even if sometime in the future there should be an opportunity for constitutional change, comes through the commitment of lawyers. If the legal education process has not prepared the ground upon which these efforts will fall, then it is very difficult to get the kind of sustained commitment necessary without those particular intellectual tools. It is not just passion. Passion without either conceptual or intellectual framework is still passion. However, if you want transformation and change, you must have both the passion and the framework. You must have the passion, the commitment, the dedication, the devotion, but you also must have those conceptual and intellectual tools.

So, with this casebook, I began with a chapter that asks: how does one prove racial discrimination?[5] There are different visions of how one goes about proving that. I start with a story that Patricia Williams of Columbia University has told very often about going to Benetton's to buy a sweater for her mother.[6] As she approaches the store, she sees that there are other customers in the store making their way buying presents. Note that this is in Soho in New York, and this store uses a buzzer arrangement, which is popular in many parts of the country, where someone in the store makes an on-the-spot decision of whether or not to allow you to enter. As her story unfolds, we learn that she was shopping at Christmastime during the daytime for a sweater for her mother, and she thought that a Benetton sweater would be a good thing to buy for her mother. She approached the store, and as she describes it, "a narrow-eyed, white teenager wearing running shoes and feasting on bubble gum" blew a bubble gum burst in her face on the other side of the glass and mouthed the words, "We're closed."[7]

Well, I think Benetton has come to regret that choice. This story is perhaps the most famous story of critical legal theory in that she not only wrote an article about it, but she also wrote an article about the process of writing the article. Additionally, it serves as an opening part of her book, *The Alchemy of Race and Rights*, in which she explores this question of race and neutrality. The neutrality issue is a part of the first chapter of my economic justice casebook because you can not get to the question of remedy unless you perceive that there is an injury. So, this very question of how do you go about proving economic inequality or exclusion from the marketplace depends upon where you start. The Patricia Williams story is helpful because it embodies the perspective of critical legal theory, which is that you start from the bottom. You look at the perspective of the people who say they have been injured and you credit their reports of injury. That, according to critical legal theorists, is the way to start the perception of the problem of inequality.

Along with her piece I have a lot of material about racial profiling — for instance, the private jails that Macy's was maintaining, and as far as I know is still maintaining for shoplifting. The purpose of these Macy's jails was to hold shoplifters or suspected shoplifters. Note, however, that there is a very high error rate in identifying who is a shoplifter. Nevertheless, they were detaining people under the New York Shopkeeper's Privilege of detention and making good faith mistakes about who was a shoplifter. Students are thus exposed to materials like this, and get information they never may have otherwise known.

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5 EMMA COLEMAN JORDAN & ANGELA P. HARRIS, ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS (CASES AND MATERIALS) 1-2 (2005).

6 PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 44-51 ("The Death of the Profane") (1991).

7 *Id.*

The next step in this progression is developing the idea of how one can value, judge and assess whether or not economic or other racial forms of discrimination have taken place. The piece that fits into this section is one by Richard Posner. Richard Posner, as you know is a judge in of the Seventh Circuit and is the founding father of modern law and economics. Law and economics essentially imports neoclassical Adam Smith economics into law, then applies it to a series of legal problems. Richard Posner wrote a piece savagely attacking Patricia Williams' piece.[8] In his attack, he questions how can we believe what she says. To Posner, this is simply her subjective point of view. We do not know that the "narrow-eyed teenager" had in his head a scenario of racial discrimination. We only have her point of view. We do not know anything about the teenager's reasons. It could have been a bad hair day for him and his reasons may have nothing to do with race at all. More importantly, he essentially says that although this is a wonderful anecdote, as a scientist and an economist, he only deals in facts that can be proven, and without proof that one can offer to a court, it is not so.[9] To Posner, this interesting story is nothing more than a part of the art of the novelist. In other words, Patricia Williams should resign her post at Columbia Law School and go to some literature department. The law demands neutral facts.

Well, those are pretty conventional claims. Of course, that is kind of the way most people think when they are in the mindset of thinking like a lawyer, that you need a neutral perspective. This essay attacking Patricia Williams is beautiful because shortly after making the claim that her piece is simply subjective, not credible, distorted, exaggerated, hyperbolic, literary, not legal, he then goes on to say that after all we have a problem with African-Americans in our country. They are the conveyors of AIDS. They are the ones who are most likely to be incarcerated. They fill our prisons. Moreover, he goes on to make the more invective claims that "drug addiction, homophobia, neglect of children, anti-Semitism, and poor political leadership" are rampant problems in the African American community.[10] So, this a wonderful essay because the teaching material in that essay is superb. The avatar of neutrality, reason, and rationality loses his cool in print, and says, you know, the black people, they are filling up the jails. There is a reason for these buzzers. They have got AIDS. They are attacking Bernard Goetz on the subway, and moreover they are anti-Semitic to boot. So, it is lovely. I can play this very softly because his incongruence speaks so boldly. In the very same essay in which he is criticizing Williams, he goes on a tirade just a few pages later. So, taking advantage of the Socratic method, I asked students: what do you think would be the neutral evidence that Judge Professor Posner has for the proposi-

8 Richard A. Posner, *Nuance, Narrative, and Empathy in Critical Race Theory,* OVERCOMING LAW 368-84 (1995).

9 *Id.*

10 *Id.*

tion that African-Americans are full of AIDS and anti-Semitism, and therefore deserving of being excluded from Benetton's? What do you thing the objective proof of that proposition might be? And they sort of scratch their heads, and eventually some student says, "I just think he lost it." And you go, "Aha." That's what you're looking for. That's an "Aha!" moment.

So, we used that learning opportunity as a stepping stone to ask: what do we credit when we are trying to find evidence of racial discrimination? Do you automatically discredit the voice of someone who says they felt discriminated against? Or do you look for the objective evidence that might come from someone who is in this position of authority, like a Seventh Circuit Judge?

So, that is the way we begin the process. It is a wonderful beginning because it challenges the very foundation of what students know. I teach first year students with this material. I teach second and third year students as well. But with the first year students especially, what I am working to do is to undo much of what they have learned in the first year of law school. For instance, they have learned that Justice Cardozo was writing from a position of neutrality when writing *Palsgraf*, and that *Palsgraf* is an opinion that is venerated. It is taught. You can not be a lawyer if you have not been taught *Palsgraf*.

We also talk about the way in which judges manipulate facts. In that vein, I introduced them to Professor Noonan. Actually, it is Judge Noonan's book, *Persons and Masks of the Law*, which is a legal history of the *Palsgraf* case, that makes it very clear that Cardozo was novelizing.[11] Cardozo belonged in the literary department in writing that opinion, because the facts could not have possibly happened the way he described it.[12] Think about it. A firecracker held under a piece of newspaper, under someone's arm, creates a concussion that does not destroy the arm; but it causes a blast that dislodges a scale that falls on Ms. Palsgraf some distance away. Well, it did not make sense to me in law school, and it still does not make sense today. *Persons and Masks of the Law* is a legal historian's report of why that is simply not what happened, but rather was the characterization of the facts that Justice Cardozo needed in order to set up the framework for limited duty.

When I decided that I wanted to be committed to this project of economic justice in the academy, to teaching it, to creating a field that did not exist before, I knew that I would have to the heart of the beast. For me, that was law and economics and its major premises. First, is the idea of rational choice — that everything people do is governed by rational choice, that we are all rational actors, and that this is true whether you are discriminating or not.[13] Second, is the premise

11 John T. Noonan, Jr., PERSONS AND MASKS OF THE LAW (1976).

12 W. H. Manz, *Palsgraf, Cardozo's Urban Legend?* 107 DICK. L. REV. 785, 818 (Spring 2003).

13 Richard A. Posner, *The Law and Economics Movement*, 77 AM. ECON. REV. PAPERS & PROC. 1, 5 (1987).

that the purpose of the law is to advance efficiency, not justice.[14] And third, is the notion that the law is designed to advance wealth maximization.[15]

Those are the core tenets of the influential school of thought known as law and economics. Today in an elite law school, you cannot take property, torts, or even criminal law without being introduced to these premises, which in my mind, are virtually antithetical to justice because they are ahistorical. They ask no questions about how people got to the position that they are in, and ignore the fact that the way in which you participate in the market is through money. And if you do not have any, then oh well. The way in which you vote or express your preference is with price, and if through historic forces you have no assets to participate in the market, the theory simply does not work. The neoclassical economists or faux economists – lawyers who play economists on television – say explicitly, "We are not concerned." Faux economists, and I include myself in this group, have been very influential in the academy. Thus, I bring in the work of Thomas Shapiro, *The Hidden Cost of Being African American*, showing the differences in wealth and asset classes.[16] I also look at identity-based differences: the way in which one's language, hairstyle, sexual orientation, gender, and other variables have a price in the market.[17] When these variables differ from the norm, they are usually given a negative price in the market.[18]

At the end of the intersection of all of these variables, is it any wonder that the rational choice will produce locked-in perpetuation of historic discrimination over time?

That proposition is the proposition that I believe we must undo; but first it has to be perceived as structurally, conceptually flawed, because without that, you are just rearranging the chairs on the deck of the Titanic. And at this late age in my career, I decided to forego that project, no rearranging the chairs on the deck of the Titanic, I said. We must be more creative to help young lawyers understand that what is a fact begins with listening to your client. Thank you.

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14 *Id.*

15 *Id.*

16 THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN 183-200 (2004).

17 Jordan & Harris, *supra* note 5, at 799-917.

18 *Id.*