

JUSTICE
AT
WAR

civil liberties

and

civil rights

during times

of crisis

RICHARD
DELGADO

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*Civil Liberties and Civil Rights
during Times of Crisis*

Foreword by Jennifer L. Hochschild



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**The struggle of man against power is the struggle of
memory against forgetting.**

—Milan Kundera

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Thanks, above all, to Derrick Bell for his permission to borrow Geneva's persona and to develop her family tree a little further, as I have done.

Foreword

Jennifer L. Hochschild, Harvard University

FEW SCHOLARS write with not only incisive analysis but also grace and wit, and even fewer can thread a tender love story through that analysis. But Richard Delgado has done all of those things in *Justice at War*, producing a book that is simultaneously charming, thought-provoking, maddening, and deeply important. I disagree with some of what he says but find his basic argument compelling and powerful. That is in keeping, in my view, with the very great virtues and occasional problems of the whole movement of critical race studies, of which Delgado is a leading light.

As Delgado points out, too many scholars, even on the “left,” have retreated from attention to disparities of economic class, racial hierarchy, and political power in favor of a focus on the meanings and implications of words and symbols. Several years ago, when I asked one of my all-time favorite students (an African American) what he and his companions sought as a result of a sit-in in the university president’s office, he responded, “to change the terms of the discourse.” Delgado would have been as dismayed as I was, and for the same reasons—the deep injustices of the world call for something less self-referential than deconstructing meaning and language. Injustices call for anger, hard-headed coalitions, redistribution of resources across groups and national boundaries and, above all, commitment to reconfigure political and economic structures that reinforce subordinations of race or class.

Critical race theorists such as Derrick Bell, Kimberlé Crenshaw, and Richard Delgado have done a great deal to trim the excesses of scholars’ move from things to symbols, from materialism to idealism, from a

focus on power to a focus on discourse. More than that, they have contributed powerful insights of wide import. Bell's insistence that African Americans only gain status or resources when it is in the interests of Anglo Americans to allow them to do so is in some sense self-evident—what group in power at any point in world history has ever voluntarily relinquished its standing in favor of the scorned underdogs? But Bell's argument is no less significant for that, since it gives us analytic tools for understanding when change does and does not occur, and impels us to look beyond surface rhetoric and celebratory narratives to understand people's motivations and fears. Crenshaw's and Patricia Williams' insistence that the leverage granted by liberal rights matters to a group of people who have never had the luxury of being in a position to scorn them has been similarly salutary in its chastening of white liberals.

Critical race theorists also play a valuable role in insisting that, despite unremitting exercises of domination by the winners, the losers can and should continue to believe in and fight for their due. Derrick Bell's recent books end on uplifting, even inspirational notes; his successors are sometimes harder-edged but they too struggle to maintain optimism and even faith. We see that mix in *Justice at War*. Delgado's own critical outlook occasionally leads him, in my view, into being excessively Hobbesian in his analysis of the United States—as he puts it, “all of law is a war zone, just as all social life is”—and insufficiently Hobbesian in his analysis of international conflict. How can a Hobbesian, or a critical race theorist, for that matter, believe that “the easiest way to see to our collective security is simply [for nations] to make friends with each other”? This sounds excessively optimistic coming from a proponent of Derrick Bell's interest convergence theory. But, it does suggest the importance that Delgado places on not simply being a nay-sayer, not simply falling back into the luxury of complete cynicism.

We have other disagreements. Critical race theorists are rightly suspicious of formal legal principles which mostly, somehow, end up resolving political and legal disputes in favor of society's winners. But their solution to this problem—to rely on “our basic values and commitments” in Delgado's terms—seems rather like a distinction without a difference. Wouldn't it be the case that, for people with Delgado's and my sympathies, relying on our basic values and commitments would lead us to resolve political and legal disputes mostly in favor of society's losers? That, in fact, is the point of his claim. Such a move would produce better substantive outcomes, but not more defensible ones

than legal formalism does from a philosophical perspective. So why not just argue over the content of the rules and values to be used for resolving disputes, rather than trying to argue that formal principles are biased but that applying basic values to particular circumstances would not be?

These disputes, however, mainly add spice and variety to my chief reaction to *Justice at War*, which is admiration for Delgado's combination of deep commitment and high analytic sophistication. His argument that universities should discount run-of-the-mill achievements of privileged applicants while searching for unusual promise among disadvantaged applicants seems exactly right; if implemented, it would help move the egalitarian aspirations of our educational system closer to reality. His caution against overbroad principles for redress of unfair treatment, on the grounds that they are as likely to be used against welfare mothers as against gun manufacturers, is also right; that discussion nicely demonstrates how to probe one's own preferred argument for hidden flaws and predictable unintended consequences.

Perhaps most impressive is Delgado's analysis of the moral, political and analytic dangers of black exceptionalism and the black-white binary. While always recognizing that African Americans have a different and perhaps even more severe history of racial subordination than do most other groups, he insists correctly that that difference does not necessarily imply a stronger claim on justice. What to do next is the painfully difficult issue. In my view, although perhaps not in his, we can best get past the moral morass of competing claims of injustice by focusing on empirical trajectories. On balance, can the children and grandchildren of immigrants improve the conditions of their lives and their standing in society? If so, a nation that treated the immigrants themselves unjustly owes less in recompense to their descendants than if those descendants remain stuck on the bottom of economic, social, and political hierarchies. I draw stronger inferences, in short, than Delgado does from the phenomenal upward mobility of most Asian Americans and the lesser but still considerable incorporation of many second- and later-generation Hispanic Americans. That makes me still a partly-unreconstructed black exceptionalist—but it may also make me more of a thorough-going class analyst.

Nevertheless, Delgado's willingness to address this barbed subject, his incisive observations about the difficulties of building essential coalitions across groups (would he include WASP miners from eastern

Kentucky in his biracial coalitions?), his urgent moral claims on behalf of the array of peoples harmed so that others may benefit—all of this is compelling and powerful. *Justice at War* moves and teaches its readers while it entertains and provokes them; if more books were like this one, it would be easier to believe that “ye shall know the truth and the truth shall set ye free.”

JUSTICE AT WAR.

Introduction

WHO IS RODRIGO? What about his mentor and straight man, “the Professor”? And, what are law professors doing writing stories, anyway?

The reader curious about these matters will find answers to most of them in the dialogs themselves. Written simply and with as little jargon as possible, they are intended to be accessible and engaging to the general reader interested in critical race theory, politics, and American public life. But for the reader who wishes a little reassurance in this respect, or just a bit of background before diving into this book, here is a brief overview of where we will be going over the course of the next two hundred pages and about eighteen months of my characters’ lives.

Rodrigo Crenshaw, my brash, gifted alter ego, is a young Italian-educated man of color in the early stages of a law teaching career. When I first introduce him to an American audience, Rodrigo has just returned to his homeland at the recommendation of his half-sister, famed civil rights lawyer Geneva Crenshaw, to seek out “the Professor.” The son of an African American serviceman and an Italian mother, Rodrigo is born in the United States but raised in Italy when his father, Lorenzo, is assigned to an outpost there. Rodrigo graduates from the base high school, then attends an Italian university and law school (“the oldest one in the world, Professor”) on government scholarships, graduating second in his class.

Rodrigo seeks advice from the narrator, a grizzled veteran of many civil rights struggles and in the final years of his teaching career. The young man is thinking of returning to the United States and enrolling in an LL.M. (graduate law) program in preparation for a law teaching career of his own. Despite their age difference, the two become good friends, discussing standardized testing, the U.S. racial scene, love, empathy, the economics of race and discrimination, human cloning, and

many other topics over the course of the next few years. The reader learns about Giannina, Rodrigo's great love, and follows his career as he progresses through his coursework and first teaching position. The reader also meets Laz Kowalsky ("Laz"), Rodrigo's best friend on the faculty, a young conservative who is as far to the right politically as Rodrigo is to the left, but just as audacious and brilliant.

In this book, the reader learns what two intellectuals of color think about, what worries them, and what gives them joy. He or she learns what race and racism seem like from the perspective of two characters who, despite high occupational status, are nevertheless frequently caught in discrimination's grasp. He or she follows one of them as he falls, to his great surprise, madly in love. The two discuss issues in the news—globalism, international terrorism, and the current wave of conservatism that is sweeping the land. But they also discuss ones the average reader might not have thought about, at least not in quite the same way—formalism and lawyers' discontents, hate speech, and the black-white binary paradigm of race. They discuss interracial attraction and whether a minority person who marries a Caucasian is guilty of bad politics. They ponder the recent spate of books that deal with the racial IQ gap. Are minorities less smart than whites? What is the role of law in the construction of human intelligence? Why are most American whites prosperous and minorities poor? Is the explanation genetic? Cultural? Why do the wider vistas opened by the civil rights revolution not lead to greater upward mobility for blacks and Latinos? Does a form of cultural DNA cause social relations to replicate themselves, generation after generation, and if so, what is the mechanism of that replication? Does the left bear any responsibility for the current dreary racial scene?

Like its predecessors, the current volume is an example of legal storytelling, a genre of scholarship pioneered by critical race theorists Derrick Bell, Patricia Williams, and myself. With this volume, I expand that approach to subjects other than race. As the reader will see, the interplay of different voices and viewpoints allows for the probing exploration of complex issues while avoiding the dry-as-dust quality that afflicts much legal writing.

I hope the reader finds Rodrigo as engaging as I did as author. He came into my life at a time when I was in transition, just as American law—indeed Western civilization generally—is today. In reflecting on these currents, it occurred to me that Geneva Crenshaw must have a brother, that he must be part black, part Latino, and that he would have

much to say about the many matters that trouble me and my countrymen.

Writing in a fever, I produced Rodrigo's First Chronicle in just a few weeks, added footnotes with the help of a computer-savvy research assistant, and sent him off to *Yale Law Journal* where a talented editor, James Forman, Jr. (whose famous father plays a small role in this book) pushed me to flesh him out even more. Then when he was satisfied I had done all I could, he edited him, brushed him up, and made him shine.

The eleven chapters in this book tell a story, with characters, adventures, and an unfolding plot. Accordingly, the best way to read it may be sequentially. But for the reader interested primarily in certain subjects—or pressed for time—Part I, and especially chapters 3 through 5, deal with a single theme: the role of conflict in American life and law. Part II deals with the current U.S. political scene, especially the role of progressive legal movements. Taking as my premise that these movements are today in disarray, chapters 7 through 11 discuss why that is so and what should be done about it. Chapter 6 is a love story.

Chapters 1, 4, and 6 through 9 are the most legal; 1, 2, 6, and 11 deal with race and racial politics. Chapters 1 and 3 supply the best insights into my principal character, Rodrigo; 2 and 6, into the narrator, "the Professor." My women characters, Giannina and Teresa, play central roles in chapters 1, 3 through 7, 9, and 11.

A final word: All the characters in this book are fictional, including the narrator. As I have drawn him, the Professor is a man of color teaching at a major law school in a city not far from Rodrigo's, and in the late stages of his career. Like his young protégé, the Professor is a civil rights scholar and activist, but, unlike Rodrigo, has suffered scars and disappointments during years in the trenches. He is as much in need of Rodrigo's impetuous energy as Rodrigo is of his caution and counsel.

As the volume opens, the Professor has taken time out from his books and students to tend to one of the necessary minutiae of life—grocery shopping. If you were there, you would see a dignified but ordinary-looking black man of advanced years wheeling his cart down the aisles of the supermarket while peering intently at some item on the shelf. Listen in, now, as he experiences one of those chance encounters—has this ever happened to you?—that set in motion a series of events that will change his life, in some ways for the better, in others not.