Foundations in Pluralism: An Opportunity for Dialogue

Dale Segrest

President Bill Clinton recently called for a greater dialogue about the problems of racism. His call underscores the reality that the problems associated with racial division have not been ended by the efforts of civil rights-era legislation and court decisions. The president makes a very valid point in his call for dialogue. However, finding ways to engage in meaningful discussion is not as easy as one might think. Often, attempts to discuss racial division simply become the opportunities for venting race-based feelings. The problems associated with racial division are charged with emotion. Persons who attend meetings that are called for the express purpose of discussing racial attitudes often leave the meeting more entrenched than ever in their deeply held feelings.

The judicial branch of government is not immune to the problems associated with racial division. Despite the fact that judges are trained to deal fairly with all races and strive diligently to overcome the impact of society's racial division, there is still great danger that racial division makes itself felt in our work. We deal daily with *Batson* motions to try to ward off the results of racial division in the selection of jurors and in the ultimate decisions of juries. Nevertheless, there is the haunting specter of the results of the O.J. Simpson trials. We can easily rationalize the acquittal in the criminal case with the liability in the civil case, based on the differing burdens of proof. Nevertheless, in our heart of hearts, we ask ourselves whether the rational explanation of differences in burden of proof caused the difference in results or whether the difference was really the racial make-up of the juries or other factors not related to legal theory, such as the performance of lawyers. Even more significant evidence of the racial division in our society is presented by the public's perception of the verdict in the criminal prosecution of O.J. Simpson. Despite the fact that all members of the public had heard and seen precisely the same media information concerning the trial, the public divided along racial lines in its reaction to the verdict.

Hon. Dale Segrest is circuit judge, Fifth Judi- ---- Circuit, Tallapoosa County, Alabama.

Clearly, the need for meaningful educational ventures and forums that will deal effectively with the problem of racial division is very great. The president's call for dialogue is justified and timely. But how can we structure meaningful discussions? How can we structure discussions so that they will actually cause us to change our attitudes about race and racial division? Many judges in Alabama believe that the *Foundations in Pluralism* project offers an excellent opportunity to deal with these problems. We feel that *Foundations in Pluralism* is an approach that makes meaningful discussions possible.

What is the *Foundations in Pluralism* project? In October 1995, a group of twenty Alabama judges gathered on the campus of Tuskegee University. The approach of the group was simple. The judges read *Up from Slavery*, by Booker T. Washington, *The Souls of Black Folk*, by W.E.B. Du Bois, *Barn Burning*, by William Faulkner, and *Sonny's Blues*, by James Baldwin. The educational method was primarily discussion. In a three-day event, a group mixed by race and gender, under the leadership of experienced faculty members, engaged in detailed discussion of these literary and historical works.

In November 1996, thirty Alabama judges again convened at Tuskegee for a second three-day event in the *Foundations in Pluralism* series. Some of them had attended the first event in 1995. This time the judges read *The Autobiography of Malcolm X* and selections from *A Testament of Hope*, which is a collection of the writings of Dr. Martin Luther King, Jr.

Enrollment in these programs was limited so that every judge who attended could fully participate in the discussions. The absence of recording devices minimized the risk that anyone would be either hesitant to participate or overzealous in participation.

There were four faculty members. Three of them, Dr. Carl Marbury, Dr. Frank Toland, and Dr. Mark Graney, are faculty members at Tuskegee University. The fourth, Mrs. Kathleen Cleaver, is a professor of law at Cardozo School of Law in New York. All faculty members have had substantial experience in teaching black studies. Tuskegee University is one of the premiere historically black universities.

So, what is important about the *Foundations in Pluralism* project? How does its approach differ from other attempts to discuss the problems associated with racial division? This approach invites the participating judges to consider and discuss specific texts and historical events, rather than attempting to pinpoint issues. The issues naturally emerge from the discussions, but the text approach depersonalizes the discussions so that there is far less danger of finger pointing and name calling. The discussion of historical events and literary texts provides an important, impersonal context for racial issues.

The material lends itself well to a discussion of jurisprudence. Equally important, judges are given valuable, specific information related to black history and black literature. Black history and literature adds a new dimension to our understanding of the problems of racial division as they effect the operation of the judiciary.

Perhaps a discussion or suggestion of a few specific issues that arise from the material will illustrate the point. In 1895, Booker T. Washington made a famous speech at the Cotton States Exposition in Atlanta, Georgia. The speech was well received initially, by both whites and blacks. With the passage of time, however, the speech became to be labeled the "Atlanta Compromise," and a significant portion of the black community came to feel that Washington had compromised their basic human rights. Washington's speech at the Cotton States Exposition was probably the first significant speech in the South by an African-American to a predominantly white audience. In it, Washington asserted that "in all things that are purely social, we can be as separate as the fingers, yet one as the hand in all things essential to mutual progress." Considered separate and apart from subsequent legal events, the speech is an absolutely masterful description of pluralism.

However, the speech cannot be separated from its historical context. The following year, the United States Supreme Court decided the now-infamous case of *Plesy v. Ferguson*. Did Washington's Atlanta Exposition speech set the stage for *Plesy v. Ferguson*? There is an arguable consistency between the speech and the decision. However, it would be passing strange if, in fact, the speech of a black man in 1895 had anything to do with a United States Supreme Court decision. If it did, then certainly the importance of studies such as *Foundations in Pluralism* needs no further proof. If the speech did not cause the decision and the flood of segregation laws than ensued, then Booker T. Washington has been misjudged. Separated from subsequent legal events, the Atlanta Exposition Speech is a beautiful description of the inherent worth of all persons, regardless of race.

W.E.B. Du Bois initially was pleased with Washington's Atlanta Exposition Speech; but in the light of subsequent history and legal events, he became critical of Washington and the speech. Washington espoused a viewpoint that the way for African-Americans to fully participate in the American Dream was by establishing their economic worth and by shouldering responsibility. Du Bois, on the contrary, insisted that blacks must first be granted their God-given rights and recognition as human beings. He insisted that such acceptance and recognition were the prerequisites for full participation by African-Americans in the American Dream.

In 1910, Du Bois was instrumental in establishing the National Association for the Advancement of Colored People (NAACP). In the course of the twentieth century, the NAACP became the articulate voice of the black community and its aspirations. The Du Bois philosophy has predominated in the twentieth century. That philosophy has become the foundation of monumental works in the law such the *Brown* school desegregation case decided in 1954 that overturned the separate-but-equal philosophy of *Plesy v. Ferguson*. The Du Bois philosophy also undergirded the major civil rights legislation and the Voting Rights Act that were passed during the 1960s.

Obviously, judges can profit greatly by studying the seminal works of these two great thinkers. Washington and Du Bois are not merely interesting figures relegated to a place in a specialty study of black history. Their thinking is deeply involved in the foundations of the most significant legal events of the twentieth century. Understanding their contributions is an important task for judges.

The more recent impact on the legal system by Dr. Martin Luther King, Jr., and Malcolm X does not require nearly as much explanation. Only extreme cultural illiteracy could cause anyone to be unaware of the impact of civil rights leaders on the edifice of law during the Civil

Rights era. To understand that there were Civil Rights leaders and that their efforts resulted in changes in the law, however, is not sufficient. A more in-depth knowledge of the thinking of these leaders is required if judges are to understand the philosophical underpinnings of the very system of law that they serve. The following sample questions demonstrate the usefulness of these materials for jurisprudential discussions.

1. Dr. King's letter from the Birmingham jail is an eloquent appeal to natural law. Do law and rights exist independently of humanly created institutions? Obviously an understanding of the nature of rights is essential to any understanding of the civil rights that Du Bois and King advocated.
2. Both Dr. King and Malcolm X spent time in jail. What can we learn about incarceration from their experience? What advantage, if any, did each obtain from incarceration? What, if anything, does their experience tell us about the usefulness of incarceration in combating crime?
3. Both Malcolm X and Dr. King were religious leaders. What was the effect of their religious views on their views about social policy. How important was religion to the work of these two individuals?
4. Dr. King received an earned doctorate degree. He was well educated in the classics and philosophy. Although Malcolm X dropped out of school at the eighth grade, he read extensively while in prison, and his reading included philosophy. What was the impact of education and reading on each? Did Dr. King find in philosophy a "received truth"? Did Malcolm X?
5. While Dr. King promoted integration, Malcolm X was critical of integration. Do their viewpoints represent an ever-present dichotomy? Is there any way to escape the tendency for one of these viewpoints to draw out the other? Does assimilation have drawbacks?

It is not necessary to discuss these questions further here to demonstrate the importance of the *Foundations in Pluralism* approach. Judges can learn a great deal about the cultural background of our legal system by studying these materials. More important, we can learn of things that are missing from the cultural background of the legal system. The issues of racial division emerge naturally from the discussion of the materials. As indicated previously, the advantage to this approach is that it is impersonal. Judges are not placed on the defensive. Judges are not invited to adopt a particular viewpoint, and they are not invited to defend a particular viewpoint. They are simply asked to consider the viewpoints of significant persons who have impacted on the legal system during the twentieth century.

The choice of Tuskegee University as the setting for the *Foundations in Pluralism* event is important. Tuskegee was founded by Booker T. Washington in 1881. It is one of the foremost historically black educational institutions in this country. For a racially mixed group of judges from the State of Alabama to read the writings of black authors and to meet together and discuss those writings on the campus of a historically black university if significant. Participation in that setting involves a commitment to openness that is likely to engender trust in the black community. More important, it is likely to lead the judges into a greater degree of understanding of racial division. The meeting took place at the Kellogg Conference Center, a state-of-the-art facility that includes a first-class hotel. A key ingredient for the success of this type of program is that judges put aside the day-to-day responsibilities of judging. A relaxed atmosphere in which meaningful dialogue can occur is important to the success of the event. Educators attempting to plan such an event should exercise care to choose exactly the right setting, the right facilitators, and the right material. Historically black institutions can make a tremendously important contribution in this entire endeavor.

Will the *Foundations in Pluralism* approach actually strengthen the ability of judges to deal with a the problem of racial division? We submit that it can. Many judges will not agree with the arguments presented by Malcolm X in his autobiography. However, by reading it, white judges are likely to become more empathetic and understanding of Malcolm X's deep distrust of the legal system. White judges may also realize that Malcolm X's distrust of the legal system is shared in many segments of the black community. And the distrust in not without reason. African-Americans are not Africans—they are Americans. There is a 400 year history of blacks in America. The heritage of slavery and segregation, both fully supported by the legal system, does little to inspire confidence in the legal system among African-Americans.

Sociologically and anthropologically, the heritage of slavery and segregation has left its mark on the structure of society. The attitudes that were produced by the institutions of slavery and segregation have an enduring quality, not only in the white community, which is often accused of being racist, but also in the black community. Unprotected

by the established legal system, African-Americans under the domination of slavery and segregation responded with solidarity and self-help systems of conflict resolution. The black community is understandably reluctant to give up its solidarity and its self-help approach to conflict resolution.

However, the self-help system is instrumental in producing black-on-black crime. It is instrumental in placing a disproportionate number of blacks into the prisons and jails of this country. Much of the black literature of the twentieth century is protest literature. Little is said in that literature that places the judiciary of this country in a favorable light. When the entire background of slavery and segregation is considered, the reasons for the protest literature were crystal clear. In fact, it is difficult to imagine any other literature emerging during the twentieth century. Nevertheless, the protest literature presents a dilemma: if W.E.B. DuBois's "talented tenth"—the educated African-Americans who write and speak for their race—have no confidence in the American legal system, then how can we expect the unemployed and poorly educated African-Americans who gather around a barrel with a fire in it on some dingy street corner to have confidence that the legal system can resolve their disputes? Just because we in the judiciary think that we provide rational solutions to conflicts does not mean that our African-American brothers and sisters will automatically "buy in" to our methods.

The immediate objective of *Foundations in Pluralism* is to acquaint judges with significant writings for edification, enjoyment, and understanding. The concept grows out of the law and literature genre. Law and literature seminars relate the work of judges to the larger context of the culture. Values on which culture are established are embedded in great literature.

Beyond the immediate enjoyment of the program, there are important long-term educational objectives. The American people are keenly aware that racial beliefs and racial tensions affect the delivery of justice. But to understand that a problem exists is not to solve it. Judges and others have much difficulty devising strategies to cope with the conflicts that result form racial beliefs and tensions. Judges, like others, are often aware of the racial biases of others, but totally unaware of their own biases. Judges, like others, have difficulty comprehending that each of us has in inevitable and indispensable frame of reference—body of experience or background—that affects the formation of judgments. Often, groups to which we belong influence our perceptions. Our groups frequently consist of other persons with backgrounds and experiences similar to our own. Biases of which we are totally unaware are shared and supported by the groups of which we are a part. Legal realist Jerome Frank pointed out that judges are not immune from the influence of their backgrounds. Judgment is the product of personal experience and education. Experience and beliefs—often shaped by groups—are reflected in judgments and decisions.

Like religion and other powerful cultural forces, racial and ethnic background leave their imprimatur on the human psyche. Awareness of such differences has been intensified by media events such as the O.J. Simpson trials and the various cases arising from the Rodney King incident. These high profile media events have not only intensified our awareness of the *existence* of differing attitudes based on racial identity; they have made us uncomfortably aware of the *illusive reality* of the abstractions that form the foundation of the justice system. Abstractions such as justice, good, truth, evil—and even law itself—are the products of *consensus reality*. They exist because of widespread belief and acceptance.

In this postmodern world, we are increasingly aware of a lack of consensus. If persons from different backgrounds and groups look at the same empirical facts that evidence conflict, and the same possible remedies, but disagree as to which remedy is just, the consensus about the nature of justice disappears. The O.J. Simpson trials and the Rodney King trials cause thoughtful persons to wonder where we get our abstractions of justice and injustice of right and wrong, of good and evil. These abstractions do no leap full grown from events themselves. We add some of the content of the abstractions in the process of interpretation.

Where are the notions about law and justice that seem indispensable to a justice system—and to civilization—stored and preserved? The idea underlying *Foundations in Pluralism* is that history and literature are important storage places for these critical abstractions. History and literature embody our collective experience, forming the substrata for our interpretation of current events. Pluralism—the existence of groups with differing opinions about justice—challenges the ability of the entire society to arrive at a consensus on core values.

Legal philosopher Ronald Dworkin coined the phrase "interpretive community" to describe the aggregate community of lawyers, judges, and legal scholars who collectively main-

continued on page 46

tain beliefs and skills that enable them to discern the meaning of legal texts. *Foundations in Pluralism* recognizes pluralism's challenge to the viability to accepted meanings in the traditional "interpretive community." Each cultural group interjects its distinctive group values, interpretations of events, and descriptive language into its members. Law's interpretive community then has difficulty accurately discerning meanings that apply with equal force in all groups. Hence the importance of the study of authentic sources of the ideas and meanings posited by and within differing racial groups. Even when historical events have faded into the remote past, affective results remain and are transmitted from generation to generation because individuals internalize attitudes of the group.

Throughout the United States, the judiciary is confronted with very practical problems that arise from the powerful forces produced by racial attitudes and opinions. For instance, the percentage of blacks convicted of crimes and sentenced to incarceration far exceeds the percentage of blacks in the general population. Blacks often assert that such disproportionateness clearly evidences racial bias within the justice system. Whites respond that blacks commit a disproportionate share of crime. Neither group concedes that its explanation is possibly consistent with that offered by the other group. Neither group considers other, more complex explanations: the lack of acceptance of the historically white justice system in the black community might cause blacks to resort to self-help remedies, which in turn create problems with the law. *Foundations in Pluralism* encourages this kind of critical thinking.

Law's interpretive community clearly needs a stronger grasp of the pluralism from which racial issues arise. *Foundations in Pluralism* approaches the educational task with an appropriate combination of daring and subtlety. It tackles the issues at multiple levels of consciousness, and achieves emotional acceptance and harmony at the same time that it imparts valuable specific knowledge.

The challenge of the twenty-first century is twofold. First, we must make certain that the judicial system is trustworthy. Second, we must find ways to encourage the African-American community to place their trust in the efforts of the judiciary. Judges are in a pivotal position to make a difference in the way the public views the legal system. The *Foundations in Pluralism* project is a viable means for judges themselves to become aware of racial differences and to become aware of the sources of racial differences. Only as we become aware of the sources of racial differences can we devise strategies to disarm the harmful effects of those differences while affirming the positive aspects of our cultural differences. Those differences lie deep in the heart of the culture, and can best be understood by careful consideration of history and literature. The hope for reconciliation lies in a clear understanding of the culturally posited differences. ☑

eignty'," under which the States retained "a residuary and inviolable sovereignty." The Framers explicitly designed a Constitution that authorized Congress to regulate individuals, not states, asserted Scalia, and by attempting the former, the Brady Act violated "one of the Constitution's structural protections of liberty."

Conclusion

During the 1996-1997 term, the Supreme Court persisted in its effort to reverse the legacy of the Warren Court in the field of constitutional criminal procedure. The past year was marked by the continued erosion of the Fourth Amendment's protection against unreasonable searches and seizures. The Court produced several decisions balanced heavily in favor of law enforcement on issues concerning criminal due process, sentencing, and habeas corpus. Outside the field of constitutional criminal procedure, the Court reopened the age-old debate over the appropriate structure of our nation's federal system, while taking the opportunity to engage in debate over more contemporary issues, such as the scope of presidential immunity and validity of state efforts to prohibit physician-assisted suicide. ☑