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ADDRESS

THE SHADING OF AMERICA: KEYNOTE ADDRESS BEFORE THE 1995 NATIONAL CONFERENCE OF LAW REVIEWS

ANTONIA HERNÁNDEZ*

Good evening everyone. When Barbara¹ introduced me and said when she became President of the United States I would sit on the Supreme Court, I said to myself, “Well, there goes my chances.”

I arrived in San Antonio yesterday, and today I came out to catch a little sunshine and also to begin to put my thoughts together. I saw many of you out there by the pool, and I thought about where I was twenty-four or twenty-five years ago. As I was looking at the books many of you were reading—you know, the navy blue books and the red books—I kept thinking, “That looks like a Contracts book,” or, “That looks like a Constitutional Law book.” It brought back some memories of my time in law school.

On a serious note, I want to share some thoughts with you. Some of what I am going to say is not going to sit well, but my philosophy about speaking is not to bore you to death. I would rather have you listen and disagree than to go to sleep on me. I hope that what I have to say will engage you in thought and perception.

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1. Barbara Bader Aldave, Dean of the St. Mary's University School of Law.

One of the first things I would like to say, based upon what I see here tonight, is that there are reassuring signs. I see a lot of women. Let me tell you, when I entered law school in 1971, we were indeed the rare breed, so progress has been made. I see a couple of people of color, and that is also reassuring. When I was in law school, that was not the norm.

I have always been very proud of being a lawyer because, to me, law is the vehicle, the tool to make change in a peaceful manner. For the last twenty-five years, that is what I have been trying to do. I find it particularly reassuring to tell you that, in the twenty-something years I have been practicing law, I can say this to you sincerely: I have loved every bit of it. I have enjoyed the practice of law just as I enjoyed law school. People really think I am kidding when I tell them that I loved my third year of law school. I loved it because I had a great time and because I saw the law for what it was. No, I did not strive to join the law review. I have some regrets about that, but I was too busy. I was a teacher putting myself through law school teaching English as a second language. Yet, I loved my third year because it gave me a sense of the real world and of why I wanted to be a lawyer.

I was also very involved in law school. Before my speech, Dean Aldave (I call her Barbara) and I were thinking of my dean at UCLA, Maurie Schwartz. If you talked to him, he would say I gave him quite a few headaches. But as I recall, I always tried to do things within the frame of the law, within the system. Even today, I shake it, I bend it and I try it and make it live up to what it is supposed to be. That is the ultimate compliment you can give to our democracy and our system of law.

The last two days, you have gone about the business of making sure that those law reviews get published. You have also considered how technology has impacted your business, how to manage a law review, how to solicit articles, and yesterday you had a very interesting presentation dealing with the death penalty. I want to bring you back to the real world. I want to talk to you about issues that are straining the moral fiber of our society. You will ask, "What does that have to do with me, the cream of the crop, the legal beagle of the future?" I will tell you that it has a great deal to do with your future because, if we do not resolve these issues, you will not be able to enjoy the privileges that society offers you.

I will talk about three interrelated issues: (1) the state of the legal profession such as it is; (2) immigration and the issue of race in America; and (3) discrimination and the “boogie word” affirmative action. I will try to tell you how I see those three issues because I think that the state of the legal profession today has a lot to do with how we resolve the other two issues and many others.

Ours is a country of law and a country that prides itself upon having remedies and vehicles for resolving problems. It is not functioning too well today. To take a little break here, Barbara told you that I am this crazy radical. Well, I am going to disappoint you, because if nothing else, I am a contradiction. To give you a sense of the contradiction in this radical speaking to you, I am the President of MALDEF, but I also serve on the Federal Reserve Board. I am a lawyer, but I am also the chair of the Latino Museum of Art and Culture. We lawyers can be cultural too. I also sit on some private corporate boards. The issue of immigration is not a Democratic or a Republican issue. There is the MALDEF perspective and the rest of the world’s perspective. Neither MALDEF nor my community can be defined or categorized. Yes, Ted Kennedy was my boss, but I also count Senator Simpson as my friend. We have the greatest debates about our diverse perspectives, but reasonable people disagree.

About the state of the legal profession: I sit on an ABA commission that looks at the legal profession and how we as lawyers are perceived. You will be coming into the legal profession in the worst of times and in the best of times. I am afraid to tell you that we lawyers are not highly respected. We are not seen as those who behold and uphold the law. We are seen as hired guns—self-interested litigators who will pursue a cause for the highest bidder. These are not Antonia’s words. They come from the results of a poll commissioned by the ABA and undertaken by a very respectable national pollster.²

The poll also says that those who know us best like us least. The poll indicated that those who have had recent encounters with lawyers and those who can afford lawyers have a more negative perspective about us. Those who do not have access to our services—

2. See Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 63 (describing results of comprehensive survey, conducted by Peter D. Hart Research Associates, concerning public’s view of legal profession).

the poor, the middle class, and minorities—think better of us.³ That is because they do not know us. We are a country of laws. How are we the keepers of the flame, the keepers of the law? How are we supposed to help society maneuver through these difficult times? How are we supposed to weave those common threads that bring people together? We have not been doing a good job.

When people call me and ask me to speak, invariably they will ask for the title of my presentation. For tonight's speech, I wondered how I could encapsulate what I wanted to say. On one hand, I wanted to make sure I did not bore you. On the other, I thought, there would be a media person here to whom I could give some sound bites. I decided to call my presentation *The Shading of America*. This title encompasses society's response to the ongoing issue of race and the recent demographic changes. In many instances, it really describes what is happening in society today.

After I thought about the title of my address, I thought I would bring it home and tell you about the shading of the Golden State known as California. California is truly a laboratory and is in the forefront of all of the latest clichés, issues, and fads that our society goes through. The state is going through a significant period of anxiety, but I am one of the rare people that will tell you that I love California, and I love Los Angeles. The Chamber of Commerce could hire me to tell you why California and Los Angeles is the place to be.

The experiment going on in Southern California has never succeeded in the history of this world. That experiment is: Can people from different parts of the world come together in the pursuit of an ideal called America and live with one another in peace? California is the favorite destination of fifty percent of all immigrants—legal and illegal. It has the largest concentration of Armenians, Koreans, Iranians, Mexicans, Salvadorans, and French (not just, you know, *that* part of the world). Everyone wants to go to California, and everyone is concentrated there. Immigration is changing the demographics and the shading of this society. There is anxiety. Not everyone is a racist or a bigot, but people are uncomfortable with change. You and I are no exception. The question is: How do we deal with that anxiety and that discomfort?

3. *Id.* at 61.

How do we deal with reality—not only the reality of today, but the reality of yesterday and the future? That is the issue that we are facing.

We all wish for an America that never was. It only existed in our memories and on television. That America is supposedly a homogeneous society in which we all look like *Leave It to Beaver*. But we do not look that way. Race has always been an issue. It is just as American as apple pie, but we do not like to deal with that problem.

In the last ten years, immigration has been the issue that has been looking us in the face. We do not like what we see, and that is what is causing the indigestion. Prior to fifteen years ago, there were very few Muslim or Hindu temples. Today, there are many Muslims in the United States, as there are Jews. There are more non-Christian temples, and other places of worship, in Los Angeles County than in the entire nation. Languages from every part of the world are heard. In the Los Angeles Unified School District, the second largest school district in the nation, sixty-eight languages are spoken.

There is room for concern. The question is how we can assimilate or cultivate and incorporate all these individuals into the ideal of what we call America. What is it to be an American? Other than American Indians, we are all transports. We pride ourselves upon saying that the American dream—independence, respect, entrepreneurship, a love of democracy—does not have a particular facial feature. It can come in black, brown, or Asian—it is just as American. Whether I say “red, white, and blue” in Spanish or English, the emotions are the same.

I sit on a board that you have probably heard very little about. It is called the National Endowment for Democracy. Much to your surprise, I will tell you that it is congressionally funded, though probably not for much longer. It is bipartisan; you have Senator Lugar sitting on that board and the likes of me. Our objective is to promote democracy throughout the world. It is fascinating to me to watch these people operate. We work through four institutions—two predominately Republican and two predominately Democratic.

At my first meeting, I had a very interesting and fascinating experience. We heard a number of proposals from throughout the world regarding how to promote democracy, to help people who

hunger to be free. The Republicans came in and made their presentation. They said that we should promote democracy through free enterprise; entrepreneurship is the way to go. I said "Amen." Then, the Democrats came in. They said that we should promote democracy through the worker, through organizations and empowerment. Again, I said "Amen." I then asked a colleague sitting next to me, "What happens when a worker earns enough money and starts a business? Does he or she then become bad in the eyes of the Democrats and good in the eyes of the Republicans? Where does it stop?" But that is what we do. You name it; in Europe, China, South America, and Asia, it is all little money. It is \$20,000 here, \$25,000 there. That is how you empower people. However, the sad part about giving money only to people outside of the United States is that our own democracy is also at risk. We do not care, we do not vote, we do not participate, and we do not engage in debate. Considering what is happening in our democracy, I raised the issue. I asked, "Well, can we get funded for some programs in this country? How do we give people a stake in our society?"

I am very proud to be an immigrant. I relate to and engage with immigrants. Most people tell me, "You do not look like one," or, "You are not like 'them.'" To that I say, "What do you mean I am not like them? Who is them?" I am different: I am acceptable to the mainstream. Well, I should be. I went to the same schools, which hopefully gave me the same level of education, and I am trying to do the same thing. But if everyone within my community had been given the opportunities I was lucky to have, there would be a lot of us—a lot more than now. What we are talking about today is the issue of race and the issue of class, something that this country has never had to deal with. We pride ourselves today as being a country where anyone can reach their potential. If you work hard enough or study hard enough, you can make it. How many of you truly believe that happens today?

Any of you who question that and whether, in fact, we provide equal opportunity, I challenge you to do something. I did it two weeks ago. I went to the school my children go to; it is small and nurturing. It is a private school. MALDEF has a program in South Central Los Angeles, and I also went to that school. You do not have to be a rocket scientist to see the difference. If we think that a person walking out of a barrio high school and a person

walking out of those private or better public schools are starting with the same level of education and the same tools, we are fooling ourselves. Unless we deal with the issue of providing an equal opportunity to everyone, we are not going to make it as a society. We will become like Latin America and other countries—a society based on class and race.

In the immigrant community, you see people who are entrepreneurs, who are coming to pursue that dream. I challenge any of you to read the statistics and to tell me immigrants are a burden on our society. They are indeed our salvation, whether they come from Ireland, Africa, Pakistan, India, the Philippines, Mexico, or El Salvador. They are what revs the engine of our society. Look at California and look at Orange County: More than eighty percent of the new businesses started there in the last fifteen years were started by immigrants. Yet, we have chosen to make them, to some degree, the easy target.

Now, let me put on my business hat. Serving on the Federal Reserve Board gives me a unique perspective into the inner workings of this society. I will tell you immigrants have had very little to do with the recession or the changes in California. It was the collapse of the savings and loans, the fall of the commercial real estate market, and the downsizing of the defense industry. How many undocumented immigrants own savings and loans? How many undocumented immigrants work at Lockheed or McDonnell-Douglas? Yet, the issue of immigration is being debated, and it will be debated in Congress. The issue of how many, from where, who, and how is a legitimate subject for debate. This country has the right to decide who it will or will not admit, how many, and the circumstances under which it will admit them. We have every right to control our borders, but this debate must be held rationally and compassionately.

The issue of Proposition 187⁴ and what happened in California is going to be revisited at the national level, but with a different twist.

4. On November 8, 1994, California voters approved Proposition 187, a referendum that would deny most government services to undocumented aliens. The referendum is now codified in various California statutes. *E.g.*, CAL. EDUC. CODE §§ 48215, 66010.8 (Deering Supp. 1995); CAL. HEALTH & SAFETY CODE § 130 (Deering Supp. 1995); CAL. PENAL CODE §§ 113-114, 834(b) (Deering Supp. 1995); CAL. WELF. & INST. CODE § 10001.5 (Deering Supp. 1995). However, federal and state courts have enjoined enforcement of nearly all of Proposition 187's provisions. Memorandum from MALDEF Los An-

We have a proposition in California called the Civil Rights Initiative. It is intended to dismantle affirmative action in the public sector. I agree with most of you folks; I wish that we did not have to deal with the issue of race. I personally do not like the perceptions that are made of me—that I went to law school only because of affirmative action, that I am not as good as most of you. Well, I will tell you I have always known that I was just as good if not better, and if I had been given every privilege, I would have been a lot better. But that is not the issue. The issue is how we can provide a remedy for the fact that race still plays a role in our society.

Going back to Proposition 187, one of the things I am proud of is that I am imminently pragmatic. Also, I do not like to lose; I like to win. When Proposition 187 came around, we knew we had to strategize. We had to look into the mind of the person who would vote for Proposition 187. The coalition opposed to Proposition 187 hired the best political consultants. For this fight, they had to be Republicans. They also had to have won an initiative that dealt with controversial issues. We hired them, and they were good. They told me not to talk about compassion, so I did not. They said, "You cannot be out in the forefront speaking on this issue. We will put you in the closet. We have got to find the League of Women Voters, people who look like they came from Nebraska, and Orange County types. We are going to get them to speak on the issue." They told me we would talk about self-interest and economics. I said, "Well, I want to win. Let's do it."

I had to go to my community. You know the perception of minority communities—we do not know what we are doing. I told my community that we had to do it their way. After a thorough discussion, there was agreement. We started moving up in the polls because we were talking about self-interest and economics. Then, some members of the community decided to organize. They held demonstrations. They waved the Mexican flag, and that did it. Every time the flag came out on television, we lost a percentage point in the polls.

The day of the elections, the pollsters and my consultants told me we were close. We were within three percentage points. In Southern California, I was designated to be the spokesperson

geles to Interested Community Members 1-4 (Apr. 20, 1995) (on file with the *St. Mary's Law Journal*).

against Proposition 187. We were at this beautiful hotel in Los Angeles called the Biltmore, and they had this huge room there with lots of cameras. I showed up at 8:00 p.m. They had the exit-poll results. Kathleen Brown and all of the Democrats had bitten the dust, and the media was putting pressure on me, but I was told not to concede. I said, "Why not? Look at the numbers." By 10:00 p.m., it was getting worse. By 11:00, I knew we had lost. I went before the cameras and conceded. We lost royally.

The next day I had a discussion with our team, and I asked what happened. You know what happened? When you are dealing with the issue of race, the public will lie about how they voted. That is why we have in the law the concept of "racially polarized voting." The public lied, and I should have known better. That is my business, but I wanted to believe.

It is going to happen again in 1996. Mark my word: the anti-affirmative action initiative is going to be on the ballot. People tell me it is not going to be a repeat of Proposition 187 because that one was just against Mexicans; this one will be different because it will involve blacks and women. To people who have an interest in this debate, I say it is no different. It is about how we perceive America and what we want it to be.

I do not care about what you call discrimination, and I do not care whether you call it affirmative action or not. I just want to know what remedy society is going to give to those who are harmed because they are denied a privilege or an opportunity because of their gender or race. I want to ask those people who are so gung ho on accountability in the private sector, who want to count every widget and every breakthrough, why having the same accountability does not work in the area of race and affirmative action. I am not talking about quotas, although we have them for everything else. I am talking about a measurement and a remedy. As long as we acknowledge the role that race plays in our society today, I will be content with the remedy, but I do not believe we can say that race is no longer an issue.

You folks are the cream of the crop. You are the best that the legal profession has, the legal beagles. You will all leave San Antonio secure and with the knowledge that you have a bright future. Yet, unless we deal with the difficult issues that we have in our society today, you will not be able to go into your cocoon, divorced from reality. You will not be able to enjoy the privileges

that our society offers those of us in the legal profession unless we deal with the issues of race and changing demographics.