Dean Kellye Testy: Good afternoon, everyone. I'm Kellye Testy, the Dean of the School of Law, and I welcome you. So very pleased you could join us this evening for a wonderful speaker series of the Gates Public Service Law program. I am particularly delighted tonight to be able to introduce our speakers to you. What I want to do is, really, I guess, three things. The first is I want to share a little bit of their formal bios with you; second, just a few comments; and then, third, let you know how they're going to proceed this evening.

So let me welcome to the University of Washington School of Law professors Richard Delgado and Jean Stefancic. We are just so delighted that you're here with us tonight. So join me in welcoming them, please.

[applause]

Dean Testy: Richard Delgado is currently a university professor at Seattle University School of Law, and he is one of the leading commentators on race in the United States, having appeared on "Good Morning America," "McNeil/Lehrer Report," PBS, NPR, and even the "Fred Friendly Show." Richard is the author of 150 journal articles, probably, and counting -- I'm sure no bio can keep up -- and 27 books. His work has been praised or reviewed in all of the distinguished publications throughout the United States, including "The Nation," "The New Republic," "The Washington Post," and "The Wall Street Journal." His books have won numerous national awards for his outstanding work, including a Myers Award for an outstanding book on human rights in North America.

I want to read one quote, from his bio, from Stanley Fish. He described his career in the book, "The Rodrigo Chronicles," in the following terms: "Richard Delgado is a triple pioneer. He was the first to question free-speech ideology. He and a few others invented critical-race theory, and he is both a theorist and an exemplar of the importance of storytelling in the workings of the law. This volume, 'The Rodrigo Chronicles,' brings all of Delgado's strings together in a stunning performance."

Before joining Seattle University, Professor Delgado spent 14 years at the University of Colorado School of Law, and then five years at the University of Pittsburgh, where he was the distinguished university professor of law and the Derrick Bell Fellow.

I'd also like to introduce Jean Stefancic. She is currently the research professor at Seattle University School of Law, and Jean writes about law reform, social change, and legal scholarship. Her recent book is entitled "How Lawyers Lose Their Way: A Profession Fails Its Creative Minds." It examines the causes of lawyers' unhappiness. Her '96 book, "No Mercy: How Conservative Think Tanks and Foundations Changed America's Social Agenda," is, quote, "a superb guide to the right-wing counter-revolution that has changed the face of America."

Stefancic has written and co-authored over 40 articles and over 15 books, many with Professor Delgado. She has shared many writing residencies throughout the country. And their book, "Critical White Studies: Looking Behind the Mirror," also won a Myers award. Stefancic and Delgado have served as co-editors for several book series.
What I want to share, more personally, after having shared some of their more formal bios with you, is that, in my experience, as many law professors as there are in the country and the world, there are a very few who absolutely changed the way we think about the relationship of law to society. These two persons have done that.

They have certainly meant a great deal to me, in my own thinking about law and its relationship to the world and how the world operates. I really can't thank them enough for all I've learned from them. It was really one of the highest honors of my career to work with them to bring them to Seattle University.

Tonight you're going to hear from them. You can tell from their bios that they are very strong collaborators. And indeed, I think that that very way of proceeding says a lot about the way they are in the world. What you'll hear tonight is one speech from two people. As they proceed, please know that that's the format that we'll be using. After their speech, then there will be some time for some questions. So, enjoy, and welcome to the University of Washington.

[applause]

Professor Richard Delgado: Good evening. It's a pleasure being back here. Kellye didn't mention this, but years ago, I actually started my legal career at this law school. So it's something of a homecoming for me to be here. I'm very happy to be back, amid these familiar vistas and familiar, wonderful, old buildings, and gardens and so on, and a few faces that I remember from those days. It's a joy for me to be here. As Kellye mentioned, Jean and I have been writing about empathy, or fellow feeling, off and on, for years, mainly in the law reviews, believe it or not, but also in a few books. We also edited an anthology by Susan Bandes, entitled "The Passions of Law," on the role of emotions such as mercy, empathy, disgust, and revenge in that discipline.

Today, we'd like to revisit that body of work and add some thoughts, prompted by the controversy over Professor Obama's nomination last spring of Sonia Sotomayor, whom he hoped would display that very quality in her work at the US Supreme Court.

Some of our thoughts will concern empathy's expansion over time, and the forces propelling that expansion. We'll also address how judges can avoid handing down decisions that will strike everyone as cold-hearted and unthinkable 100 years or 200 years later. Finally, we'll examine some of empathy's limitations, including the problem of escaping entrapment in the mindset and preexisting attitudes that we bring to experience.

Although much of our talk will center on the role of narrative and narratives, devotees of law and economics will be glad to know that we believe that empathy has economic value or utility, since it enables a possessor to understand what the other side wants, and thus make trades that enable one to get what he or she wants in return. The empathic businessman, like the empathic lawyer or world-wise detective, is thus apt to be more successful than one lacking that quality.

We see empathy as both an emotion, or passion, in the Aristotelian sense, and, as mentioned, as a form of knowledge. It's also a disposition, or a character trait, which develops over time as a result of experience, with the result that some people end up having more of it than others.

In all of its guises, it seems to operate more effectively with persons whom we recognize as "like us." An emerging branch of social science, known as norm theory, which is different from the legal school of thought that you might have heard of; norm theory holds that our reaction to an individual in distress is a function of how normal or abnormal their predicament seems to us, strikes us.
The images on TV of people starving in Africa. We tell ourselves that that sort of thing happens all the time over there, so we don't get terribly excited, since, we reason, those people are probably used to it by now. You might think of all those newspaper articles that you might have seen recently about Haiti's poverty and checkered political past, as though preparing us for a feeble response.

But our nice, next-door, suburban neighbor shows up at our door not having eaten in three days, because she lost her job and her husband ran off with a floozy. We're immediately alarmed that sort of thing isn't supposed to happen here. We fix her a sandwich and show her how to get emergency assistance from the country for herself and her children. On another occasion, we might out for a drive in the country and see a Mexican-looking family standing beside a broken down car or by the side of the road.

We drive by thinking that this is a farming region, after all, and another car loaded with Mexicans will probably come along and help them. We're in a hurry and they're probably not. Besides, farmer workers are always driving beat up old cars. Mexican law professors do to. Me, for one.

[laughter]

**Professor Delgado:** They undoubtedly know what to do when the car breaks down. A few miles later we see a neatly dressed Anglo woman standing beside her car, but with the hood up. We slow down and ask if she needs help. Recently empathy was in the news when conservatives challenged President Obama on the need for the judicial version of it. Which they saw as a kind of favoritism. If you empathize with the plaintiff, they reasoned, you have to be showing a lack of it, a lack of empathy for a defendant. If you go easy on a criminal, perhaps because he had a rotten social background, what about the feelings of the victim? And so on.

Their point of course presupposes that law is a perfect, evenly balanced system with few unforeseen cases requiring an active judgment. But is it? Note that the same conservatives that argued against empathy for judges, probably wouldn't apply the same logic to an adult who beat a child at a board game 10 times in a row.

The rules say you're supposed to play as hard as you can, but no sane adult does this and for good reason. With a child, the game isn't fair. After all, winning isn't the only value. On other occasions, conservatives can and do demonstrate abundant empathy. For example, toward unborn fetuses or operators of small businesses weighed down by taxes and demand that the law change to take their interests into account. So empathy is often selective, and someone who likes one kind might not like another.

**Professor Jean Stefancic:** A recent book by Lynn Hunt enables us to look at empathy and how it has been expanding over time. Watch the way that Christopher Stone did in a famous article about environmental rights. Hunt shows that western society's identification with outsider groups has been on the rise. Peter Singer makes a similar point in a famous book on animal rights. Recently, Jeremy Rifkin echoes some of these themes as well. Stone, for example, points out that early in history humans recognized rights for members of their immediate family or their group. Others were outside the law, or outlaws. Gradually sympathies extended to include other clans, then foreigners, women, Jews, members of other races.

Today, law protects animals from certain types of mistreatment, and one day Stone hopes we will come to endow natural objects like trees, rivers, and rocks with rights. And not merely because doing so may sometimes benefit us. Perhaps we are already starting to do that.
What propels this gradually widening arc? Lynn Hunt in her book, "Inventing Human Rights," writes that the answer lies in new forms of writing. Particularly the advent of the epistolary novel around the mid 18th century. When readers learned that persons of different groups had feelings, hopes, and plans and lives of their own.

Over time, additional forms of engagement with text; reading newspapers, doing plays, listening to conversations in coffee houses -- all of this happened about that time and contributed to empathy; the ability to see others as like oneself.

It culminated in documents like the French Declaration of the Rights of Man and Citizens, the American Declaration of Independence, and in the last century, the United Nation's Universal Declaration of the Rights of Man.

Eventually, according to Hunt, we may go the limit and recognize human rights for all, including groups that are now shorn of them -- including gays and lesbians wishing to marry, felons wishing to vote, immigrants wishing to come out of the shadows, and the insane.

It describes expansion of human rights and what must happen for that expansion to continue. Feeling and emotion are integral to the process, she argues. A person knows that a human right has been violated if she feels horrified by its violation. This emotion, empathy, is closely tied to notions of bodily integrity or sanctity. Think what that means.

For example, in the late middle ages, ladies would regularly undress in front of their male servants who they did not consider fully human, and thus unlikely to notice. I never knew that. Hune, however knew convictions about hygiene and delicacy, including disgust or such things as spitting, sneezing in public without covering one's mouth, or urinating in the street, arose, marking the beginning of a new attitude.

Empathy then came to include new concerns about the viability and sanctity of others and their bodies, culminating in a growing aversion to mutilation and torture. Early readers of novels, such as Samuel Richardson's Pamela, and Clarissa. Or Jean Jacques Rousseau's Julie reported torrents of emotion as they read about the mistreatment of heroines by older suitors or employers, who are able to get inside the lives of the character.

Some readers wrote to the authors saying that they had cried or howled on learning of Julie's death. While strict proof, of course, is impossible, the vicarious experiences that readers found in texts such as these appeared immediately preceding the appearance of declarations of the rights of man, and seemed bound up with them, according to Lynn Hunt.

Although Clarissa, Julie, and Pamela concerned the rights of women, later novels such as those of Charles Dickens exposed readers to the suffering and struggles of workers and the poor.

Political writers and analysts weighed in, too. Voltaire wrote against torture. Beccaria against cruel punishments. Slaves and former slaves like Toussaint L'Ouverture and Frederick Douglass. Abolitionists like Harriet Beecher Stowe turned non-fiction to the same end. Sorry.

Professor Delgado: If human rights and sympathies have been expanding, one may ask, why have they advanced further in Europe than they have here in the United States? Comparing the two regions, one would have to conclude that on most fronts, including abolition of slavery, rights of women and prisoners, environmental protection, and rejecting the death penalty, Europe, not the United States, has generally led the way. If rights are expanding, as it seems to us they are, it tends to happen there first and here later, if at all. This brings us to consideration of empathy's limits, which the rest of our
talk will be about. Although the United States has at times acted generously, as in the Marshall Plan or the bailout of Argentina's economy in Europe abominably.

We have generally brought up the rear. Why should this be so? We are not among the first dozen nations to abolish slavery, and other nations have made formal amends to their indigenous populations far exceeding what we've done. We've resisted signing treaties banning global warming, protecting women's rights, and prohibiting genocide.

We reserve the right to torture, detain those accused of terrorism indefinitely, and engage in preemptive war. American law recognizes no duty to retreat in the face of threat, or to rescue, even when one could do so without inconvenience or danger to oneself. We executed the mentally retarded until very recently, and juveniles until 2005.

Britain's Civil Partnership Act gave same-sex couples rights similar to marriage over five years ago. We still do not -- and are the only industrialized nation in the world -- without some form of universal health insurance. We were slow to forbid child labor, while Britain put in place three factory acts to decrease abuse of children in mills in the 19th century.

The comparison of the attitudes towards torture, women's reproductive rights, and a host of other areas shows similar differences -- rarely in our favor. Animal rights and protection receive much more attention in Great Britain than here. The doctrine of employment at-will, under which workers can be fired without the employer having to give any reason or justification, received its broadest justification in the US, as well.

When doctrines such as unconscionability, contracts of adhesion, and the duty to bargain in good faith entered American law, they did so via European Émigrés such as Friedrich Kessler. Listeners will no doubt be able to think of many other examples, and perhaps a few counter-examples.

But a fair comparison shows that the United States has lagged behind the record of most other advanced nations in extending protections to outcasts, and the weak, and vulnerable. Why might this be so? We posit two reasons: America's early literature and its way of doing business. Fiction may well promote the development of empathy, as Hunt points out. We think it probably does.

But early American fiction -- much more than that of some European countries -- celebrated warriors, settlers who chopped down trees, Indian killers, and plantation owners who managed large numbers of slaves. Not Dickensian factory workers, the homeless, criminals, or slaves.

Fiction may instill empathy as Lynn Hunt, literary critic Wayne Booth, and others point out. The empathy may just as easily be for the exploiting class as the exploited. Early writers and political figures, even ones with towering reputations, like Thomas Jefferson, Benjamin Franklin, and Abraham Lincoln, depicted blacks and Indians in disparaging terms. Perhaps the better to justify harsh treatment.

D.W. Griffith's film "The Birth of a Nation," based on the novel "The Klansmen," by Thomas Dickson, romanticized the Southern way of life as did "Gone with the Wind." Even abolitionist writings, such as "Uncle Tom's Cabin," portrayed gentle, longsuffering blacks, not impatient revolutionaries like Toussaint L'Ouverture or later, Paul Robeson.

Most novels and short stories about westward expansion or war glorified it. The few that questioned it -- war, I mean -- such as "Red Badge of Courage," found it bittersweet. Entire genres of writings, such as Indian captivity tales, titillated female readers with stories of savage Indians, carrying off white women to unimaginable fates.
James Fenimore Cooper, perhaps the most sympathetic of the storytellers about Indians, nevertheless, painted them as radically unlike white men and women. Frontier narratives such as those of Daniel Boone depicted heroic trappers and settlers battling Indians, wild animals, and other dangers. Even Stephen Crane, who occasionally wrote admiringly of Indians, wrote disparagingly of Mexicans.

Other 19th century American journalists depicted conquered people as drunken, wicked, cowardly, apt to shoot you in the back -- casting white people as either their victims, or their saviors.

**Professor Stefancic:** Not only did America's early fiction promote sympathy for the overlords not the underdogs, its way of doing business pressed in this direction as well. The wide open spaces encouraged a pioneer's spirit of selfishness and acquisition. Moreover, the early colonists decamped from Europe for a life of log cabins and Indian raids the very time when Europe was enjoying the social and cultural changes of the Enlightenment. Talk was rife with the glories of science, and art, and the rights of man.

The settlers got on one boat, they might have missed another altogether. But we also wish to highlight another connection that we mentioned briefly, early in the talk. In Great Britain, mercantilism rewarded empathy, just as novel reading enhanced it.

A merchant or employer who could place himself in the shoes of a customer or worker, coveted and aimed -- might gain an advantage on the competition. He could understand what the other party coveted and aimed to satisfy it in return for something the first individual wanted.

The same held true in New England, where trade and manufacturing required some of the same interpersonal skills. But, a settlement economy, west of New England, one based on labor-intensive cotton or tobacco farming, hunting, trapping, logging, ranching, or mining required little of that quality. In fact, a settler who hesitated to cut down a stand of old grove trees could easily lose out in competition to one who quickly lifted his ax.

Of course, capitalism and the factory system could be cruel, too. Yet shop owners and factory operators at least had to negotiate with their hired hands. Parliament could and did pass child labor laws. In the United States, a slave owner did not have to negotiate with his slaves, and the Constitution protected that institution in at least six clauses.

Empathy does not come easily. Living in a rude, threatening environment inhibits it, just as do hyper-competition in bureaucratized settings, where human relationships are distant and impersonal. Hence, legal formalism depersonalizes it -- legal formalism probably does as well. Living with crime and terror do the same. Extreme inequality can, too. Since there is little point to cultivating a close relationship with a destitute stranger who has little to trade.

Still, in most settings, empathy is an advantage, and one of the most prized human traits. It makes others eager to deal with you, secure in the belief that you will reciprocate their friendship. This is why nations that exhibit a deficiency of empathy eventually tread a lonely path.

One benefit of reading Lynn Hunt, or literary critic Wayne Booth, or Christopher Stone is that it invites reflection about national culture and reading habits, and their relation to human flourishing in rights.

We believe this holds true for lawyers and judges, which is where Obama's remarks about judges and judging come in. All of us like to think of the common law as evolving toward ever higher levels of wisdom, and have even higher hopes for our public or constitutional jurisprudence.
Yet, our system has yielded a number of embarrassingly inhumane decisions that mar the reputations of famous judges and prompt us to ask, years later, "What were they thinking?" Of course, appellate judges are the most text-based in their daily work. But trial judges, as well, consult texts, particularly in the form of statues, prior decisions, and jury instructions.

For this reason, the role of text and reading bears examination in connection with judging. To be sure, judges also consult social knowledge, which includes not only firsthand experiences with the world, but also vicarious experiences gained from reading. So that texts enter in this second way, as well.

Like other writers, we have identified a number of notorious Supreme Court decisions, such as Dred Scott v. Sandford and Plessy versus Ferguson, which considered the rights of blacks. And certain Indian cases including Johnson v. McIntosh, which approved the so-called "Discovery Doctrine."

We also nominated the Chinese Exclusion Case, Chae Chan Ping, the Japanese internment cases, Bradwell versus Illinois, which denied a Bar application to a woman, Buck versus Bell, the "Three generations of imbeciles sterilization" case, and Bowers versus Hardwick, a case that approved Georgia's statute outlawing sodomy.

All these entered our personal hall of fame -- infamy, excuse me. Their personal hall of fame. It occurred to us that you could see these cases, which stain the reputations of famous judges, as products of their inability to see Indians, gays, Chinese, or blacks, as persons like us -- with feelings, hopes, and fears.

We wondered, "Might this suggest a role for law in literature? Since reading texts humanizing all these groups might conceivably enable the judges to avoid handing down embarrassing opinions, consigning the group to legal oblivion, or worse?" We found little support for this supposition.

In each case, a counter-narrative was close at hand. For example, Justice Holmes, who wrote Buck versus Bell, was a camp follower of the American Eugenics Movement, which was then in its heyday. So to him, the depiction of retarded Carrie Buck must have seemed obvious and true.

Yet the scientific community even then was beginning to turn against exaggerated claims of the eugenicists. Even the early editions of the Encyclopedia Britannica, for example, rejected such crass, eugenical claims, and took a more moderate view of the role of heredity in mental disorders and retardation. Leading biologists were beginning to weigh in as well.

Similarly, for Bowers versus Hardwick -- when Justice White based his 1986 decision to uphold Georgia's statute outlawing sodomy on a history of social condemnation of the practice, he focused on statutes in a number of states. He also rejected the very idea that sodomy, like the implicit in the concept of ordered liberty, are deeply rooted in this nation's history and tradition.

Yet, writings by Walt Whitman, Christopher Isherwood, E. M. Forster, W.H. Auden and James Baldwin, all persuasively described homosexual relations as potentially loving and constructive. Some of this language is lyrical. Moving. Completely believable. Consider the following passage from the novel "Maurice," by Forster:

"Clive, his protagonist, flung down all the barriers. Not at once, for he did not live in a house that can be destroyed in a day. All that turn, and through letters afterwards, he made the path clearer. Once certain that Hall loved him, he unloosed his own love. Hitherto, it had been a dalliance. A passing pleasure for body and mind. How he despised that now. Love was harmonious. Immense. It poured into it the dignity as well as the richness of his being. And indeed, in that well-tempered soul, the two were one."
Likewise, in James Baldwin's first novel, "Giovanni's Room," published in 1956, the narrator describes his thoughts of Giovanni in the following terms:

"We were both insufferably childish and high-spirited that afternoon. And the spectacle we presented -- two grown men jostling each other on the sidewalk, and aiming cherry pits as though they were spitballs into each others' faces, must have been outrageous. I realize that such happiness, out of which it sprang, yet more so, for that moment I really loved Giovanni, who had never seemed more beautiful than he was that afternoon. Watching his face, I realized that it meant much to me that I could make his face light so bright. And I felt myself flow toward him as a river rushes when the ice breaks up."

One is tempted to ask, reading such lyrical passages full of love and excitement over another being, how the authors of Bowers versus Hardwick could have written as they did? We found similar texts extend at the time of other cases that we mentioned earlier. Articles in books depicting Japanese as loyal, and with human feelings, were available at the time Kobayashi and Korematsu came down.

Abolitionist writing such as "Uncle Tom's Cabin" was in print and circulating at the time of Dred Scott and Plessy, and so on, and so on.

Professor Delgado: "Do judges cry?" We ask. We posited that these countervailing narratives, "saving narratives," as you might call them, seldom altered judges' behavior -- much less engaged their emotions. Because they're rarely found in the canon; the group of texts recognized as valid and important during a given period in history. If they do come to the attention of influential figures, like judges, they're apt to strike them as coercive, political, or unrepresentative. The very forces that lead judges astray are the very ones that lead to the formation of a literary canon that is bland, uniform, and unlikely to save judges from serious errors. If, indeed, the works come to their attention at all.

Judges then, for that reason, rarely cry. As a test case, we selected one period -- the present -- and looked at the canon of works contained in the Law and Literature movement and found in popular anthologies used in law schools.

Despite the objective of at least some of the compilers to present aspirational, liberating works, the range of those included in the lists was remarkably narrow. With white authors, by and large, writing about white men and their experiences -- straight white men and their experiences.

The canon contained little more than a token representation of the views of indigenous people, Latinos, or feminists of color, just to name three groups whose legal problems are now, or soon likely to be, on law's front burner.

We did attach a second, broader list that did contain outsider writing as an appendix to our article in the "Texas Law Review," but had little faith that judicial conferences and colleges would adopt it any time soon and indeed, they haven't.

Subsequently, we examined a little more closely the mechanisms that suppressed texts and messages that go against the common sense of the time. We also examined why outrageous texts containing bias, derogatory messages, and stereotypes are only recognized as such years later when we look back and ask how anyone could have believed, or written, or consumed that?

In a piece examining the premises of First Amendment ideology, we described something we called "The Empathic Fallacy" to explain resistance to new narratives, particularly in the area of racial stereotypes and images. We examined the historical and social depiction in cartoons, posters, and
films of each of the four major minority groups in the United States; Blacks, Latinos, Asian Americans, and Indians.

We noted that the images -- the various images -- the Sambo, the murderous Indian, the dirty Mexican, sneaky Asian and so on, changed from era to era depending on what the dominant society needed.

In one era, the images might depict a group as so incompetent, shuffling, or carefree and dimwitted, that it's hard to see how they survived to adulthood. At other times, the social images would portray them as terrifying, primitive, larger than life -- sometimes with designs on white women. Not at all stupid, shiftless, or incompetent -- indeed the opposite -- but cruel and bloodthirsty.

Seeing these haunting images from the past, one is tempted to ask, as we did, how could these cartoonists, writers, filmmakers, graphic designers, individuals certainly of higher than average education and probably social progressivism, create such appalling images?

We concluded that the reason is they simply did not see them as grotesque at the time they wrote them. Their consciences were clear. Their creation didn't trouble them. Their creation seemed true, not particularly demeaning, certainly well within artistic license.

Our much vaunted system of free expression with its marketplace of ideas can't correct serious, systemic ills such as racism or sexism or homophobia, simply because we don't see them as problematic until much later.

Why is it that no one can formulate an effective contemporaneous counter-message to challenge the vicious depiction? This happens only later after consciousness shifts and society adopts a different narrative, often just as demeaning in its way. Before then, any counter-narrative doesn't ring true. It seems ridiculous, humorless, wrong, politically correct.

At any era, one may be able to find counter-narratives, such as the peace-loving Indian, the intelligent black teacher, hard-working Mexican, et cetera, but these works are apt to have very small audiences. Sometimes they are discovered many decades later like the works of Zora Neale Hurston today or Tomas Rivera, and we wonder why they didn't catch on with the readers of their day.

It turns out, then, that we simply do not see many forms of discrimination, bias, and prejudice as wrong at the time. The racism of other times and places does stand out and strike us as glaringly, appallingly wrong, but this happens only decades or centuries later. We acquiesce in today's version with few qualms, little realizing that later generations will ask the "how could they" question of us.

The reason is that ills like racism and classism are woven into the wharf and woof of the way we see and organize the world. They're among the many preconceptions we bring to experience and use to construct and make sense of the experiences we're having right now.

If racism, say, forms part of the dominant narrative, the group of received understandings and basic principles that form the baseline from which we reason, how could they really be in question? History shows that the dominant narrative changes very slowly and resists alteration. We interpret new stories in light of the older ones packed in our heads. Ones that deviate too markedly from our current stock, we dismiss as wrong, politically correct, or just plain wishful thinking.

The only stories about race, for example, that we're prepared to condemn, then, are the old ones giving voice to the racism of an early age, ones that society has already begun to reject. Thus, we can condemn Justice Brown for writing, as he did in Plessy v. Ferguson, but not those free speech
absolutists who today reject remedies for campus hate speech on much the same grounds, balanced
principles, this right against that right, free speech right, your right not to hear my free speech, failing
to notice the remarkable parallels between the two.

The overriding reason is that we always interpret new narratives in light of the old ones which we
hold. The belief that we somehow can control our consciousness despite limitations of time and
positionality we called the "empathic fallacy." In literature and literary criticism, familiar to many of
you, the so-called "pathetic fallacy" holds that nature is like us, that it's endowed with feelings,
moods, and goals that we can understand.

A poet, say, noticing that it's raining outside, and feeling sad, writes, "The world weeps with me."
Both are forms of hubris, a belief that we can be more [snaps fingers] just like that than we can be, at
least easily.

Ethic fallacy, its companion which we coined then, consists of believing that we can enlarge our
sympathies through linguistic means alone. Exposing ourselves to ennobling narratives and texts, we
could quickly and easily broaden our experience, deepen our empathy, achieve new levels of
sympathy and fellow feeling. We can, in short, think, read, talk, ponder our way out of bigotry and
narrow-mindedness, out of our limitations of experience and perspective.

We can do this, however, only to a very limited extent, much less than you think. New statements,
messages, texts, novels, and even experiences that deviate too sharply from what we know, we reject
or qualify or deem an exception. They don't register, they don't compute.

Professor Stefancic: Empathy can also be false or misconceived. Recall that we said earlier that
empathy contains a cognitive component. Everyone knows of husbands who give their wives a lug
wrench for their birthday or wives who give their husbands tickets for the opera, thinking, of course,
that would make them happy. Similarly, white folks sometimes, looking for ways to help blacks or
Latinos, may put themselves in the place of those groups and ask, "What would they, the white
person, want if they were black or brown?"

They end up providing the kinds of help or services that a white Latino or a white black would want,
that is, if they were a black but with all the same thoughts, histories, and experiences and needs they
have now as a white person. It doesn't work.

Take the settlement house movement, for example, back in the early 20th century. Most of the upper
middle class ladies who lived and worked then, 100 years ago, professed great concern over the plight
of immigrants to whom they provided services. Yet their sympathies did not extend to learning the
languages of those immigrants or their ways.

Instead, their mission was to teach them personal hygiene and housekeeping, English, and how to
prepare American food like roast beef and mashed potatoes, when the immigrants ate perfectly good
food of their own like pierogis and borscht and goulash.

Derrick Bell pointed out something similar in his famous "Serving Two Masters" article in "Yale Law
Journal" in which he notes a conflict of interest inherent in much public interest layering; where the
lawyer, say at a major reform center like ACLU or NAACP, might want a sweeping breakthrough,
while the client wants something more modest, maybe better-funded schools or just a pair of sturdy
work shoes.

Empathy can also be shallow and short-lived. With all of the disasters taking place in the world, it's
easy to develop compassion fatigue. Let's apply your own example [inaudible 44:56]. All these
mechanisms, then, work against empathy, at least the kind that stems from reading texts or talking with others.

Perhaps their combined force accounts for the relative slowness of the rate of change that Lynn Hunt describes. We live in a faster-paced world now. Many have given up novel reading. Others get their news or accounts of reality from the like-minded. If they hear about radically different people or the poor, it's often in disparaging terms.

Unless you are willing to accept change that proceeds at a glacial pace, spanning decades if not centuries, we have two small suggestions for you. We're speaking of change emanating from writers and lawyers and teachers and other knowledge workers, not activists. Derrick Bell has some ideas for them, but they are not what we're talking about today.

You can do as a friend of ours once suggested, and introduce an inconsistency or discordance that will provoke reflection in the person you're talking to. A friend describes someone, a confirmed conservative, who had no use for the weak and poor and thought them by and large a bunch of liars, able but on public welfare.

One day, the man attended a rally at which the speaker was railing along those lines, and of course, he found himself agreeing with almost everything he heard. The speaker then went on to say that society needed to cut back on aid to the handicapped, most of whom were unlikely to contribute much to society anyway, so that if they died young, no one would be the worse off.

The listener happened to have a daughter of whom he was fond, who was born with a cleft palate. On hearing the speaker's careless remarks, he began reconsidering his own position, eventually arriving at a more balanced view of the poor and outcast. One can create such doubts, sometimes inadvertently, in this example, by getting to know one's audience and using that knowledge to plant seeds of doubt.

**Professor Delgado**: Our second and last approach is a variation of the first. A pair of French movies starring Gerard Depardieu will help me explain what I mean. In "Jean de Florette" and "Manon of the Spring," a French family consisting of an earnest hunchback -- Jean, played by Depardieu -- and his wife, an opera singer, and young daughter, Manon, leave comfortable lives in the city for the French countryside. Where they hope to make a fresh start; with clean air, healthy work and food, and far from big-city problems such as noise, crime, drugs, congestion. They're able to make the switch when Jean inherits a small patch of land in Provence. A tax accountant in his former life, Jean approaches his new calling, farmer, with boundless energy coupled with book learning. Because he's interested in numbers, he's read of the theory of exponential increase, and believes he can apply it to rabbits, which he can sell for food. Beginning with an expensive, very large breeding pair, he will breed them and their offspring. Soon, he will have four rabbits, then eight, 16, 32, and so on.

To feed the rabbits, he'll raise lettuce in a garden, which in turn, of course, requires water. He thinks he's allowed for that, having studied meteorology, I'm sorry, meteorological charts showing that the region in Provence, typically receives enough rainfall to support a garden for the rabbits and his family.

The neighbors in the village nearby know better. They ridicule Jean behind his back when he plants his vegetable garden in the sun. They've traditionally planted in the shade. One well-meaning neighbor asks him about it, but Jean gives a scientific explanation. He expects enough rain to ward off parching and the vegetables would grow faster in the sun.

It turns out the neighbors have a dark side. A local village elder played by Yves Montand and his nephew had long had their eyes on Jean's land. They know that if the hunchback fails, they can buy it
from him very cheap. When Jean inherited the land, it came with a map showing a spring. He never expected it to be important, because the charts showed that the area gets plenty of rain.

Sure enough, summer arrives, and with its scorching heat, unrelieved by rain, Jean's vegetables start to wilt and his rabbits to die. [rabbit dying noise] He frantically begins carrying water by mule, and on his own back, filling heavy containers from a communal well in the distant village. He does this several times a day until his mule dies of overwork. [mule dying noise]

[laughter]

**Professor Delgado:** His wife, the opera singer, pitches in, but their repeat trips on foot with heavy barrels on their backs bring them close to breakdown. In desperation, Jean begs Montand to lend him his mule. The elder turns him down, explaining that he needs it for work around his own farm. Montand's nephew is an appealing young fellow, but alas, homely. His uncle fears that the lad will never marry and the family line will die out. The movie ends with Montand, the village elder, aging, the nephew still single, and the hunchback dead of overwork.

After Jean dies, it comes out that he and Montand, unknown to either, are blood relatives. If Montand had come to his rescue, the family line would've continued. Montand dies a broken man.

The sequel, Manon, begins some years later. The ugly nephew has prospered from raising carnations, but is still unmarried. Jean, as I mentioned, is dead from overwork, and his farm lies idle. His daughter, however, has grown up and is now a beautiful recluse making a living as a shepherd woman in the surrounding hills.

One day, the ugly nephew sees her bathing nude and falls desperately in love with her. She finds him repulsive, however, and her revulsion only increases when she discovers the hidden spring blocked with concrete in a cave and realizes that had it not been for his and Montand's dirty work, her father would've made a success of the farm and would still be alive.

Vowing revenge, Manon, the young woman, changes the course of the underground spring a second time so that the village's well way off in the distance grows dry. The villagers realize that Montand's greed has brought about disaster for the town as well as the demise of his family line.

In the end, we see that Jean's good nature and boundless energy proved no match for his neighbor's superior knowledge and greedy designs. The villagers, all of whom were complicit in the plot to destroy him, end up destroyed themselves. The villagers paid a heavy price for their lack of empathy and imagination.

Failing to see the newcomers as like themselves, as parts of their human family, they did not identify with them and even made fun of their fumbling efforts. Their powers of empathy failed. Not realizing that Jean was one of two surviving males in the family line, his death, which they could easily have forestalled, meant little to them.

If they had seen the continuity between themselves and the struggling family, had recognized them as kin, both sides would've been better off. Jean's book-learning, I'm sorry, the hunchback would have had plenty of water, while the villagers would've had enough, too. Jean's book-learning and imaginative approach to farming might've helped them break out of old habits as well.

The films are powerful parables, enabling us to see struggling groups, perhaps like Latino immigrants today, in ways that quicken empathy. They also illustrate the main points of our talk. They can prompt an audience to mentally connect a new group with values they themselves hold dear at the
same time that the stories remind us of personal interests, such as who will pick our food, take care of
us in our old age, or replenish the country's rapidly declining birth rate?

The current story about immigrants that you tend to hear on right-wing radio or Fox News is both
unsympathetic and untrue, painting them as dirty, grasping, criminal, unwilling to learn English, and
so on, when the truth is just the opposite. Then stories of hard-working, law-abiding newcomers like
the French family, who mainly want to take care of their families, stay out of trouble, and send money
home to educate their children or provide medicine for an ailing grandmother, can perhaps serve as a
partial antidote.

All such stories, however, will confront the empathic fallacy, and they have trouble finding their way
into the canon. Many readers will think they've grasped your meaning, but will have done so only at a
superficial level; their empathy will be shallow, even false. Will judges cry? Probably not, but if
you're clever and a good storyteller, you may be able to change a few hearts along the way. And of
course, change has to start somewhere.