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ARTICLES

RACIAL REFLECTIONS: DIALOGUES IN THE DIRECTION OF LIBERATION

Derrick Bell,*
Tracy Higgins,**
and Sung-Hee Suh,*** Editors

NOBODY CAN FREE US BUT OURSELVES!

Preston Wilcox¹

Freedom is acquired by conquest, not by gift. It must be pursued constantly and responsibly. Freedom is not an ideal located outside of . . . [the individual]; nor is it an idea which becomes myth. It is rather the indispensable condition for the quest for human completion.

Paulo Freire²

INTRODUCTION

In this last decade of the twentieth century, the erosion of civil rights gains once thought permanent has uncovered a long repressed question. What significance should we attribute to the struggle for racial justice that African-Americans have waged for the past 300 years with no end in sight?

This is a time for serious reflection. Another repetition of time-worn slogans will not do. Throughout the tattered civil rights ranks, voluntary reassessment must accompany the involuntary re-

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1. Harlem black activist.

2. P. FREIRE, *PEDAGOGY OF THE OPPRESSED* 31 (1989).

trenchment imposed by a decade of civil rights setbacks in the White House, in the courts, and in the crucial realm of public opinion.

As a current colloquialism puts it: It is time to "get real" about race and the persistence of racism in America. The highly visible social and economic progress that some African-Americans have made must no longer obscure the actual status of most of those who are descendants of slaves. Although advantageous, the election of African-Americans to public offices, many never before held by African-Americans, will not affect greatly the problems of unemployment and poverty.

Basic measures of poverty,³ unemployment,⁴ and income⁵ suggest that the slow racial advances of the 1960s and 1970s have ended and that regression is under way. Statistics, however, cannot begin to detail the havoc that joblessness and poverty have caused: broken homes, anarchy in communities, and futility in the public schools. All are the unhappy harvest of race-related joblessness in a society in which work provides sustenance, status, and the all important sense of self-worth.

Incidents of random and organized racial violence are rising. Hostility to African-American progress, translated into political and judicial enmity, threatens the gains of the last four decades. These manifestations of the end of an era of civil rights progress suggest it is time to discuss seriously whether African-Americans and *all* people of color will ever enjoy real racial equality in this country.

3. In 1987, the poverty rate for black Americans was 33.1%; 700,000 people joined the ranks of the poor in that year. By contrast, in 1987 the poverty rate for white Americans fell from 11% to 10.5%. CENTER ON BUDGET AND POLICY PRIORITIES, STILL FAR FROM THE DREAM: RECENT DEVELOPMENTS IN BLACK INCOME, EMPLOYMENT AND POVERTY (Oct. 1988). The report is available from the Center, 236 Mass. Ave., N.E., Suite 305, Washington, D.C. 20002.

4. The black unemployment rate averaged 13% in 1987; although lower than in any other year in the 1980s, it was higher than in most years of the 1970s. The proportion of the total black adult population that is employed is at the highest level recorded since the data were first collected in 1972. But black unemployment has declined less than white unemployment, and the gap between black and white unemployment has widened to 2.57 times the white rate in 1988—the highest black-to-white unemployment differential ever recorded. *Id.* at ix-x.

5. The 1987 income of the typical black family (\$18,098) equalled just 56.1% of that of the typical white family (\$31,935), a lower percentage than in any year since 1967 when the data were first collected. A factor contributing to the growing income disparity between blacks and whites is the growing income gap between upper and lower income families in the nation as a whole. In 1987, this gap reached its widest point in forty years. *Id.* at vii-viii.

The close of a century is an appropriate time to make such an assessment: to plan for the future by reviewing the experiences of the past. First, assessment of the past century from a critical angle is necessary at this time to counter those persons in political offices and in the media who portray the twentieth century in an overly positive light—as the steady march of social and political progress. Second, the close of the twentieth century is important as a historical moment. In the past ten or so years, we have witnessed serious civil rights set-backs in the courts and in the legislatures, as well as in the society at large—setbacks that can be characterized collectively as “the demise of the second Reconstruction.” This historical moment is all the more noteworthy because it parallels so closely the later nineteenth century period in American history that saw the demise of the first Reconstruction.

At the end of the eighteenth century, the framers of our Constitution shared Thomas Jefferson’s view that blacks should be free, but that “the two races, equally free, cannot live in the same government.”⁶ Staughton Lynd, summarizing in a document committed to protecting individual liberties the reasons that these framers recognized and protected human slavery, wrote: “Even the most liberal of the Founding Fathers were unable to imagine a society in which whites and negroes would live together as fellow-citizens. Honor and intellectual consistency drove them to favor abolition; personal distaste, to fear it.”⁷

The framers’ ambivalence, founded upon white supremacy, survived and subverted the well-intentioned efforts of even those who championed abolition and the post-Civil War amendments granting citizenship rights to the former slaves. By the end of the nineteenth century, it was clear that the citizenship promises contained in law had been abandoned—in spirit by the northern political elite and in fact by the terms of the 1877 Hayes-Tilden Compromise.⁸ The Supreme Court’s 1896 decision in *Plessy v. Fer-*

6. Lynd, *Slavery and the Founding Fathers*, in BLACK HISTORY 117, 129 (M. Drimmer ed. 1968).

7. *Id.*

8. In the hotly contested Presidential election of 1876, the Democrat, Samuel J. Tilden, won a plurality of 250,000 votes in the nation and appeared to have won the electoral count by one vote. The returns of three states were challenged, and when recounts did not resolve the dispute, it was submitted to a special electoral commission that awarded the vote to the Republican, Rutherford B. Hayes. Democrats accepted this outcome in return for several concessions including a Republican promise to withdraw the remaining federal troops from the South, an action that removed the last barrier to the already-in-progress subjugation of the black freedmen. See E. FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877 575–87 (1988).

guson⁹ legally formalized segregation policies. The Court's holding that the provision of "separate but equal" accommodations met the equal protection guarantee of the fourteenth amendment denied moral reality.

In our era, the premier civil rights precedent, *Brown v. Board of Education*,¹⁰ was heralded as the twentieth century's Emancipation Proclamation. Both the *Brown* decision and the Emancipation Proclamation advanced the nation's foreign policy interests more than they actually aided blacks.¹¹ African-American people, ignoring the self-interested motivations, and inspired by the rhetoric of freedom, launched a movement based on peaceful protests to gain long denied rights.

Freedom efforts in the twentieth century have fallen short as they did in the nineteenth century. Although he was criticized by civil rights proponents at the time, the late Professor Alexander Bickel has proven correct in his dire prediction. He warned that the *Brown* decision would not be reversed, but would become, dread word, irrelevant.¹² The Supreme Court's civil rights decisions of the last term demonstrate that irrelevance is the apparent fate of this once proud decision.

Radhika Rao, a third-year Harvard Law student, assessed the Court's anti-civil rights thrust in a decision that found a minority set-aside ordinance unconstitutional.¹³ Ms. Rao writes:

In *City of Richmond v. Croson*, a majority of the Supreme Court chose for the first time to subject an affirmative action plan enacted by the former capital of the Confederacy to the stringent review it applies to the most repugnant forms of racism. The Court's decision to treat all racial classifications identically possesses the same superficial symmetry of the "separate but equal" analysis in *Plessy v. Ferguson*, and it suffers from the same flaw. The Court denies the reality of racism when it isolates race-conscious actions from their context and concludes that benign ra-

9. 163 U.S. 537 (1896).

10. 347 U.S. 483 (1954).

11. The benefits to the nation of the Emancipation Proclamation, including the disrupting of the South's economy, the raising of political barriers to European nations entering the Civil War on the side of the South, and the opening of enlistment to thousands of blacks in the Union Army, are discussed in D. BELL, RACE, RACISM AND AMERICAN LAW 3-8 (2d ed. 1980). For a description of the advantages the nation gained as a result of the *Brown* decision, see Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

12. See A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 151 (1970).

13. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989).

cial classifications warrant the same standard of review as invidious acts.¹⁴

She aptly compares the Court's approach in *Plessy* at the end of the nineteenth century with its approach in *Croson* at the end of the twentieth century. It is significant that a very able law student recognized and articulated the message that many veterans of the civil rights struggle have been reluctant to acknowledge.

"New voices" of future lawyers are particularly important in this area because racial problems are theirs to confront in the next decades. Teaching techniques developed by Paulo Freire have facilitated the enlistment of students in the racial struggle. By these techniques teachers, as well as students, learn through sharing, and students become active participants, rather than passive observers, in the learning process.¹⁵ The educational process, Freire counsels, "must begin with the solution of the teacher-student contradiction, by reconciling the poles of the contradiction so that both are simultaneously teachers *and* students."¹⁶

In the fall of 1988, two dozen students enrolled in a Harvard Law School seminar *Civil Rights at the Crossroads*,¹⁷ a course applying the Freire thesis in structure and spirit. The students were determined to think and write seriously about the slow stagnation of the once vibrant civil rights movement.¹⁸ In a process developed by Professor Charles Lawrence, students prepared for weekly class ses-

14. Harvard Law School, J.D. 1990. Ms. Rao's comment is contained in a reflection written during the fall, 1989, *Civil Rights at the Crossroads Seminar*.

15. The adoption and further development of such teaching techniques seems compelling in light of a now voluminous collection of scholarship criticizing the dominant modes of legal education, most notably the Socratic/case method. See, e.g., Gellhorn, *The Second and Third Years of Law Study*, 17 J. LEGAL EDUC. 1 (1964); Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 37 UCLA L. REV. 1157 (1990); Richardson, *Does Anyone Care for More Hemlock?*, 25 J. LEGAL EDUC. 427 (1973); Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444 (1970); White, *Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) to Be*, 36 J. LEGAL EDUC. 155 (1986).

16. P. FREIRE, *supra* note 2, at 58-59.

17. The participants, including auditors, were: Vada Berger, Barry Berke, Victor Bolden, Donald Brown, Barbara Burr, Lisa Castanon, Mitchell Chester, Luke Cole, Drake Colley, Rebecca Cox, Martin Fantozzi, Yvette Glasgow, Suzanne Goldberg, Tracy Higgins, Linwood Holton, Maina Kiai, Jule Kreyling, Kirsten Levingston, Michael Linfield, Lisa Marsh, Jeffrey Moslow, Thomas Mueller, Reginald Orcel, Kevin Reed, Tynia Richard, Eric Richards, Anthony Scaramucci, Jeffrey Selbin, Anne Schroth, Sung-Hee Suh, April Taylor, Terry Walcott, and Wilhelmina Wright.

18. The seminar's basic readings were: D. BELL, *RACE, RACISM AND AMERICAN LAW* (2d ed. 1980 & Supp. 1984) [hereinafter *RACE, RACISM*]; and D. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) [hereinafter *AND WE ARE NOT SAVED*].

sions by writing a two-page paper of "reflections" responding to that week's assigned readings.¹⁹

The written reflections provided a means of moving the students and the course beyond the existing doctrine and policy choices that lie at the foundation of so many adverse civil rights decisions. Seminar participants' papers exhibited both abstract understanding of the doctrine as well as views about the doctrine enlightened by personal experience and a willingness to advance new theories to redefine old problems.

Empowerment was a valuable by-product of the "written reflection" process for all students: white students as well as students of color, men as well as women. Professor Lawrence, in his own experiences, found that "[t]he power of these pieces is not just in their usefulness as a method for discovering new insights gained from a diversity of experience and perspective, but in the authority they give to voices of those who have come to experience themselves as without authority."²⁰ Students, particularly those who hope to work with the disempowered in our society, need as much self-esteem as law schools can provide them. Valuing their observations and experiences is an important step in preparing them for responsible professionalism.

In addition to empowering student voices, the reflection papers encouraged students to integrate their personal experiences into their doctrinal analyses, a process that often led them to redefine old problems and generate new insights. New definitions and new insights, especially those grounded in the lived experiences of people of color, are essential to the project of rethinking civil rights issues and objectives. This rethinking constitutes, in turn, a necessary response to the narrow and formalistic approaches that the Supreme Court majority increasingly has used to curtail civil rights reme-

19. Discussing this approach, Lawrence writes:

Reflection pieces serve several purposes. Students come to class prepared. But more than that, they come having already engaged in the process of experiencing the harmony or dissonance between the perspectives described in the readings and their own. The assignment privileges experience and the forceful articulation of that experience. Each week I am newly impressed by the thoughtfulness of these pieces. I am struck by their honesty, by the students' willingness to risk making themselves vulnerable, by their bravery in their criticism of my manifested bias or myopia as well as that of the cases and the authors assigned.

C. Lawrence, *The Word and the River: Pedagogy as Scholarship as Struggle* 18 (Mar. 13, 1989) (unpublished manuscript).

20. *Id.*

dies²¹ and also to the approaches that too many civil rights advocates and legal scholars implicitly have embraced. Viewing pervasive racism in broad intellectual terms saps it of its visceral, substantive content. Racism in America is pervasive precisely because it affects people's everyday lives on a deeply personal, individual level. Formalization of race discourse, on the part of scholars, civil rights advocates, and the Court, has served to silence, and thereby render immaterial, the voices of people most directly harmed by racism, as well as to deny that pervasive racism even exists.²² Combatting the ossification of race discourse requires a concerted effort to inject into the discourse the voices of people too long ignored and the power of experiential knowledge too long discounted.

In a time of transformative social change, "consciousness becomes an essential issue, decisive of important judicial decisions, vital to the lawyer's intellectual arsenal, indispensable to the scholar's ability to interpret and criticize the progress of the law."²³ To do justice, or at least to avoid chaos, it no longer suffices to understand or analyze doctrine to reach a "right" result. Reason is not enough; passion is required.²⁴ This passion involves "empathy, the ability to hear and understand the feelings of others, the capacity to imagine what it is like to be poor, or black, or a mother on welfare, or a woman encountering job discrimination."²⁵ Responses based in empathy reflect "a special moral sense," different from reason, and often described as the 'heart' that nurtures the moral sense.²⁶ Empathy allows one to rise above the "'subconscious loyalties' of one's position and privileges in life."²⁷

Despite their divergent views and disparate backgrounds and experiences, students retain enough flexibility to "hear" what others are saying and incorporate the multiple voices into contrasting,

21. See, e.g., *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (interpreting the protection of 42 U.S.C. § 1981 to apply only to conditions at the formation stage of an employment contract and not to problems that may subsequently arise from the conditions of continuing employment).

22. See, e.g., *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2136 (1989) (Blackmun, J., dissenting) ("[o]ne wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was . . .").

23. Reich, *Law and Consciousness*, 10 *CARDOZO L. REV.* 77, 77 (1988).

24. Brennan, *Reason, Passion, and "The Progress of the Law,"* 10 *CARDOZO L. REV.* 3 (1988) (1987 Benjamin N. Cardozo Lecture).

25. Reich, *supra* note 23, at 78.

26. Brennan, *supra* note 24, at 9.

27. *Id.*

rather than conflicting, visions. Legal education, as well as legal scholarship, must create a place for these voices—for thinking and writing that develop consciousness about today's complex issues. This consciousness will, in turn, help to ensure that the legal system supports basic human needs and a democratic vision. This collection of writings is intended to make a small start toward what must become a large literature.

This Article groups student pieces into five general categories. These categories derive from the content of the student pieces and do not reflect the original organization of the course. Part I of the Article explores the universality of prejudice and its implications for understanding racism in America. Part II suggests a theory of a property right in whiteness as a means of understanding the Supreme Court's civil rights decisions and includes students' assessments of the explanatory power of this theory. Part III examines the Supreme Court's decision in *Brown v. Board of Education*, which required the desegregation of public schools, and evaluates the successes and failures of integration from the viewpoint of students of all races. Part IV focuses on the psychological effects of racism; the student pieces describe these effects and suggest ways to "decolonize" the minds of victims of racism. Finally, Part V examines various strategies of change through activism.

I. INTERPRETING THE UNIVERSALITY OF PREJUDICE

What significance should civil rights advocates in this country give to the frequent reports of racial hostility experienced by African-Americans visiting other countries? Does bias abroad reflect a worldwide antipathy towards black people? Do the sources of this antipathy cause even blacks of one group to discriminate against those of another?

Prejudice based on color is not the sole form of bias. Discrimination based on religion and ethnicity are ancient practices that persist long after their original motivations have been forgotten. Pointing to these facts, many conservatives preach patience on matters of race. They dismiss the claims to the equality of all citizens as ideal aspirations rather than substantive guarantees. "All things considered," they say, "we are doing very well in America."

We are not doing well. Racial intolerance is rising in this country. In the current racial climate, intolerance abroad is cause for alarm, not comfort. For those who are not its victims, there may be a consoling message in the seeming universality of prejudice based on racial or religious difference, but consolation of that char-

acter undermines the faith conveyed in the pledge to the flag's stirring lines promising "liberty and justice for all."

RACISM ABROAD AND AT HOME

Thomas Mueller

In late August on the sands of a South Carolina beach, I began to become involved in the problems of American civilization again. I had just returned from my summer job in Munich. For three months I had not seen a single black. This is not to say I had encountered no racism during that time. West Germany was embroiled in arguments about its response to its foreign workers, predominantly Greeks and Turks. I saw the efforts of the Anne Frank House in combatting the racism of LePen's National Front. While in Munich, I had a single conversation with the woman who ran the laundromat nearby. She informed me that she believed that women should run for political office since they had been good monarchs, but that she could never imagine a black as President of the United States. Yet while she was thankful that Jesse Jackson had not gotten the nomination, she remained extremely disturbed about the possibility of a hot-tempered Greek in the White House (the irony of racism could not be more poignant after this election campaign).

EVERY NATION HAS (NEEDS?) ITS "NIGGERS."

Michael Linfield

My ex-wife is from Czechoslovakia. We met and married there. The society is relatively homogeneous and has considered itself socialist since 1948. Two vignettes survive my four or five trips to Czechoslovakia.

First, there are very few Jews left in Czechoslovakia. Most of those who were not killed during the war emigrated soon thereafter. When my fiancée's family found out that I was Jewish, they were delighted. After all, they told me, Jews were "clever," "intelligent," and "made good husbands." These statements made me uncomfortable. To my ears they were racist (even though well intentioned). To their ears, these statements were simply common knowledge. In their world view, each race and people—be they Jews, Blacks, Russians, Poles or Italians—had their own characteristics. Some were lazy, others industrious; some scientific, others good lovers, musically inclined, or drunkards. The Slovaks with

whom I spoke didn't think of this view as racist; it was simply a correct understanding of reality.

Second, while the Slovaks considered their views of various groups benign, it was clear that they had their own "niggers": the Gypsies. Everyone hated the Gypsies. They were discriminated against in schools and in housing. The stereotypes heaped upon Gypsies in Czechoslovakia parallel those of the white majority in the United States toward Blacks: gypsies are lazy; they will rob you; they are congenital liars; they want "our" women; they prefer to remain poor so as to enjoy their free and easy life. In addition, the Slovaks were resentful of the affirmative action policies the Czech government adopted in an effort to assimilate the Gypsies into Czechoslovakian society. Because most Gypsies are nomadic, the government allows them to travel across borders with relative freedom. In addition, they receive preferential access to housing. Both policies stirred resentment and a "Czech backlash" against Gypsies and the governmental programs designed to improve their status. While told that racism does not exist in socialist nations, I understand that few Slovak women would date African exchange students studying at the universities. No self-respecting Slovak woman would think of going out with a Gypsy.

Unfortunately, the Slovak view of Gypsies seems to have counterparts in every country. In 1971, I spent the summer in France. I remember how surprised I was to see the number of interracial couples strolling arm-in-arm down the boulevards. On the surface, at least, there seemed to be little or no racism directed toward the black population in France. Yet Frenchmen continually warned me to beware of the Arabs! Because of the French experience in Algeria, coupled with the fairly large immigration of Arabs into France during the prior decade, the Arabs had become the French "niggers."

The Pakistanis in England bear the brunt of British racism. Africans studying in Russia and Czechoslovakia complain of the racism they encounter in those countries. Even the Scandinavian countries, often viewed as the most enlightened of the Western nations, now face racial problems as a result of the increase during the past decade in the number of nonwhite immigrants.

Must an end to racism await a further evolutionary step? I don't want to even consider that this may be true. If I didn't believe that we can achieve a non-racist, non-sexist society, I might stop struggling. And yet, I am not sure my belief is rational.

SCAPEGOATS FOR SELF-PROTECTION

Suzanne Goldberg

Last summer, while working in Senegal and travelling in Mali and Burkina Faso, I saw clear distinctions between elites and other classes in what are ostensibly racially homogeneous societies. The discrimination I witnessed against various ethnic groups and less educated classes was no less arbitrary or damaging than what I see in the United States. There, as here, the likelihood of receiving a well-rounded education and a wide range of job opportunities diminishes substantially if one is not a member of a privileged class. I saw my "boss," who had degrees from a French university and the Senegalese University law school, abuse and belittle her live-in maid and other service people presumably because they were from different backgrounds. In the Senegalese development organization where I was helping to design an urban legal aid center, I saw people accorded respect and privileges based on the level of education they had received, as well as their facility in French in addition to Wolof, the local language. I also witnessed outright discrimination in professional and service environments against workers from Mauritania, who were also black but were generally looked down upon by the Senegalese as marginal and unworthy of attention.

The self-protectionist instinct is not particular to the Caucasian race. While living in Singapore for over a year, I saw a Chinese majority acting out what I see as the role of whites in the United States. The Chinese population there controls the significant economic resources as well as most decision-making positions in the government. The Indian population plays a vocal but minority role, assuming more than their proportion of positions in the government, private sector, and university. The Malay population, on the other hand, fills the bottom economic and education rungs of society and probably has the least power over the nation's development, apart from political influence owing to solidarity relationships with other Malay majority societies in the region (particularly Malaysia, which is perceived by Singapore as a potential security threat). In each place, the "marginalized" populations have little choice but to rely on the benevolence or professional accountability of the majority, in addition to power derived from whatever resources they somehow control, to claim their position in society.

White racism does not seem to be exclusively, or perhaps even primarily, responsible for race-based discrimination in the United States. Rather, these cross-cultural comparisons suggest that it is

the control of resources which leads groups of people to structure distribution of power and resources to protect their own social status and control. This is my theory of *self-protectionism*. I have become increasingly convinced that discriminatory treatment is rooted in a neutral power dynamic which implicates many forms of prejudice, including racism.

Race, Racism argues convincingly that racial discrimination "is the key to the division between the economic advance of whites and economic stagnation for blacks"²⁸ and that it is "the major factor in explaining the economic disadvantage of blacks today."²⁹ I don't dispute this conviction. Although in any event I would be hesitant to challenge it because I am white and am sure, despite my best efforts, that I do not fully appreciate the impact of racism on the lives of people of color in the United States, I also do believe that racism pure and simple accounts for many of the discriminatory practices carried out in this society.

If the racist instincts are indeed as powerful and deeply rooted as *Race, Racism* suggests, there might be little hope for any change. Even the most progressive laws, if enacted, would not likely be enforced by a truly racist regime. Perhaps it is desperation at the thought of a fundamentally racist society, but I would like to think it is a broader perspective on human nature which leads me to conclude that racism alone is not accountable for the discriminatory treatment imposed on many sectors of American society.

Restructuring the distribution of resources sounds like a daunting task. In a country which appears to be becoming increasingly conservative, the idea of making a frontal attack on the status quo seems almost fanciful. Actually, however, civil rights attorneys during the past three decades have followed this oath by advocating laws redefining rights traditionally reserved for whites (or the ruling elite) as rights to be enjoyed by all.

Such efforts at legal enforcement of equal rights and opportunities for all is critical, but as time has shown, even most neutral non-discriminatory laws ring hollow without committed implementors and adequate resources. Just as "justice" meant that neither the rich nor the poor could sleep under bridges in Anatole France's late nineteenth century world and anyone can apply for admission to Harvard Law School, the purported equal application of prohibitions or opportunity is meaningless without regard to the context in

28. RACE, RACISM, *supra* note 18, at 591.

29. *Id.* at 592.

which the rules are applied. The American experience, for example, varies significantly by gender, race, class and many other factors. The challenge of treating equally such a diverse population has not yet been successfully met by even the best political and legal theorists, as evidenced by the correlation of race and gender to the distribution of wealth and resources.

If it is true that because of self-protectionism, people's access to resources will never reach the point where neutral or even mild affirmative action laws will effectively assure equal opportunity to all members of society, we must explore whatever alternatives remain. To return to theory for a moment, the real question I seem to be asking is how to protect the interests of a historically disempowered population? Assuming that they do not monopolize as many resources (economic, political, etc.) as desired, a "marginalized" population will by definition have at least some concerns different from those who control distribution of scarce resources. The interpretation that equates resource control with power may explain the continuing popularity of black musicians and sports figures in a racist society. Aretha Franklin and Carl Lewis, for example, each control resources that others desire. *Interestingly, it has been in areas of personal talent where blacks have been most successful within mainstream American society.* The message here may be that control of American racism may require both rigorous enforcement of civil rights legislation and economic measures addressing inequality in the distribution of resources.

RACISM WITHOUT A HISTORY OF SLAVERY AND SEGREGATION

Rebecca Cox

I grew up in a largely white environment, in school and in university in England, where the black population is proportionately smaller than it is in the U.S., without any affirmative action programs in universities, and with a very different racial situation and consciousness. In some ways the polarity is not so great between black and white because (at least in liberal, conscious circles, and to some extent in the general population) all people of color consider themselves black, whether their origins are Caribbean, African, Pakistani, Indian, or Southeast Asian (although there are also tensions and racism between these groups). The British colored population is also far less homogenous than the American, in that all of these groups have very different ethnic backgrounds, histories, and languages. Thus the "black" community is not such a distinct

group as opposed to the white population. The very different history of racial oppression and injustice also has something to do with how a white person defines herself, in that the bulk of Britain's colored population came to Britain in the 1950s.³⁰ They were entitled to citizenship and equal rights before the law. The legalized and large-scale institutions of slavery and segregation never took place in mainland Britain, and that is very different from the dim historical sense most young Britons have of Britain's activities in the colonies and in the African slave trade. It has been suggested that the situation of Hispanics in America is more akin to the situation of colored people in Britain, in terms of cultural variation, length of settlement, and colonial background.³¹

This is not to underplay the racism in Britain, but merely to state that it differs from the U.S. situation. In some ways Britain is clearly behind the U.S. in race relations policy in that "positive discrimination"—the British term for affirmative action—is almost nonexistent in every field. Without a Constitution or Bill of Rights, no legal claims of equal protection can be made. The only possibility of legal change in housing, employment, education, and other areas of discrimination and disadvantage has to come from the legislature. This has only happened in a very limited way. In addition, public consciousness of racial issues is very low: there has not been a civil rights movement, and most white people have thought that the situation of minorities was gradually improving. Some still do although others realize that the situation of many minorities in urban areas is getting more desperate under the Thatcher government.

The examples of minority group domination in other societies could be extended indefinitely.³² Certainly, the oppression suffered by the powerless in many parts of the world is both severe and sus-

30. It is estimated that 40% of Britain's black population was born in the United Kingdom. CSO, *Social Trends* 9, HMSO (Summer 1979).

31. Alan Little and Diana Robbins of London University make this comparison in their very useful booklet, *LOADING THE LAW: A STUDY OF TRANSMITTED DEPRIVATION, ETHNIC MINORITIES AND AFFIRMATIVE ACTION* (1982), published by the Commission for Racial Equality. They agree with the conclusions of Lord Scarman, who wrote an official government report on the 1981 Brixton riots and their causes and possible remedies. He said that "a policy of direct coordinated attack on racial disadvantage" was necessary and that the white backlash should not prevent positive discrimination programs from being instituted. Almost nothing has been done at the national level, but some local governments, particularly the Greater London Council ("GLC"), operated various programs until the national government abolished the GLC in 1984 and started to control local government spending very closely.

32. See, e.g., M. MARGER, *RACE AND ETHNIC RELATIONS—AMERICAN AND GLOBAL PERSPECTIVES* (1985).

tained. But the significance of that suffering for this country's continuing racial crisis is difficult to discern.

Over many years now, we civil rights advocates have eased our doubts by telling one another that we must "keep the faith."

For too long, we have accepted the philosophy incorporated in Gunnar Myrdal's study, *The American Dilemma*.³³ Racism was simply an anomaly in a society committed to equality, the reparable failure of liberal democratic practices to coincide with liberal democratic theory regarding black rights. Our optimism relied on two assumptions that ignored a contrary history:

1. that white America did want to abolish racism; and
2. that the standard practices of American policy making were adequate to the task of abolishing racism.

In *The New American Dilemma*,³⁴ Professor Jennifer Hochschild examines Myrdal's "anomaly thesis."³⁵ Reviewing the modest progress in school desegregation over almost four decades, Hochschild concludes that the anomaly thesis cannot explain the persistence of racial discrimination.³⁶ Rather, she finds, the continued existence of racism supports arguments "that racism is not simply an excrescence on a fundamentally healthy liberal democratic body but is part of what shapes and energizes the body."³⁷ Under this view, "liberal democracy and racism in the United States are historically, even inherently, reinforcing; American society as we know it exists only because of its foundation in racially based slavery, and it thrives only because racial discrimination continues. The apparent anomaly is an actual symbiosis."³⁸

Hochschild cites writings supporting the symbiosis thesis, including historian Edmund Morgan's analysis of the relationship between slavery and the development of a republican ideology of freedom, and contemporary Marxist accounts of the functional utility of racism within a capitalist economy. History, she points out,

33. G. MYRDAL, *THE AMERICAN DILEMMA* (1944). "The Negro problem in America represents a moral lag in the development of the nation and a study of it must record nearly everything which is bad and wrong in America. . . . However. . . not since Reconstruction has there been more reason to anticipate fundamental changes in American race relations, changes which will involve a development toward the American ideals." *Id.* at xix.

34. J. HOCHSCHILD, *THE NEW AMERICAN DILEMMA* (1984).

35. According to Myrdal, racial discrimination "is a terrible and inexplicable anomaly stuck in the middle of our liberal democratic ethos." G. MYRDAL, *supra* note 33, at 3.

36. J. HOCHSCHILD, *supra* note 34, at 203.

37. *Id.* at 5.

38. *Id.*

reveals several occasions on which blacks have served as bargaining chips in facilitating the settlement of differences between segments of the white society. Even traditional liberal views advocating symmetry in legal principles protect and perpetuate racist policies.

If Jennifer Hochschild is correct, then her second dilemma explains the intractable nature of the one Myrdal (and most of us) saw as the barrier to full equality for blacks. She suggests that rather than being understood as the tension between liberal democratic theory and liberal democratic practice, the American dilemma must be understood as the more fundamental problem of reconciling liberalism with democracy. If most white citizens choose not to grant the citizens of color their full rights, then perhaps democracy must give way to liberalism.

But how do you invoke the equality policy choice in a majoritarian, democratic state, where racial equality is the oft-heralded ideal, but power-based majoritarianism is the on-going societal stabilizing fact? How do you convince white Americans that the nation's most pressing social problems will never be addressed meaningfully as long as opponents of the needed reforms can stigmatize them as aid for unworthy black folks?

Economist Robert Heilbroner confirms that "there is no parallel to the corrosive and pervasive role played by race in the problem of social neglect in the United States."³⁹ He observes that:

the merging of the racial issue with that of neglect serves as a rationalization for the policies of inaction that have characterized so much of the American response to need. Programs to improve slums are seen by many as programs to "subsidize" Negroes; proposals to improve conditions of prisons are seen as measures to coddle black criminals, and so on. In such cases, the fear and resentment of the Negro takes precedence over the social problem itself. The result, unfortunately, is that the entire society suffers from the results of a failure to correct the social evils whose ill effects refuse to obey the rules of segregation.⁴⁰

How can we explain the willingness of so many white Americans to sacrifice their interests in social reform to insure that blacks they deem "undeserving" do not gain from government benefits needed by both whites and blacks? What precisely are they trying to protect in this land where equality is a concept while ownership of property is a basic measure of worth?

39. Heilbroner, *The Roots of Social Neglect in the United States*, in *IS LAW DEAD?* 296 (E. Rostow ed. 1971).

40. *Id.*

II. A PROPERTY RIGHT IN "WHITENESS"

Over time, beliefs in white dominance, reinforced by policies subordinating black interests to those of whites, have led to an unrecognized, but no less viable, property right in whiteness. In challenging the legality of racial segregation in the late nineteenth century, the plaintiff in *Plessy v. Ferguson*⁴¹ recognized, and the Court acknowledged, a property right in being white: an entitlement to those advantages gained over blacks by virtue of a white identity.⁴² Although there is no such overt recognition in contemporary racial decisions, the application of the strict scrutiny standard of review—once reserved for the most invidious forms of racism—to affirmative action programs reflects a concern for “innocent whites” and implicitly recognizes what the *Plessy* Court was willing to acknowledge openly.⁴³

Viewing racial discrimination as a phenomenon based on property rights, students explored why whites so often oppose social reforms that work to their advantage while perpetuating racial barriers that disadvantage them.

EXAMINING THE PROPERTY OF RIGHTS IN WHITENESS

Wilhelmina Wright

The practice of American racism is based on two principles: the sanctity of property and the belief in the hierarchy of races. The first of these principles is firmly protected by the words and action of the Constitution; the second is proscribed by the words of the instrument, but not by its effect. History shows that when these two principles are juxtaposed (which happens constantly), property rights are given absolute priority.

41. 163 U.S. 537 (1896).

42. Justice Brown, for the Court, wrote:

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is “property”, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

Id. at 549.

43. See, e.g., *Martin v. Wilks*, 109 S. Ct. 2180 (1989) (the failure of white firefighters to intervene in earlier employment discrimination proceedings did not preclude them from challenging employment decisions taken pursuant to a consent decree).

American liberalism, embodied in the Constitution, was designed to protect life, liberty, and property. The polity was given the rights to these three things, and the state was given the power only to act so as to protect these rights. Slavery, the Black Codes and Jim Crow laws could only exist under a constitutional regime when justified by the belief that the lives and liberty of members of the Black race were worth less than the property of the white race. The problem we face today stems directly from this liberal conception. Few persons today would evoke that conception to justify their position against affirmative action or in favor of the Yonkers City Council, yet it remains a primary motivation for their actions. Modern America has publicly rejected the notion that it is okay to advocate racial supremacy, that is, to argue that the life, liberty, and property of whites are worth more than the life, liberty, and property of blacks. The liberal conception we face today is, however, equally damaging and little discussed: that property is worth more than life or liberty. The fact that whites own the vast majority of what Americans define as property does not usually enter this argument, and it therefore appears nonracist. Bill Cosby serves as the face-saving example of how our country has achieved the ideal of "equal opportunity," while the beneficiaries of the Yonkers housing plan are persons who failed to take advantage of the same opportunities the white property owners had.⁴⁴

The failure of today's racial discourse is its reliance on the notion that property is neutral, that the deed to a suburban home is "property" while the opportunity to move out of a slum is not. The fungibility of property can be no better exemplified than it is by slavery. The fact that our Constitution once recognized one person's very life and liberty as another's property should teach us the danger of letting property determine liberty rather than looking to liberty to define property.

DEFINING THE PROPERTY RIGHT IN "WHITENESS"

Tracy Higgins

The notion of a property right in "whiteness" seems to thwart the progress of civil rights for blacks in at least two ways. Within the political sphere, if such an interest in "whiteness" is culturally

44. *Spallone v. United States*, 110 S. Ct. 625 (1990) (summarizing lengthy history of city officials' efforts to evade court ordered housing discrimination orders, and finding lower court exceeded authority in assessing fines against city council persons in their individual capacities).

defined and recognized even implicitly, the interests of blacks become separated from those of whites who are similarly situated within the social and economic structure. This separation of interests allows blacks to become a "bargaining chip" among different white economic groups. In addition, the separation (and subordination) of black interest functions to ameliorate white lower class dissatisfaction with its own position and prevents the mobilization of economically exploited groups, both black and white. Within the judicial system, the implicit recognition of a property right in whiteness has led to severe limitations on the progress of civil rights litigation when relief for black plaintiffs would mean undermining this property right. Judicial protection of this property right goes far toward explaining the limitations of traditional civil rights strategies. For example, *Washington v. Davis*⁴⁵ protected this property right by severely limiting the possibility of relief for victims of all types of discrimination. More specifically, decisions such as *Wygant*⁴⁶ and *Bakke*⁴⁷ established limitations on affirmative action at a level which presumably preserves the property right in whiteness. *Milliken v. Bradley*,⁴⁸ by protecting "neighborhood schools," in effect protected white neighborhoods' right to white schools.

The theory of a property right in whiteness initially emerged as a means of understanding and explaining at least in part the racial oppression that has existed in this country throughout its history. Ultimately, however, the property right in whiteness idea may offer not only a critique of existing conditions and strategies but also a hope for a new strategy. Whites must come to recognize that "they are paying too much for their property right in whiteness."⁴⁹ A critical analysis of this property right and its manifestation through political discourse and legal decisions reveals it as a tool for class oppression as well as racial oppression, the costs of which are borne by blacks and whites alike.

Understanding racial oppression not simply as an end in itself but also as a means of maintaining economic advantage and class oppression is useful not only in explaining the persistence of racial oppression but also in formulating ways to combat it. The notion of a property right in whiteness suggests that traditional civil rights

45. 426 U.S. 229 (1976) (equal protection claims cannot be sustained solely on proof that challenged policies adversely affect blacks more than whites).

46. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

47. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

48. 418 U.S. 717 (1974).

49. D. Bell, *Legacy of Racial Discrimination: Who Pays the Cost?* 7 (unpublished manuscript) (1988).

strategies designed to empower blacks at the expense of whites, to obtain "a fair share of the country as it is," will meet with only limited success.⁵⁰ Nevertheless, litigation has "transformed the Constitution from a document speaking of rights as the main means of protecting property and privilege into an instrument in which the concept of rights has gained a humane purpose and significance for even those who lack property, and for whites as well as blacks."⁵¹

Even so, the prospects for relief seem limited. Yes, this new concept of rights has been co-opted by whites in many cases. Nevertheless, in a broader sense, litigation has challenged with some success the preeminence of property rights, and may well serve as a tool to extend the concept of individual liberty to include economic justice. If we complete our analysis disheartened by the failure to find the ultimate civil rights strategy, we have, in a sense, bought into the idea of a property right in whiteness. That is, our conclusion lends legitimacy to a system based on exploitation. By judging the strategies based only on their success in obtaining for blacks a share in the spoils, we sacrifice both the prospects for ultimate success as well as the morality of our cause.

WHITES WITH NOTHING BUT WHITENESS

Yvette Glasgow

I did not realize how much poor whites were willing to sacrifice to hold onto their property right in whiteness until I worked on my first pro bono case last summer. The firm that I worked for had decided to help a woman regain custody of her child. The woman was one of the unfortunate victims of society whom most of us only read about in tabloids. She had been a foster child, and a victim of child molestation, rape, and husband abuse. The child she sought to regain custody of was fathered by one of her foster fathers. On top of all of this, she was mildly retarded, unemployed, homeless, and deaf. I witnessed poor whites' belief in a property right in whiteness through this woman who was living an absolute nightmare. On two occasions I watched while this woman with so little held on to the last vestiges of perceived superiority.

First, efforts to move this woman out of the Salvation Army Shelter to an apartment were defeated by her refusal to move to any complex where black people lived. I told the interpreter to ask her to explain. She was very frank in her explanation. She told her

50. AND WE ARE NOT SAVED, *supra* note 18, at 252.

51. *Id.*

interpreter to tell me that she was a white woman, and that it was not safe for her to live alone among black men. She stressed the fact that she was not "raised" this way. I was angry at this woman, who could hardly characterize her childhood experience of being shuttled from foster home to foster home as being "raised" in a particular way. My anger soon subsided, however, when I realized that her only sense of self-esteem came from her belief that she was better than black people. I felt sorry for her, because she could not hear the sarcastic voices of rejection and scorn each time I called predominantly white apartment complexes to inquire about their policy of accepting welfare recipients.

The second incident involving this woman was one in which she was accused of sexual misconduct with a twelve-year-old boy in the homeless shelter. When I asked her what happened, she denied the allegations, but not in the manner that I expected. She was not alarmed that someone would accuse her of molesting a child. Only the embarrassment of being accused of sleeping with a black man seemed to bother her. She emphatically signed that the story could not be true because he was black. Perhaps she forgot that I was black, or perhaps she did not care. The interpreter apologized for what was momentarily a very tense situation. I was not angry at the close of our conference; I only felt sorry for this woman who did not realize that she was one of society's most pitiful victims.

"WHITENESS" PROPERTY RIGHTS EXERCISED BY PEOPLE OF COLOR

Lisa Castanon

In the words of Professor C. Vann Woodward, Jim Crow laws were intended to "bolster the creed of white supremacy in the bosom of a white man working for a black man's wages."⁵² The concept of a property right in whiteness illustrates that racism offers poor whites the illusion of superiority while maintaining the reality for rich whites. Racism, as a class stabilizer, maintains the status quo of economic exploitation of both black and white victims. Yet the white victims' perverse clinging to racial exclusiveness serves only to divert attention away from economic reform. Whites, unable to resist the superior status promised them, will reject the potentially powerful coalition they could form with blacks.

52. RACE, RACISM, *supra* note 18, at 29.

Thus, the concept of a property right in whiteness as just described highlights white racial solidarity over class-based interests. The problem I have with the concept is that it is too limiting. A property right in whiteness, in my view, includes not only skin color but privilege as well (although I realize that the reasoning behind this concept is to display the reaction of those very whites who *lack* privilege). There are, I think, two sides to this property right in whiteness—for poor whites, it may mean forgoing economic improvement for white exclusivity; for minorities, on the other hand, it may mean gaining economic improvement at the expense of racial solidarity. Crudely speaking, the poor white may say, “If I can’t have the wealth, at least I have the right color” while the rich non-white may say “If I can’t have the right color, at least I have the wealth.” This is *not* to say that we all have the desire to suddenly turn white. Earlier in the semester Kirsten shared with us that as a child she would sometimes wrap a towel around her head and imagine herself with “long flowing blonde hair.”⁵³ We’re older now. We no longer dream of white physical characteristics but instead of white privilege and success. Perhaps, this may also have something to do with Sung-Hee’s statement, “Somehow to be associated with a white man brings legitimacy and, occasionally, a sense of empowerment”⁵⁴

Recognizing the many-sided aspect of this so-called property right in whiteness, we have to ask ourselves, “How much do we, consciously or not, see a property right in whiteness?” (As a side note: We’ve often brought up the Huxtable family during the course of the semester, usually with disdain as we recognize a white neighbor’s view which would willingly have this black family live next door. But are the Huxtables not secure in their property right in whiteness—as I have described in terms of privilege and success. For that matter are we not all equally secure with our pending degrees from Harvard Law School?) I suppose the point I’m trying to make is that all of us to some extent are trying to obtain that which is encompassed in the concept of whiteness. It may be too easy to only evaluate the impact that a property right in whiteness has in poor whites. It may be more difficult but in the end more beneficial to recognize its influence in our own lives.

53. See *infra*, Part IV.

54. See *infra*, Part IV.

THE ACID TEST OF BLACK DOMINANCE

Mitchell Chester

Recognizing one's own periodic but fleeting feelings of malcontent is an important launching point for examining the substance of the fabric which forms one's views on race relations. Several years ago I was aggressively pursuing an administrative appointment within the public sector of an urban, mostly minority district. In the course of one year, there were eight positions for which I was one of ten persons chosen to be interviewed. I was selected as a finalist for three of these positions. Each position was filled by a staff member from within the district (which I was not) and the majority of those chosen were minority group members.

I knew that my qualifications, skills, and abilities were impeccable. I attributed my lack of success to characteristics which were beyond my control: my white, male status and being from outside the system. Whether there were other reasons for my rejection is immaterial. It is my perceptions and feelings which I am examining. At moments during that year I harbored feelings of resentment, which were bolstered by internalized putdowns of individuals who had succeeded in their job pursuit. My reactions did not target a race in general, but were focused on individual members of minority groups. I checked those thoughts quickly, for they were not pretty nor, I realized, were they constructive for me or others. Those cogitations both frightened me and led me to reexamine my feelings about minority advancement and self-help. Perhaps my feelings of resentment were simply defensive reflexes for justifying my experiences. Nonetheless, what are the implications of such thoughts as they relate to minority achievement and self-help? Had I been in a position where I was in control of the advancement of those who come from the ranks of the oppressed, I am sure that any personal resentment would not have surfaced. I would have been able to balance such promotions in a manner that served my own self-interest.

In the end, I confirmed my belief in affirmative action and minority advancement. But serious questions were raised about self-help and just how much minority advancement can be tolerated before the "fleeting thoughts" overwhelm the rational intellect. These issues must be confronted. Denying minorities access to the control of their advancement decimates the chances of large-scale, substantive progress.

SEARCHING FOR THE INNOCENT, WHITE VICTIM

Vada Berger

The truly disturbing aspect of *Bakke* and similar cases is the focus on the sacrifice of the "innocent" white victim. I have yet to meet any innocent whites. I do not necessarily mean that we are all consciously experiencing or acting on racial animus. Rather, every day of our lives we whites benefit from white privilege. This means we are enjoying the benefits of something that is not fairly ours, that we have not worked for and that we often do not need, at someone else's expense.

The assumption in the *Bakke* case is that all of the whites attending the medical school at the University of California at Davis attend the school because they deserve to and they work hard. Why do the whites deserve to attend the school? They deserve to attend because they scored higher on a racially biased test, one of their parents is an alumnus of the school, one of their ancestors provided large donations to the school, they attended a suburban high school where they received individualized attention, and/or they attended a college with an outstanding reputation.⁵⁵

Of course, whites can claim that it is not their fault that they are blessed with these attributes and that they as individuals did nothing to promote the benefits bestowed upon them. However, these people miss the point. They are not viewed merely as individuals, they are viewed by their status as whites. Every accomplishment they would like to claim as their own is tainted by the fact that it was gained through their whiteness. Therefore, the truly questionable group in any medical school setting, the ones (if any) who should operate in a "cloud of suspected incompetency," are the white students.

EQUAL OPPORTUNITY EMPLOYER

Eric Richards

A third-year law student, I recently completed a hectic schedule of fall interviewing with law firms, government agencies, and others, seeking post-graduate employment. Typical of one of my interviews was a visit to a highly regarded New York law firm of about 260 lawyers (60 partners and 200 associates), which proudly adjusted its recruiting pitch to appeal to me as a black student. "We are one of the most progressive firms in the country," I was

55. See RACE, RACISM, *supra* note 18, at 455.

assured by one of the older partners, "certainly one of the first in this city to hire blacks, women, and Jewish attorneys." He confidently continued, "You need not worry about being a minority lawyer in our firm. We are and have *always* been a *meritocracy*. You will advance or not advance here solely on the basis of your own *merit*."

If the appeal to meritocracy was meant to impress me as a minority, it failed to do so. And despite the partner's assurances, I did worry. The firm's own statistics revealed that while it hired a small number of minority associates each year (four out of fifty in 1987), all would be gone (for reasons not indicated) long before they were to be considered for partnership. Yet the firm still insisted that it was a meritocracy, where factors other than merit, and certainly not race or sex, supposedly have no bearing on an individual's ability to advance. Even a conservative foe of affirmative action might concede that the firm's complete lack of minority partners suggested that firm may be indifferent to individual merit, but not race or sex, in advancing lawyers towards partnership.

While it was an easy decision for me not to join that New York law firm, I continue to worry. The record of the legal profession in general, the profession which I have chosen to join, is not a good one for advancing minority lawyers, despite its claim to be one of the most individual, merit-driven professions around. I worry too because the legal profession may not be much different from the rest of American society, which boldly claims to distribute economic and other benefits according to merit, but which sees few of those benefits reach blacks, other minorities, and, no doubt, some unfortunate whites. Is it simply that blacks and these others are inherently lacking in merit? Or is the concept of meritocracy, as widely and blindly believed as it is, not fully applicable to our society?

Distribution of employment and educational opportunities according to merit goes largely unchallenged and lauded as the *just* and *existing* method by which such benefits are rewarded in American society, although it is neither. Nonetheless, the mythical application of the concept of merit to the American system plays an important, but unfortunate, role in the make-up of fair employment laws and in the nation's affirmative action debate. In both contexts, it undermines, perhaps intentionally, the quest for racial justice, by subjecting blacks and other dispossessed minorities to meritocratic rules and hurdles never before encountered by empowered whites in their advancement.

The recognition that ours is not a meritocracy would in itself provide blacks and other dispossessed minorities with fairer opportunities for advancement, simply by eliminating the bias and contestable prerequisite of traditional merit, which, as it turns out, never guaranteed their advancement in the first place. But more importantly, revealing the American myth of meritocracy could lead to the acceptance of alternative needs-based methods of economic and social distribution which would have a favorable impact on the quest for racial justice.

COMPETING FOR A TOO-SMALL PIE

Sung-Hee Suh

Given that affirmative action programs in all walks of American life have recently come under serious attack and that even the term "affirmative action" has practically become a dirty word, I do not want to dwell on an abstract, intellectualized analysis of the ends (what exactly are they?) and means of affirmative action. Of course, I recognize the importance of an analysis such as Professor Sullivan's—that white claims of innocence may count for less if one considers the basis for affirmative action programs not as past sin but, rather, as a future-oriented institutional desire for "promoting a variety of goals dependent on racial balance."⁵⁶ But I am constantly disheartened by the bottom-line reality of the matter. American society *does* indeed see affirmative action programs as "punishing" "innocent white victims," and as far as I can tell, *no* abundance of intelligent, incisive law review articles (nor of favorable, well-reasoned judicial opinions, for that matter) is going to have any effect on the population at large—the very people with whom minority "beneficiaries" of affirmative action programs must deal on a day-to-day basis.

Given also that affirmative action programs, as they are now followed in most educational and employment settings, *do* have underlying, unspoken limits and probably "offer more benefit to the institutions that adopt them than they do to the minorities whom they're nominally intended to serve,"⁵⁷ I would like to concentrate instead on the effects of affirmative action programs on minorities and on the ways in which we, as minorities constantly bumping up against institutional roadblocks and constantly being pitted against

56. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 81 (1986).

57. AND WE ARE NOT SAVED, *supra* note 18, at 154.

one another, should consider seriously problems that are, at least potentially, more within our own control.

One of the most devastating consequences of current affirmative action programs is competition among women and minority groups, *against one another*, for what widely appears to be a piece of the ever-shrinking pie (ever-shrinking since, on the one hand, the amount of "goods" is always fixed at a level that the powers that be deem "acceptable" and "comfortable" and, since, on the other hand, increasing numbers of women and minorities, with rising expectations, have gotten their proverbial foot in the door). While I am distressed by the "upper quota" phenomenon that presently discriminates against Asian-American students in academic admissions, I am even more distressed by a growing Asian-American resentment that is not necessarily directed against the white administrators but, unfortunately, against *other* minorities.

For example, because of the University of California's apparently "fixed" upper quota on all minorities and its desire not to have its entire minority representation be "disproportionately" dominated by Asian-American students, Asian-American students who are rejected inevitably feel that the admissions committees unfairly discriminated against them in favor of Black and Latino applicants. For those rejected Asian-American applicants and their parents, it is not exactly consoling, however true, to hear that their resentment against Blacks and Latinos is short-sighted and misplaced. Although there are significant distinctions between the two cases, rejected Asian-American applicants, ironically, tend to see themselves as "innocent victims" of race-conscious (as opposed to race-neutral) educational policies, just as the laid-off white teachers with more seniority felt "victimized" by the race-conscious preferential lay-off provision in *Wygant v. Jackson Board of Education*.⁵⁸

Racial divisiveness is now alarmingly high with regard to urban business competition as well. In New York City, Black community groups have organized a large-scale boycott of Korean small businesses (mostly grocery stores and convenience shops). I cannot deny that many Korean immigrant shopkeepers harbor intense racist feelings towards Blacks and Latinos and that many, indeed, *are* ambitious, self-interested entrepreneurs who seek to reap all the benefits of a Black or Latino consumer community without ever thinking of obligations to contribute to that community in turn. Nonetheless, I think that Black anger against Korean-Americans is

58. 476 U.S. 267 (1986).

largely misplaced. A more constructive strategy would be to establish some means of communication between the two communities, and to work *collectively* to advocate state and city programs to help establish and foster *all* minority businesses. Such a strategy, at this point, appears to be out of reach, largely because both sides seem hopelessly embroiled within the “divide and conquer” trap. For example, efforts by Asian-American and Latino community groups in one New York-based multiracial coalition to take a stance against the boycott—because it may ultimately result in increased racial tension and even incidents of interracial violence—were defeated by the Black members of the coalition, perhaps because such a stance for Black organizations would undermine their Black community support.

Closer to home, I wonder how the minority faculty recruitment advocates in BLSA (Black Law Students Association) would truly feel if Harvard Law School miraculously hired four minority law teachers tomorrow—two Latinas and two Asian-American women—given the fact that the school does indeed have an upper quota on minority law teachers? Would BLSA consider this at least a partial “triumph”? Or would some BLSA members feel resentment because all of their efforts seemingly “benefitted” other minority groups that might not have worked so hard for minority recruitment and may thus be less “deserving” of such gains? In other words, is there also an underlying, unspoken limit on how much we, as women and minorities, can be truly united amongst ourselves?

THE CHRONICLE OF THE RACE CHANGE GUN

Michael Linfield

Can *Plessy's* nineteenth century sophism survive twentieth century science-fiction technology?

A new weapon is developed. When fired at a person, it transforms that person's color and racial characteristics. Other than race-related physical appearances, the person is unchanged. A Caucasian is “zapped” by the gun and instantly becomes a black man. Angered, insulted and feeling a deprivation of personal identity, the white man sues his assailant, claiming a drastic curtailment of his economic potential because he no longer is a member of the society's dominant group and, because of the defendant's act, must live his life as a member of the group occupying the lowest rung of the societal ladder. He may be “disowned” by wife and family. He

would claim that as an involuntarily black man, he can expect harsher treatment from the criminal justice system; conversely, if murdered, his assailant would likely receive a lesser penalty than would have been assessed were he white. Expecting that any white jury would be sympathetic to his claims, he claims damages for lost earnings, pain and suffering for his lost status, as well as punitive damages.

Suppose a black man is "zapped" by the gun and is transformed into a white? On what grounds might he sue for damages? His economic potential has improved and he can expect his lifetime earnings to soar dramatically. But what of his pride in being black and part of the black community, and his role in black struggle against racism? The loss of personal identity and cultural pride is a serious loss, but is it likely one that a typical white jury will understand or be willing to compensate? Would either the late nineteenth century Court that decided *Plessy v. Ferguson* or its late twentieth century counterpart understand the basis for the black's claim for a pain and suffering award and for punitive damages?

Michael Linfield's "race change gun" is a marvelous metaphor for a whole range of situations in which society recognizes and responds to the victimization of whites in a far more sensitive and supportive way than it does to the similar injury of blacks.⁵⁹ More than a particularly venal form of racial paranoia is at work when blacks are convinced that the American response would be quite different if the racial oppression in South Africa were perpetrated by a black ruling minority on a white subordinate majority. Consider, for example, how the Supreme Court, and the nation, would have reacted had the statistics in *McCleskey v. Kemp*⁶⁰ revealed that in a state dominated by blacks, whites convicted of killing blacks were 4.3 times more likely to be sentenced to death than blacks convicted of killing whites.

In what might be called a "property right in racial empathy," whites benefit in innumerable ways from a positive presumption by students and teachers that they are competent, from bankers that they are solvent and reliable, and from employers that they are trustworthy and qualified. Contrary presumptions about blacks can dilute ambition, sap energy, encourage despair and lead to negative

59. See, e.g., J. PETERSILIA, RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM (1983) (Rand Corporation publication prepared for the National Institute of Corrections, U.S. Dep't of Justice).

60. 481 U.S. 279 (1987).

behavior patterns in line with societal presumptions. White society then attributes the unhappy manifestations of despair to the black victims of societal rejection. These manifestations serve as readily accepted proof that blacks deserve no better than their outcast status.

III. RECONSTRUCTING THE SCHOOL INTEGRATION GOAL

To counter the multi-pronged opposition facing those without the property-like advantages vested at birth in white Americans, African-American parents have relied heavily on public schools. Responding to varying political conditions, African-Americans alternatively have espoused both racially segregated and integrated schools in their quest for effective education. In Massachusetts, for example, the legislature in 1855 enacted a law requiring desegregation of Boston's public schools.⁶¹ The statute was the culmination of a half-century campaign by blacks in Boston to obtain effective education for their children.⁶² In the ensuing victory celebration, probably few persons remembered the dire warning that a black minister, Thomas P. Smith, had delivered a half-dozen years before. A critic of school desegregation, Smith predicted, with unsettling accuracy:

Were the [black] school abolished, of course the whole mass of colored children of various ages and conditions, with very few exceptions, would be precipitated into one or two schools at the West end, where the great body of our people live. Suppose those schools to be full, as they are; in that case the colored ones could not be admitted, unless some of the present ones are excluded. That would not be done. Then other school-houses would have to be built, of course, for the accommodation of these very children, and when finished they would enter, and there be alone in their glory, as at present; having made much trouble and expense, and really accomplished nothing.⁶³

Within a decade, state officials conceded that Boston's public schools had again become identifiable by race.⁶⁴

A century later, the Supreme Court declared segregated public schools both a constitutional violation and a source of damage to black children's hearts and minds "unlikely ever to be undone."⁶⁵

61. Mass. Laws 1855 ch. 256, § 1.

62. See RACE, RACISM, *supra* note 18, at 365-68.

63. Address by Thomas P. Smith, Delivered Before the Colored Citizens of Boston in Opposition to the Abolition of Colored Schools (Dec. 24, 1849), *quoted in* RACE, RACISM, *supra* note 18, at 367.

64. *Id.* at 368.

65. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

At the time, Dr. W.E.B. Du Bois warned that the South would not comply with the decision for many years, "long enough to ruin the education of millions of black and white children."⁶⁶ Thirty-five years after *Brown*, a national study conducted by the National Research Council found that, while substantial progress has been made in providing educational resources to blacks, "black and white educational opportunities are not generally equal."⁶⁷ The Council based its conclusion on findings that:

Standards of academic performance for teachers and students are not equivalent in schools that serve predominantly black students and those that serve predominantly white students. Nor are equal encouragement and support provided for the educational achievement and attainment of black and white students. . . . Measures of educational outcomes—attainment and achievement—reveal substantial gaps between blacks and whites. . . . Segregation and differential treatment of blacks continue to be widespread in the elementary and secondary schools. . . . Differences in the schooling experienced by black and white students contribute to black-white differences in achievement.⁶⁸

The shared experiences of seminar participants help explain the cyclical success and failure of desegregation efforts. While reflecting a wide range of views, the papers justify the pessimism of Rev. Smith and Dr. Du Bois. They illustrate how public school officials have responded to civil rights challenges by altering the form of pervasive discrimination while retaining the substance of racial subordination.

SCHOOL DESEGREGATION: A POSITIVE REPORT

Kevin Reed

From the time I was eight years old, I have been a student in "integrated" schools. When I started second grade, I was transferred from a school which was literally one block from my home and bussed to a school downtown, a school that before had been all black, was much larger, and had a far nicer physical plant. After I graduated from the same public school system, I attended the University of Virginia, a school which was all-white until the late 60s and remains about 8% black, despite the fact that it is under a federal desegregation order.

66. See RACE, RACISM, *supra* note 18, at 412.

67. NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 19 (1989).

68. *Id.*

Thus, I find myself too steeped in the life of education to feel totally objective when I think about race and education. Having stated this, I would like to make a case for the importance of racial balancing in education. All discussion of "associational" vs. "non-associational" rights aside, I believe there is a positive good achieved when black children and white children occupy the same classrooms. I doubt very much that I would have the same progressive political consciousness today had I not had the opportunity when I was eight years old to deal with black folks as my colleagues and peers. Racism, I believe, as an irrational behavior, is a product of ignorance and fear.

That is not to say that all my school experiences were good ones regarding race. My high school was severely divided by a system of "tracking," which kept most blacks in the shop wing while whites were in the college-prep classes. I do not wish to imply that education does not require substantial improvement. But for those advocating all black schools, what will happen to the black students not included in the "talented tenth"? Are they to be permanently allocated to the shop wings of the public high schools? What sort of race relations would be promoted if most white students are removed to private schools or schools in the suburbs, while a few black students—those that perform well—are allowed to attend a magnet school?

I am speaking from the perspective of a white student, and I understand that all that I say must be balanced with—and may lose out to—an understanding of the harms caused by putting black children in the front line of racial reform. But as a white student in an integrated elementary school, I learned a lot when the black principal would play Martin Luther King, Jr. speeches over the school loudspeaker. I would hate to think that the white students who follow me will not have the same lessons.

THE BOY THAT SCHOOL DESEGREGATION FAILED

Anthony Scaramucci

I remember Mark Jones (not his real name), a black boy in my fourth grade class who was brilliant. He was so smart that our teacher said to us that he was the only person in our class whose writing really read like the encyclopedia—meaning the rest of us had better stop copying our reports from the World Book. Mark was smart, but he never made it to college. It was a shame. Here was a guy who could write like the encyclopedia at age ten, and now

he works in an auto body shop. It is not that I think that working in an auto body shop is demeaning. I worked in a motorcycle shop throughout high school and it was anything but demeaning, but this guy had intellectual promise.

Mark's family lived in a housing project that was built in the 1960s to house lower and middle income black families. The project was not met with widespread support among the citizens of Port Washington. It was isolated from the rest of the town. Yet in the 1980s the project received nothing but praise from the town's councilmen as a shining symbol of how the public sector can help integrate the society. It is still isolated from the rest of the town, but that's politics. What is particularly disturbing today is not that the project is isolated, but rather that the black students who went to our prominent public school system did not receive the same coddling as the whites. To be sure, there were and still are teachers who were colorblind, but overall, it was a shade of institutional racism that deterred the black students from fully prospering.

"Even when school desegregation takes place without overt hostility to non-whites, well-meaning school officials are usually so concerned about retaining racial balance that school policies (particularly academic, disciplinary, and extra-curricular policies) are structured to meet the needs of white students and respond to the fears of white parents."⁶⁹ This was most certainly the case in Port Washington. There were no black parents on the school board. I cannot recall ever being taught about Afro-American history. Slavery was a misnomer. If it wasn't for the television version of Alex Haley's *Roots*, slavery could have been just another form of employment in the mind of my twelve-year-old body.

I do not know the reason why Mark never went to college, or why Joe Jackson (not his real name), a high school basketball star, never received a scholarship. You probably could not pin it on any one thing. It was the overall lack of interest. The lack of encouragement, perhaps at home, but certainly at school.

BUSING IN THE MARTIANS

Jeffrey Moslow

Can blacks get equal education within a system that caters to whites? Can they formulate a sense of identity that will help them combat the cold cruel world that is so hostile to blacks? Busing was

69. Carter, *A Reassessment of Brown v. Board*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 21, 27 (D. Bell ed. 1980).

court-ordered in my community in the early 1970s. I remember when I was in elementary school a bus loaded with black children arrived every morning and most of the students looked on with amazement as if Martians had just landed. The response was not unusual. After all, black children had never stepped foot in the Guggenheim elementary school.

The black children were dispersed throughout the classes, which resulted usually in no more than one or two in a classroom of perhaps thirty students. These black children did not just have their minds on learning but were focused on getting used to a whole new "culture". Having to get used to this new environment had to have put them at a distinct disadvantage to their white counterparts, who only had to focus on learning. When I look back on those elementary school days I remember that the black children always seemed to look preoccupied and perhaps did not concentrate on learning as much. As a result, in the ensuing years, a disproportionate number of black children were placed in so-called special education classes for children who seemed to be a bit slow at learning. This situation only increased the problem of those black children.

I went through the public school system with many of these special education children and a good number of them never had any sort of learning disability but were simply adjusting to dramatic changes in their lives, whether it was at home (i.e., family problems) or at school (i.e., being put into a whole new environment). My point is simply that I do not know if desegregation on a grand scale is the solution.

QUESTIONING THE BENEFITS OF DESEGREGATED SCHOOLS

Wilhelmina Wright

I wonder. Why did civil rights legal strategists believe that equal educational opportunity for blacks could only be gained in the context of integrated classrooms? I think it was reasonable to assume that whites would not harm their own academically in order to subordinate blacks. Unfortunately, this did not prove to be correct. The education of black and white children has suffered as teachers who felt federal judicial coercion in their classrooms responded with lethargy and disillusionment.

The creation of ability grouping in education has reseggregated the classrooms of many integrated schools. Classes for gifted students are almost all white. Vocational education courses and non-

academic tracks are almost all nonwhite. My public school experience further illustrates the methods used to circumvent the *Brown* mandate. I was bused for 35 minutes from my inferior black neighborhood school to a wealthy white neighborhood school that competed with local private schools for its pupils. The gifted and talented programs were the best in the city. Busing transformed the student population from 100% white to a 60–40 white to black ratio. However, as a result of the tracking, the academically rigorous classes maintained a 100% white student population until my mother's protests were answered by my admission into the gifted program. There, along with a challenging academic experience, I was indoctrinated with a subtler form of racial subjugation. My talents so separated me from my black neighbors that a white playmate's mother rationalized my presence in her daughter's class by explaining, "You're black on the outside, but your brain is white." I smiled gratefully. Only later did I learn from my mother that this woman's racism was so endemic that she had to resort to biological myths to explain what she perceived to be the incongruent combination of black intelligence. "No honey, you're black through and through," my mother corrected. "And there are plenty more like you. That's what she's afraid of."

The integration mandate was necessary to change some white minds about black incompetence and to open doors for some blacks to walk through. In order to force white society to invest in the education of poor children of color, we need to be able to point to the few who have achieved to prove one point—black people given the same opportunities are equal to white people in intelligence, perseverance, commitment, and industry. But just as the achievements of a few blacks make that point, such achievements must be scrutinized. We must not let white people and bootstrapping black people use the presence of the "talented tenth" to condemn the less fortunate nine-tenths. Rather, we must scrutinize the opportunities, encouragement, family structure, and academic rigor afforded the talented tenth in order to replicate it through public and private initiatives with the goal of achieving a talented nine-tenths (or even ten-tenths)!

We are beyond the stalling tactics of "all deliberate speed," and stories of busing good fortunes and misfortunes. White people are running and hiding. Their mad scramble is aided by a Chief Justice who owned racially restrictive property and a Presidential administration that believes bigotry, poverty, and poor educational oppor-

tunities for most public school students are the unavoidable fruits of a "thriving" free market economy.

To make progress we should learn from whites who opposed desegregation until they lost and, once defeated, used the desegregation mandate for everything it was worth. First, educate black parents in the urban school centers of the potential benefits of desegregation orders even after the white people have run away. Improved teacher-student ratios, magnet programs, and learning technology may all be employed to remedy the educational harms of past segregation and inferior educational opportunities for blacks. Educate parents to redefine "desegregation" as a term meant not to guarantee that a white child sits on either side of a black child, but to guarantee academic proficiency of that black child regardless of the race of her classmates.

Second, borrowing Judge Robert L. Carter's idea,⁷⁰ combine the skills and expertise of parents, teachers, and attorneys to define the necessary components of a basic adequate education. I propose a curriculum that fosters student pride and self-respect by incorporating the political, social, and cultural contributions of people of color in American and world history. Utilize the community to send forward new role models who live and succeed in the students' midst. Justice Powell's recognition of the role of community support, interest, and dedication to public schools is apposite in the context of urban education's revitalization effort.

WHY INTEGRATED SCHOOLS FAILED BLACK STUDENTS

Drake A. Colley

I agree with Dr. Du Bois that quality education is needed much more than integrated schools. One might argue that many blacks have been injured by the focus on school integration rather than quality education. Within my own family I have witnessed just such an injury. My sister, who is three years younger than me, was bused to a school which was not only educationally inferior to the public school directly across the street from our home, but also was the site of extreme racial hostility and tension. This is not to say that the legal principles upon which school desegregation cases rested are invalid; rather, they appear to be incapable of being successfully applied.

70. RACE, RACISM, *supra* note 18, at 411 (quoting Du Bois, *Does the Negro Need Separate Schools?* 4 J. NEGRO EDUC. 328, 335 (1935)).

One must start with the realization that in the not-too-distant past, most whites preferred (and many whites continue to prefer) one-race schools. Further, many whites did not care whether blacks received any education whatsoever. It is because of those prevailing attitudes that black schools were considered to be of the lowest priority insofar as budget considerations are concerned. It is the desire today for one-race schools that accounts for "white flight" from the public education systems, and the urban areas, of this country.

One might also note that the lack of concern for the education of blacks has had an effect which is seldom considered by courts and too infrequently mentioned in the briefs of civil rights litigators: to the extent that public school curricula are uniform, and to the extent that this uniformity is geared towards the needs of the majority community, the special educational needs of black children remain unmet. One aim of school desegregation was the provision to blacks of the same education as was received by whites. It is important to understand that blacks need an education which is equally beneficial to their needs as is the education which whites receive. The standard public education continues to promote white superiority on several levels. Black youth might be better served by an education which emphasizes black self-worth in addition to the core curriculum.

In light of the recognition that black progress largely relies (unfortunately) on white self-interest, one legal strategy might focus on a return to neighborhood schools especially for the primary grades coupled with the assurance that the quality of the education provided be equal for all schools. This will require measures that ensure equal distribution of good teachers and resources for schools that are predominately black. I admit to sharing the concerns of those who fear a return to policies permitting segregation; I feel, however, that segregation was never completely overcome. This strategy might also make use of the rhetoric that black empowerment is in the best interests of white society, and that (we may as well wrap it in the flag!) the result will be a stronger and more unified America, where minority and majority interests converge.

PARENTAL SUPERVISION AS EDUCATIONAL KEY

Terry Walcott

While many black parents supported school integration as "the only way to guarantee that a black child received the same educa-

tion as white children," we now know that parental supervision and teacher expectations play important roles in the educational process. My schooling experience supports this view. I was born on the island of Barbados, where I attended elementary and secondary school until age thirteen. Growing up in a single parent environment, I realize now that the chances of my attaining academic success were not great. But my mother instilled in me the importance of education, supervised my school work, and was in constant touch with my teachers. My mother's efforts paid off when at age ten I was accepted into the top secondary school on the island.

Shortly after starting secondary school, my mother left Barbados for the United States. Not long after her departure, my grades plummeted from a number one ranking out of twenty-six students to an average ranking of about number eighteen. I recognize now that I missed my mother's supervision. At age thirteen, I immigrated to the United States to join my mother and my grades went up immediately. Here, however, I encountered the problem of low teacher expectations that so many black American children experience in the schools. Even though I had done most of the work for my grade level in Barbados and was able to demonstrate that fact on tests, I had great difficulty getting into upper level and honors classes in my racially mixed high school. This led to frustration and a certain amount of academic coasting despite my mother's efforts to supervise my progress.

When it came time to apply for college, I was referred only to city colleges even though I was in the top ten percent of my class and had Ivy League credentials. I realize that I was fortunate to overcome these obstacles, but the tragedy is that most black children do not overcome them.

FORTUITY AND EFFECTIVE, DESEGREGATED SCHOOLING

Yvette Glasgow

The result of forced desegregation of the public schools in Richmond, Virginia reflects the usual pattern: the inner-city schools are predominantly populated by blacks, and the county schools have majority white representation. Although *Brown* was decided in 1954, the public schools in Richmond remained segregated until the early 1970s. My family got caught up in the hullabaloo of desegregation. Many black students and parents in Richmond were satisfied with their neighborhood schools. (However, there had been battles over issues like guaranteeing black students a fair op-

portunity to take the SAT.) When the pronouncement came that some students would be bused across town or would have to walk long distances to an assigned school, it was met with a tremendous amount of resentment from blacks and whites.

I can remember the neighborhood meetings at my house with my mother leading the opposition. Parents expressed concerns about safety, comfort, friendship, and class rank. Black parents argued that their children should not be moved. After a long battle with the school board, my sister and a few other black students were allowed to remain at Armstrong High School.

My brother and I had a different experience. We were bused across town, but we suffered no anxiety because our friends from various parts of the city were also going to Thomas Jefferson. My mother was not pleased, but she learned to live with it. Thomas Jefferson high school is located in the most exclusive area of Richmond. Until the mid-1970s, the school was predominantly white. This imbalance was not caused by the flight of whites to the suburbs; most of the residents in the surrounding area sent their children to private schools.

Thomas Jefferson was the best of both worlds: it was predominantly black and the teachers and the educational facilities and resources were excellent. One reason for this was that Thomas Jefferson had been the public school where the children of the elite attended school from the 1930s until the 1970s. When desegregation occurred, the facilities were the best in the city, and many of the good teachers stayed put. The school is known for the number of people that go on to the "best" colleges in the nation. A large number of these students are black. One factor that contributes to Thomas Jefferson's success as an inner-city black school is that the curriculum and the staff were originally provided for white students. This is evidence that what black children need is not the presence of white children in the classroom but good teachers and enough funding to insure that they are getting the best quality education. The majority of students at Thomas Jefferson are encouraged to attend college, and the black teachers provide a strong network of alumni from black colleges who go out of their way to make sure that all students can further their education if they choose to do so.

I compare my situation with that of one of my friends who grew up in Fairfax County, Virginia. Fairfax is known for its wealthy population, and needless to say, there are few blacks in the area. If you are not a black honor student or superior athlete, your

chances of going to college are near zero. Somehow you get lost in the crowd. I was alarmed by the number of black high school dropouts in this area. This is one example of how shipping black children to white schools has proved detrimental. Perhaps the dropouts that I met would not have been good students at the black school. Nonetheless, I believe that they would have a certain sense of pride that one does not get from attending a school where teachers are not concerned with the needs of black people.

THE ROLE OF RESIDENCE IN SCHOOLING OPPORTUNITIES

April Taylor

For poor parents, finding a place to live occupies the priority that the middle class devotes to insuring good schooling for their children. I often wonder how my perspective on life would be if I had been reared in the suburbs, in an area predominantly white—as opposed to my actual upbringing, in a predominantly African-American, inner city community. I would have been a different person—educationally, socially, politically, and emotionally. There are just many more “opportunities for advancement” in the suburbs. Ahhh, just mere speculation. I really can’t expound upon life in the suburbs. My experiences have been that of living in the so-called ghetto.

Housing in the inner city is very difficult to obtain. Growing up, we moved from one place to another. I really didn’t understand why my mother, being a single parent, didn’t get the really nice apartment or live in a nice, clean neighborhoods. As I grew older, I began to understand the underlying problems: My mother is a person of color—an Afro-Puerto Rican; she had been recently divorced (single parent) and had been trying to find a steady job; and she had three very young children assisting her in the pursuit of a decent apartment for the family. Some landlords didn’t even give her a chance to view an empty apartment because, they told her, it was already “taken.” Most of the apartments that she was allowed to see were astronomical in price and couldn’t be considered. So we actually had several factors of discrimination to contend with: racism, sexism, and economic exploitation.

Yes, I can see clearly now, as the old saying goes, how deeply entrenched this country is in moral evils. A single parent, a woman who looks “Black,” can’t find shelter for herself and her children in this great land of abundance and wealth. The only places of refuge for a low-income, single parent, were the housing projects (which

are dilapidated and neglected by the city) or an apartment, likely also neglected and over-priced. We chose the latter, and strange as it may seem, there seemed to be some semblance of "pride" on my mother's part for not wanting to live in the local housing projects. I remember when the prospect of such was first presented to me, I was frightened out of my mind. I didn't know any better then, I thought "those people want to live like that." Little did I know, "those people" were faced with the same socio-economic problems we had been faced with as a struggling family.

The experiences I am reporting happened during the early seventies, but the problems remain unchanged and are likely worse. African-American people are still facing the problems of discrimination with landlords who don't want to rent to them because they are "Black," because of their economic status, and because of their sex. Given all of the above, there is now the additional problem of gentrification in the inner city; Donald Trump, and people of the like, are now buying acres of land and buildings, be they inhabited or not, to convert them into high-priced buildings for the "privileged" class.

The student comments illustrate how school desegregation implemented on the racial balance model, while of some benefit to the most able black children, perpetuated white superiority in both educational resources and the minds of many whites involved in the process. Even black students, who benefitted from attending better white schools, did not emerge unscarred from the experience.

We can expect that when these students approach the task of educating their children, they will be far less enthusiastic than their parents for the values of integrated schooling. They, like Dr. Du Bois and Thomas P. Smith, the early nineteenth-century minister, will emphasize the effectiveness of schools rather than their racial mix. Their experience has taught them that it is foolish to assume that an integrated environment will insure an effective education. They will agree with Dr. Du Bois that:

Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.⁷¹

71. AND WE ARE NOT SAVED, *supra* note 18, at 228-29.

IV. DECOLONIZATION OF BLACK MINDS

[S]ocial science experts can help us prove what should be obvious: namely, that blacks cannot purge self-hate without nurturing black pride through teaching designed to show that the racism of whites, rather than the deficiencies of blacks, causes our lowly position in this society—a dangerous truth that indicts the nation's leaders, institutions, and long-hallowed beliefs.⁷²

If racism is as deeply damaging to the self-esteem of black people as we insist, then we need not apologize for the resulting debilitation that hinders effective functioning. We must understand how the long-held belief that black people are inferior to whites becomes a self-fulfilling prophecy when educational and hiring policies are based on this belief. Even students of color able to rise to professional school status are not immune, although they have survived and are able to diagnose the damage. Recognizing the symptoms is a prerequisite for healing. Here, as students speak for themselves, they define a society's race-based afflictions and possible cures.

THE GOLDBLOCKS FANTASY

Kirsten Levingston

When I was a little girl, I used to wrap a towel around my head, or a shirt, or any flowing piece of material which would enable me to have long flowing blonde hair. I used to revel in the ability to toss it over my shoulder with my hand, to feel it falling on my back, or to just pull it around and let it caress my face. When I had long flowing blonde hair I felt beautiful. Talking about this strange behavior with friends recently, I discovered that many of them had done the same thing. While relieved that I was not a demented person, I am saddened that little black girls cannot feel good about the hair that they were born with. Granted, people dye their hair and curl their hair, and do all types of things to it to change its appearance. But when I was a child, I was not interested in working with what I had: I wanted what little white girls had.

Some might view this behavior as being insignificant—children do some silly things. But I view it as being symbolic of a great deal more. It shows insecurity, self-denial, and self-hatred. Before ever entering the world, I pictured myself as not being as good as others who had certain qualities and traits I did not, and could not, possess. It truly is amazing to me at times that there is even one

72. A. LORDE, *SISTER OUTSIDER* 139 (1984).

sane black person in this country. We should all be suffering from an extreme case of schizophrenia.

There is nothing really that strange about the concept of self-help. It is a rather basic notion that one does what is necessary to better one's own personal situation. Where the problem arises is in the definition of these two small words. In this society "self" is often perceived as being the definition advanced by the majority, which makes sense for members of that group but is ludicrous for people who are not. "Self" is love of, pride in, and comfort with that reflection that faces us in the mirror. As a child, self was unattainable for me since in that reflection I saw an image that did not look like the images I encountered most of the time.

But even when people of color are secure in themselves, there remain the problems of deciding how to "help" that self. However, until we take care of the first step, we cannot proceed on to the "help" stage. I believe I have taken the towel off of my head, and am ready to go on. As the majority has defined its "self" and put forth a broad agenda of advancing it, so too must black people have a vision. There will certainly be a multitude of ways to achieve that vision, but there must be a base from which to begin.

DENIAL AS THE GREATEST SIN

Vada Berger

Racial injustice permeates every institution of this country from the moment of its inception and is perpetuated today. However, racism is neglected by conventional approaches both to the psychology of black Americans and to constitutional developments. Part of the constitutional neglect is due to America's idealization of the Revolution and the founding fathers. No one wants to believe that the Revolution or the idea of the founding fathers as a variety of Renaissance men (both intellectuals and frontiersmen) is somehow soiled by the dirtiness of racism. However, the presence of slavery and racism at the time of the formation of the Constitution is undeniable. I am embarrassed to admit that I was surprised to learn of all the textual references to slavery in the Constitution. With this kind of knowledge, I find any black's belief in the Constitution or the so-called American dream to be an even more astounding phenomenon than ever.

Further, discussions of race and racism are often embarrassing and uncomfortable for instructors, particularly whites. A white instructor may believe that a discussion of racism will lead to the in-

structor's authority being undermined. After all, the instructor gained that very position through white privilege. Therefore, in order to avoid any controversy, the teachers merely present a "sanitized" version of topics or a history. The irony of such an approach is that the teachers do not realize that their silence is controversial in and of itself.

Nevertheless, this kind of self-conscious denial of racial difference and racism by white teachers is probably not the predominant reason that such issues are neglected. Rather, white scholars probably do not even think of their heritage and themselves as racists. Therefore, racism is simply a non-topic because they do not believe racism has in any way affected them. However, even for whites who do not feel any particular ancestral ties to those men who drafted the Constitution, the legacy of privileges drafted into the document is theirs. Once again, we are confronted with the reality that whites will only consider and promote agendas when they enhance the privileges retained by the whites. Thus, black scholars are forced to shoulder the entire burden of presenting racial issues and racism as legitimate topics of discussion.

If, as Foucault has stated, power is knowledge, then the self-conscious teaching of racial history is a mechanism leading to black empowerment.

BLACK SUCCESS RATES COLOR-BLIND STATUS

Wilhelmina Wright

This weekend, Rev. Barbara Harris was hailed by the media as the "first woman bishop among the world's 70 million Anglican Christians." No reference was made to her race. With this gap in information, I was relegated to scrutinizing the picture with the question often asked by my grandmother resounding in my mind. "Is she colored?" The news did not report that Barbara Harris is the first *black*, woman Anglican bishop. Yet, she is both the first woman and the first black woman. The media's omission clearly illustrates the importance of gender over race when it comes to achievements other than teenage pregnancy. The news reports chose to erase Barbara Harris's racial identity.

Audre Lorde wrote:

We lose our history so easily, what is not predigested for us by the *New York Times*. . . or *Time* magazine. . . . We do not have to romanticize our past in order to be aware of how it seeds our present. We do not have to suffer the waste of an amnesia that

robs us of the lessons of the past rather than permit us to read them with pride and understanding.⁷³

It seems inconceivable to some whites that blacks would want to maintain their ethnic and racial identity in the face of success, because black is integrally linked to inferiority and failure in these white minds. (We all know they wouldn't let us forget our blackness even if we did want to forget.) I am sardonically amused by the unsuccessful attempts of white people to make me known to someone while using a description that excludes my race. "Oh I didn't want to offend you by saying that you're black." Incomplete reports of Barbara Harris's success abound because even many of the most sympathetic white liberals fail to comprehend that black racial pride is as genuinely felt as white ethnic pride.

In our class last week a commentator assessed as "progress" the fact that the Huxtables are not considered by many whites to be a black family. Typically the merits and achievements of blacks become racially neutralized—American—while the troubles of blacks are exclusively our own. Race will never be insignificant in this country. Rejecting "not white" as the definition of black is the source of pride, success, and the perceived threat in Geneva's *Chronicle of the Slave Scrolls*.⁷⁴ Black is the summation of resilience and tenacity when threatened with annihilation. Black is not the negation of white privilege.

Self-definition is the only reliable mode of empowerment. As long as we relinquish to others the language to define us and the methods through which we may achieve a wealth of self-confidence and pride, such language and methods will hinder our progress. Heed literature's keen illustration in *Robinson Crusoe*. A helpless white man stranded on an island used language to guarantee not only his survival but his superiority. To the indigenous man of color the colonizer said, "I am Master, and you shall answer to Friday." With that one pronouncement Friday's identity was bound by his inferiority.

MARKS OF OPPRESSION

Lisa Marsh

"Would you die for your freedom?" Yes. I would die for my individual freedom. However, if asked "Would you die for the freedom of African-Americans?" my response would be negative.

73. A LORDE, *SISTER OUTSIDER* 139 (1984).

74. *AND WE ARE NOT SAVED*, *supra* note 18, at 190.

I often consider what life in the United States would be like had Africans sailed to the "New World," usurped the land from Native Americans and enslaved Europeans. We would now speak and dress differently. Architecture, art, music, and dance would follow African influences. History would be whatever Africans wanted it to be. Blacks would be considered the intellectual and moral superiors of whites. Also, whites would have their hair chemically treated to make it kinky and their noses "fixed" to make them flatter and broader. Only those persons we now consider "black" who had the darkest brown or ebony skin would truly be black. All the others would be white, or more likely, of tainted lineage. The sanctity of black womanhood would be a revered ideal. By adopting a western European mindset, blacks have transformed their victimization by this society into self-hatred.

I had recently graduated from college and went to teach at an all-boys "inner city" (that means black) public high school. I was eager to impart what knowledge I had to these young black boys in hopes of helping to mold them into strong black men. Starting from my first day in front of the overcrowded, poorly maintained classroom, I was the target of the most cutting invectives. Cutting because they expressed a distaste for blackness, a lack of respect for women, and most disappointingly, they reflected no respect for black womanhood, that bottomless well of strength that has nurtured and fortified a race from continent to continent, from century to century.

It took me some time to realize that the hatred my students expressed was not directed at me, but at themselves. It must have been maddening for them to sit facing me five days a week, my dark brown skin, full lips, and broad nose echoing back to them what they saw in the mirror each morning and recognized as that which imprisoned them in a world of littered streets and uninhabitable housing projects, far removed from the "white" world they viewed weekly on television programs such as *L.A. Law*.

What use would the willing surrender of my life be if those I die for do not realize that their lives are worth living? Only after blacks are able to break their chains of self-hatred and cease to curse that which makes us African-Americans, will I be willing to die for our people's mutual freedom.

INTERRACIAL ROMANCE: PERSONAL RIGHTS VS.
GROUP INTERESTS

Kirsten Levingston

I have a very hard time formulating a single opinion on the interracial romance debate. As an individual, the answer is quite simple—people should be able to date people who make them happy. I would not encourage a black woman to stay with a black man who makes her unhappy, nor would I encourage her to stay away from a white man who makes her happy. Similarly, a black man should date the woman who makes him happy, whether that woman be black or white. The fact that I may not like the decisions these individuals make is irrelevant.

However, my group perspective tells me that black Americans must do all they can to unite and develop themselves. That unity and development must begin at home with our children, and the key to producing strong and proud black children is to raise them in an environment with strong and proud black parents. While I'm sure it may be possible to raise proud black kids in an interracial environment, one parent's culture is going to be forced to take a backseat.

At the university I attended, most of the black men at the school were athletes, and many of them chose to date white women. Some of these athletes may have felt it necessary to date these women to gain legitimacy. Nevertheless, from where I stood, surrounded by very ambitious and together black women, it was difficult for me to understand from an individual happiness perspective why these men did not choose to date black women. For many of these white students, the black athlete status was the most attractive thing about him. Of course, black women may be status seekers as well; but the black women I knew in college were attracted to black men because of who they were, not what they were. However, by observing how these black men treated these white women, it became clear to me that many of my friends would not be interested in these relationships.

My observations of these relationships has led me to believe that part of the problem between black male and black female relationships may be caused by the black man's acceptance of the white man's definition of what a "good" woman is. My black female friends are not weak and submissive, and while many if not most white women are not either, the white women I saw black men dating did have these characteristics.

SALVAGING BLACK MALES

Victor Bolden

Black males have been disturbingly irresponsible. The rest of the Black community has suffered immeasurably as a result of this irresponsibility. How do we properly develop Black men in a pervasively white patriarchal society? First of all, we have to acknowledge certain realities. There is a unique problem for Black men in being able to cope in American society. This is in no way meant to trivialize the problems of Black women, nor is it in any way meant as a way to express the notion that Black men have suffered more than Black women. Black men are less likely than Black women to go on to any form of higher education, especially college and graduate school. By the time they reach the age of twenty-five, the proportion of Black men that are likely to end up unemployed, imprisoned, or dead is alarming.

The above realities do not even begin to consider the number of Black men who are involved in abusive relationships with Black women (this is not to say that White men are not equally as abusive; I really do not know nor do I believe that this possible fact should deter me from mentioning abuse in the context of the Black community) or the number of Black men who do not adequately provide for or even care for their children.

In order to find out how to get Black men where they ought to be, it is important to explore how they got where they are. Bearing in mind that my analysis is a personal rather than a studied assessment of what has gone on, I would say that a good deal of the problem can be attributed to the emasculation of the Black male theory. All too many Black men suffer from a confused sense of male identity that stems from white male society's reluctance to allow Black men to express themselves and to develop themselves in what is to be considered traditional male ways. Black men have been much less likely to be in an economic position to provide for their families. Black men have attempted to define their sense of identity in these traditionally male ways. I must add that while I believe that the development of some sense of male identity is important, I do not believe that the solution to Black men's problems lies in their being able to be the so-called "breadwinner."

Black men must develop a sense of personhood that focuses on sharing, instead of perceiving as solely their own the responsibility for the Black community's survival. While a new sense of personhood is necessary, it must be recognized that this is a tall order

for Black men. I am asking them to create a sense of identity which is at variance with the society as a whole. Black men must take on the awesome task of saying to this society, which is dominated by a white patriarchy, that it must change drastically and that they will not cooperate in the continued oppression of women. While I say that this is a tall order, I must also say that this is no less than the burden that women, especially Black women, bear as an existential matter.

Beyond dealing with white patriarchy, there are more formidable problems, such as the environment that many Black men live in. This is an environment where violence and anger play a major role in how Black men respond to circumstances. People may be oblivious to this reality, but to be a Black man often means that you must develop a violent nature which is considerably greater than the violent nature of White men. Astonishing crime rates, directly related to drug trafficking, make many Black communities unbelievably dangerous. Black men are expected to live amidst this danger in a way that Black women are not. How do you avoid constantly being beaten up unless you learn how to respond with enough force to survive? How do you say no to the gang that says join or else?

The same violent nature which Black men use to protect themselves is the same violent nature which causes problems in relating to people in the Black community. The need to respond with force makes violence against Black women more acceptable to all too many Black men. The same is true for abuse of children. The most disturbing aspect of this violence problem is that it is not just limited to black men who are chronically in prison or are not well-educated. I have witnessed this tendency to respond to situations with violence even at the college level.

With all of these problems, the situation is not hopeless; it is not without possible solutions. As mentioned earlier, Black men need and, I believe, can develop a sense of personhood that makes them more capable of sharing responsibility with Black women and more willing to forego some false sense of pride for a real sense of progress. Beyond this approach, the issue of violence can be dealt with by having community-wide efforts to teach nonviolent conflict resolution. George McKenna, who runs a very successful school in Los Angeles, recommends that every school ought to offer classes in nonviolent conflict resolution.

Of course, it is equally important to have the greater white community focusing on ways to end the despair and anger which created and maintains many of these problems. The Black man

must not be just looked upon as a threat. In a community like the Black community, where the appeal to resort to criminal behavior is so strong because of dire conditions, the treatment of Black men as criminals, regardless of their achievements, only leads many Black men to consider criminal behavior as the only way to survive.

SUBORDINATE SALVAGING THROUGH EXCLUSION

Barry Berke

As I enter the gym, I notice that everyone is Black. I ask the person who appears to be waiting for the next game whether he needs another player. He responds that he already has five (despite the obvious fact that less than five are there waiting for the current game to end). Having been in this situation before, I ask him exactly who is playing with him. He assures me he has five. I badger him a few more times before the current game ends, until he is left no choice but to let me run with him.

The guy I'm covering out-rebounds me and gets a basket. Someone on my own team gives me a hard time about it. I return his hostility in kind, knowing that if I appear vulnerable all is lost. On offense, no one is passing me the ball. This continues. Finally, I get the ball: twenty-five feet—swish. Still, the ball is not coming my way. I get it: pass to the big guy—basket. I get it again: pass again to the big guy: basket. I'm now part of the offense and my team passes me the ball.

I foul the guy I'm covering. He starts giving me a tough time about not being able to stop him without fouling him. He, along with an occasional teammate, continues to stay on me about my defense until the end of the game. We win. Game two begins with me hitting three shots and blocking a guy's shot into the rafters (playing better than I have in a long time). Nobody else says anything.

What does it mean to be oppressed? Does it mean to be prejudged as an individual based on a prejudice toward a group to which you belong (racial, religious, ethnic)? If so, then does the person overcome the oppression after hitting three, straight shots and blocking a ball into the rafters? Or, does it mean simply to be a member of a group that is the target of bigotry? Then how does a person overcome oppression measured not by his or her personal characteristics but rather by the rigid views about the group held by the oppressors?

SUBORDINATE SALVAGING THROUGH SELF-REJECTION.

Sung-Hee Suh

In various different contexts, I'm often asked why such a significant number of Asian-American women tend to date only white men. I am, on the whole, ill-equipped to answer such a question. But my random thoughts on the subject thus far, as well as several in-depth discussions I've had with other Asian-American women, have led me to some fairly disturbing conclusions—disturbing not only in a “quasi-objective,” societal sense but also in an extremely personal sense.

When I participated last year in a WLA [Women's Law Association] Women of Color Committee discussion on interracial relationships, I was struck by the similarities between, on the one hand, the Black women's critical observations about many Black men and, on the other, the critical observations that Asian-American women have shared with me about many Asian-American men. Many Asian-American women, too, perceive in the majority of Asian-American men the ever-annoying “macho” persona, the “castration complex,” and the insecurities stemming from historical oppression. Deeply-rooted male chauvinism, often transplanted from the traditional societal and family cultures of Asian countries, takes on a new dimension in American society, as many Asian-American men attempt (usually unsuccessfully) to assert their sense of self-esteem. Mass media portrayals further reinforce subhuman stereotypes—the Bruce Lees, the Charlie Chans, the obsequious servants, and the nerdy, computer whizkids—thereby inculcating in Asian-American men a tremendous sense of inferiority and in Asian-American women a general (often unconscious) distaste for Asian-American men.

Although not necessarily logically related, I've found in an increasing number of conversations with Asian-American women another “phenomenon”—one underlying motive for why some Asian-American women find themselves attracted to white men is to obtain status as “equals” (equal to white women, I suppose). Put crudely, a relationship with a white man is much more “valuable” than one with an Asian-American man. Somehow, to be associated with a white man brings legitimacy and, occasionally, a sense of empowerment to a significant number of Asian-American women. Just as wearing the “right” clothes and speaking accentless English are signs of assimilation into mainstream American society, dating a white man means being a “full” American—it means that one has

risen "above" the Asian-American "ghetto" (metaphorically speaking). Furthermore, for some Asian-American women, their own images of themselves as attractive sexual beings depend largely on whether or not white men go out with them.

Of course, I do not mean to convey that all, or even most, Asian-American women feel this way. Even if many did, they would probably not want to acknowledge the feeling. But I have also noticed a pattern in some of the conversations I've had recently with Asian-American women who date white men at Harvard College and Harvard Law School: these Asian-American women feel that their relationships are ultimately inadequate in some inarticulable way. Perhaps some of them sense a version of the frustration or self-hatred described in *And We Are Not Saved*:

It was just one more reminder of my inability to defend myself or another black against the racial hostility that any black person . . . can encounter at any moment, regardless of who we are. That knowledge of my powerlessness affects my relationships, and all relationships between black men and women, in ways no less hurtful because they are impossible to prove—or even discuss.⁷⁵

Speaking for the only person I can—myself—this perspective, whether it is essentially accurate or not, has made me rethink all of my significant life associations, not only romantic relationships but friendships as well. I must admit, for example, that walking into a fancy restaurant with a white date has been a much more "comfortable" experience for me than doing the same with, say, my older brother: this society treats me better when I am with a white man than when I am with an Asian-American man. What does something like this, reinforced on a daily basis, do to my ideas of whom I am "attracted" to and to my ideas of how I regard myself? This process has involved for me an extremely undermining, ongoing self-scrutiny and has also been, on the whole, very paralyzing. It has been a very painful experience to open my eyes to the racism perpetrated by others in society; it is often debilitating, however, to open my eyes to the pervasive racism within. "Decolonizing" my own mind will be, I imagine, a life-long struggle.

Keep in mind that these confessions of race-based inner conflict and trauma are experienced by persons, all of whom have impressive advantages, achievements, and potential for success. It is not difficult to envision the tremendous force that society's racism

75. *Id.* at 223.

exerts on people of color at the bottom of the socio-economic ladder. Those pressures are insidious and pervasive precisely because they spur self-deprecation rather than rage. The victims not only expect failure, but they attribute defeat to personal inadequacy rather than societal unfairness. Success, when it comes, is credited to luck.

As Geneva Crenshaw, the heroine of *And We Are Not Saved*, explains, black people need to be taught how to succeed:

They have learned very early that too much success in competition with whites for things that really matter, like money and power, threatens black survival. In a society where success is a supreme virtue, a deliberate decision not to succeed creates a spiritual vacuum. Just as some poor whites relieve their frustration by feeding on the myth of their superiority, many blacks engage in self-destructive and antisocial behavior as an outlet for their despair.⁷⁶

Although the odds weigh against them, individual blacks can undertake the decolonization process and hope for success. Group remedies, though, require major policy changes that improve opportunities for people of color while reducing the myriad of factors that render so many of these long subordinated people dysfunctional.

V. RACIAL REMEDIATION

It would be a marvelous thing if these insightful and forthright reflective essays definitively answered the question so many civil rights advocates are asking: "Where do we go from here?" The seminar, however, aimed to clarify the present position rather than advance a cornucopia of new and more viable strategies. Even so, an examination of both external barriers and internal disincentives points toward avenues of racial reform not yet travelled, as well as new ways of traversing already familiar ones.

A NON-RACIAL FACT OF RACIAL REFORM

Luke Cole

In fashioning new anti-discrimination strategies, we must remember: (1) that society is slow to act even in the face of overwhelming wrong; and (2) that society is most likely to demand action when the evil is clear and the reform will not involve the majority. I'm thinking of the national response to the social-ill-of-the-year, drunk driving. Ten years ago, drunk driving was socially

76. *AND WE ARE NOT SAVED*, *supra* note 18, at 223.

acceptable, but today it is condemned from billboard to TV screen. Here, we can act because the evil—the driver—is easy to isolate. Few of us imagine ourselves as that person. In confronting racism or economic oppression, on the other hand, many more of us are culpable and have more to lose (than our licenses). But the drunk driving example is instructive. Even when we summon our national outrage, our response is to the individual driver, rather than looking at the structural context of the problem. We do not go after the liquor companies whose bloated advertising budgets appeal to our dependencies, or after the auto companies who could make cars significantly safer so that auto accidents wouldn't cost so many lives. Instead, we go on TV and try to change the attitudes behind the problem. In fact, even the liquor and the auto companies run anti-drunk driving ads. To some extent it has worked, but the real problems remain.

REPRESENTATION BY RACE AS REMEDY FOR ELECTORAL RACISM

Donald Brown

We have structured our voting system to eliminate the effect of the Black vote. The history of our voting process has been one of "gerrymandering" to allow candidates to draw their votes from areas in which they could garner broad based support. One need only to examine the congressional districts of Massachusetts to see that the districts, for the most part, were formed to favor majority interests. The resultant structure makes it impossible for the Black vote to be effective in any significant way.

For too many years, there has been an over-emphasis on the registration of Black voters, in hopes that by their numbers, they could effectuate representation for their interests. If all Blacks eligible to vote exercised that right, it would accomplish very little in the way of addressing the lack of adequate representation in the political process. We need only to look to the presidential elections of 1980, 1984, and 1988 to see that the Black vote is inconsequential. The party which received the Black vote, in record numbers, was overwhelmingly defeated. So what did the Black vote accomplish? Nothing!

When one party can coast to victory, virtually ignoring the concerns of millions of voters, how can those voters ever gain a voice in our political process? The solution must come from proportional representation, not the remedies of the Voting Rights Act.

Blacks must be given the opportunity to gain effective representation in the same manner whites got it—through proportional representation. It seems apparent that “getting out the Black vote” is no longer the obstacle. The undeniable fact that the vote hardly counts is the problem. So, we must make the votes of our Black citizens count, taking whatever legislative steps necessary to achieve representation.

The 1988 Democratic Party presidential primary election illustrates the problem. Jesse Jackson got Black voters to cast their ballots in record numbers. His vote total in the primaries was just short of the amount garnered by Michael Dukakis, and far more than any of the other white contenders. Blacks spoke through their vote, yet the result of their efforts was nil. If a white candidate had done as well, he most certainly would have become the Vice-Presidential candidate, and his constituents would have been represented in the process. Yet, as we have witnessed, Jackson, his candidacy, and its promise of representation have fallen by the wayside.

With that in mind, along with the failure to make the Black vote count in most national elections since 1960, how does one go about selling the idea of the importance of a vote to Black America? Somehow, we must fashion a system, through legislation, that will guarantee Black representation at every level of our society in order that their voices can be heard in all policy making. Then, and only then, will the legal system be an effective tool in the struggle to end racism. Given today's racial malaise, a positive response to my call will require a miracle. I predict that until Black Americans gain real representation, we will remain a racially torn society, with little prospect for a better day.

AN INDEPENDENT BLACK POLITICAL PARTY

Reginald Orcel

Any serious discussion of black political and economic power inevitably turns to the possibility of the formation of a black political party. The question becomes whether blacks would be more or less powerful if we had our own independent political party. As the 1988 presidential election clearly demonstrates, the two-party system is a major impediment to the goal of black power and to the overall political strategies that greater power in black hands could set in motion. Blacks have always been loyal voters to one or the other party. In the post-emancipation era, the black vote was the Republican party's best asset. After the shift was made to the Dem-

ocratic party with the election of President Roosevelt, blacks have shown an unwavering loyalty to the Democratic party. In return, blacks are granted almost no bargaining power within the party. Their votes, taken almost as a birthright by Democratic politicians, are essentially powerless in shaping platform issues. This is especially true when the interests of blacks run counter to those of other important constituencies, such as organized labor. Democratic leaders will readily pay public tribute to the emerging political power of blacks while at the same time placating racial conservatives privately and ignoring past equal opportunity declarations when necessary to meet the demands of other constituencies.

The case for the formation of a black party is very strong. A black party would solidify the political cohesiveness that already exists among black voters. This is especially important at a time when there seems to be an emerging gap in ideology between middle-class blacks and poor blacks. Perhaps a political party would neutralize this gap and focus on the common interest of black people as a whole. Of greater importance, however, would be the fact that a black political party would give blacks a highly "mobile political force." In other words, a black party, created and perceived as an independent political base, would make the black vote negotiable and therefore important and pivotal in any election.

A black party could also be the source of leadership in the community, helping to organize funding, legislative agendas, etc. on a national level. Furthermore, if blacks were organized it would be relatively easy to prove how important our role is in the electoral process. Once this kind of proof is on the table, it is inevitable that political negotiations would ensue with the powers that be.

Once more, blacks in the U.S. must turn to the politics of ethnic solidarity and self-help. *As a group*, black people must determine what goals and tactics are going to serve their best interests. We must find a trailblazing leader who will make the black agenda effective by connecting it with the interests of society at large. Black power can be seen as a legitimate and principled power. It is a cause which acts on the behalf of those who have had to face grievances which are deeply rooted in centuries of overt and subtle racism.

As it continues to strive to overcome the overwhelming economic advantages that go with being white in this society, black power must prod and agitate in order to carry out its mission. We have to march, protest, and boycott in order to constantly remind

those in power that there is a price to pay for continued exploitation.

POTENTIALS OF PROTEST, PARAMETERS OF PROTECTION

Tracy Higgins

Protest demonstrations, whether in the form of sit-ins, marches, boycotts, or pickets, have been and continue to be an important part of the political arsenal of marginalized groups. Such tactics have been used by civil rights groups, labor organizations, and women's groups with varying degrees of success. The potential of actions of protest depends on the political climate, the link between the form (or forum) of protest, and the wrong, and the nature of the protest itself. However, the "success" of a particular protest action or the value of such action in general should not necessarily be measured in terms of the actual changes brought about by the action.

In order for a protest demonstration to be effective in the sense of bringing about substantive change, the political climate must be at least open to that change if not amenable to it. This is not to say the climate must be hospitable; however, unless there is some degree of openness, the action and the protesters may be either dismissed as "radical" or "fringe," or, worse, may be subject to criminal sanctions. For example, the sit-in of the Dean's office by BLSA⁷⁷ was effective in part because of the existence of some significant support among other students and members of the law school community. Because of the sentiment that BLSA's cause was legitimate and its demands reasonable and necessary, the administration could not focus on whether or not the action itself was appropriate. Instead, the demands themselves had to be addressed in some way. Finally, in the case of the BLSA sit-in, the absence or ineffectiveness of established means of communication lent legitimacy to the use of means "outside the system," making the protest seem less threatening to the system as a whole.

Another factor which seems to affect the success of a protest demonstration is the link between the protesting activity and the focus of the protest. For example, the lunch counter sit-ins were particularly powerful because the action of the protesters was so closely linked to the conditions protested, segregated dining facili-

77. In May 1988, the Harvard Black Law Students Association organized a sit-in at the Dean's office to protest the school's minority hiring record. *See* N.Y. Times, May 12, 1988, at 18, col. 4.

ties. The action not only forced acknowledgment of the protestors' demands but also, through the action itself, dramatized the nature of the wrong and brought the issues powerfully to the fore. The BLSA sit-in perhaps lacked some of this power and poignancy because the action was, inevitably, somewhat removed from the nature of the demands. The action could (and did) say, "We must be heard," but, unfortunately, the protestors could not convey the nature of the message through action alone. Consequently, the message may become diluted or lost in the course of discussion and debate which follow the action. This danger of dilution is exemplified by the frustration of many members of the Coalition for a Diverse Faculty involved in the "dialogue" of the Dean Search Committee.

Subject to these strategic considerations, protest actions are an important means of communication for groups who have traditionally been shut out of the accepted forum for political discourse. Last Term, however, the Supreme Court significantly limited the scope of protection afforded certain types of protest. In *Frisby v. Schultz*,⁷⁸ the Court upheld against constitutional challenge a municipal ordinance prohibiting picketing before or about the residence of an individual regardless of the degree of disruption caused by the action. One may well wonder whether the Court in the future will show even limited tolerance of protest actions which threaten private property rights in any significant way. Potential limitation of protest action in the interest of protecting private property will directly reduce the effectiveness of such protests. Often it is precisely because certain kinds of property interests are affected that protest actions (particularly pickets and boycotts) are effective.

Despite both the uncertainty of protection afforded protest actions and, as they are circumscribed, their decreasing effectiveness, such actions are, nevertheless, important. Whether the action is directed against a certain practice or statute or simply a set of conditions, the action of protesting is almost always experienced as empowering. As I marched with a group of women in response to an "anti-choice" rally, I felt a sense of solidarity and purpose. I felt engaged in the struggle. As we, as undergraduates, built shanty towns to protest our university's investment policy toward South Africa, we felt that we were making a difference, and our cause brought us together. Somehow the administration and the faculty

78. 487 U.S. 474 (1988).

seemed less monolithic in the face of our unified challenge. Although my university has not yet agreed to divest, our actions were not meaningless. We could not speak with our wallets, which ultimately may be the only way we will be heard; however, we were not silent. Perhaps the value of some such action is primarily or even exclusively therapeutic; however, that is not to say that it is without value. For me, the real danger lies not in speaking and being ignored but rather in believing those who tell me my words do not matter at all.

LIMITS ON PROTEST EFFECTIVENESS

Jule Kreyling

Protest is more effective than litigation because protest is the catalyst and litigation is the result. Thus, the protest tactic should be pursued by those who feel moved. On the other hand, one worries that protest, if overused, may become ineffectual. Today sit-ins are utilized by anti-abortion activists, environmentalists, civil rights activists, and others. Although the majority of these protests are sincere manifestations of people's beliefs, a large number of protests are viewed as frivolous exercises undertaken to ensure publicity for an organization and its leaders and not for the benefit of "the cause." Unfortunately, such perceptions will make protests increasingly ineffective.

Even so, the most significant social changes in the United States have been a result of public outcry. Politicians, administrators, business people, and the general public are unwilling to make changes. They are content with the status quo unless they are given a damn good reason for action. Starving children will not in themselves be enough of a reason for social change. On the other hand, angry parents staging a sit-in in officials' offices in an emotional protest with the possibility of rioting and looting probably will bring about at least some action.

Why? A couple of reasons. First, most of those empowered to effectuate change will not do so when their careers and personal lives are not affected, but protests and riots will affect those careers because those in power will be deemed responsible for the unease the general public will feel as a result of these protests. But even more than that, Americans do not like to be embarrassed. Protests and riots that highlight problems that need to be addressed in the United States embarrass many; after all, it makes it look as though we cannot take care of our own house.

Economic protests may be the most effective tool in many areas. Such protests should be protected unless clearly coercive. For example, if a black neighborhood has in it a supermarket that refuses to employ black employees, it would seem quite natural for the members of the black community to shun that business in favor of stores that give something back to the community (in this case jobs). There are movements afoot to bring an end to protests that are organized for these purposes. Whether such an economic protest is organized or spontaneous should make little difference. The choice itself seems so personal as to escape any jurisdiction. The case of boycotting stores in order to coerce owners into supporting particular legislation is another matter. An economic protest against a business that discriminates to the detriment of the community is one thing, but extorting an owner to support specific political views is quite another.

PROTEST FROM AN AFRICAN PERSPECTIVE

Maina Kiai

Although I have been involved in protests of all kinds since my high school days, the date February 10, 1985 is of particular significance to me. Following the expulsion of six students from the University of Nairobi without notice or hearing, the other students peacefully boycotted classes for a week. The protest was marked with fervent speeches demanding that reasons be given for the expulsion.

On Sunday the 10th a prayer meeting (for strength of purpose and as a sign of unity) was held at the University's sports field. In the midst of prayer and song, truckloads of policemen with shields and baton/night sticks descended onto the field and completely encircled the students. After the mandatory warnings to break up the gathering (which was not humanly possible) they zoomed in and started beating up the students. Tear gas was unleashed, causing a massive stampede. The result was the death of one student. Scores of others were injured and the University was shut down. Upon their return to the campus, all the expelled students (except for one who was injured) were reinstated albeit with stringent conditions.

Other protests around the world have provided varied results. Spontaneous and emotional protests, while normally causing great injury and loss, will almost always draw massive attention to their cause. Redress may then follow. But we must always bear in mind that authorities will hardly give in without a whimper. A painful

price must be paid by someone somewhere. Now, are the rewards of that protest worth the price? There are fears of retribution, hopes for more amicable change, and even a fear that the protest may fail, as Arthur Scargill learned with his coal-miners' strike in the United Kingdom. Authorities must never give in, for they fear surrender will open the way for more protests in a manner similar to fears of terrorism. Even so, a cursory glance at the power of protests in Iran, Sudan, the Philippines, Albania, and Algeria present pictures of hope for those of us who avow protests.

Noting the special position of economics in protests, what can we say about the worth of protests for Black Americans as we approach the 1990s? History has taught us that unless the reason for the protest is particularly heinous and especially more so since America strives to maintain the position as leader of the "free world," protests will be clamped down. One must never forget that there will be a heavy price to be paid by someone in terms of life and property. But as in South Africa today, redress will not come on a silver platter, and protests must remain one of the options open to Black Americans. Indeed, never to be forgotten is the old adage that "nothing good comes easy." Needless to say, one can never forget the feeling of self-esteem, of worth that always results from protest and standing for your own.

CONCLUSION

Mr. Kiai's sentiments are noble. Even so, it does not seem either right or rational that those long held at the very bottom of this society should bear the burden of alerting the nation to the dangers in its present course while simultaneously struggling to fulfill the fading but still possible dream of equality—equality so long espoused, so infrequently realized.

The quest for justice is worthy and right, but the morality of their cause is seldom a sufficient lever for those seeking social reform. Indeed, Paulo Freire suggests that only when unfairness and injustice become unbearably oppressive do the oppressed rise up against their oppressors. Freire writes:

This, then, is the great humanistic and historical task of the oppressed: to liberate themselves and their oppressors as well. The oppressors, who oppress, exploit, and rape by virtue of their power, cannot find in this power the strength to liberate either the oppressed or themselves. Only power that springs from the

weakness of the oppressed will be sufficiently strong to free both.⁷⁹

Appropriately, in these dialogues, we give the final word to a student whose reflection builds on Freire's theme and moves it toward a realistic foundation on which we can base more viable strategies.

FINDING REALISTIC HOPE FOR THE FUTURE IN A BLEAK RACIAL HISTORY

Jeffrey Selbin

My "thesis" is that the private, individualistic, autonomous assumptions of late nineteenth and twentieth century liberal jurisprudence make little room for the claims of an historically (and currently) oppressed minority community. At the same time, I want to suggest that the law's development (and the status of Black people as defined by it) is not nearly as inevitable as history might lead us to believe. Although I agree that the weight of the past certainly makes the outlook bleak for those committed to racial justice in this country, I also firmly believe that the future is much more up for grabs than we imagine.

One way to better understand race relations law might be to apply critical theory to this area of law, much in the way that someone like Karl Klare has done with collective bargaining law.⁸⁰ Instead of focusing on the strategic impact of specific cases or even groups of cases, we might do better trying to uncover and expose the socio-political vision (including economic motivations) underlying and pervading civil rights law as a whole. As Klare points out in the labor context—and I think it applies as well in the civil rights context—the leadership of the labor movement has largely internalized this vision and the corresponding latent value system which serves to legitimate an ideology reinforcing dominant (in the civil rights context, white) institutions and the hegemonic culture of (white) society.

I challenge the proposition that law is merely a tool used by whites to maintain domination over Blacks. Though appealing on many levels for a variety of reasons, such a proposition is as questionable as the vulgar Marxist critique of the bourgeois legal system as being simply a tool of ruling class oppression. We would be as

79. P. FREIRE, *supra* note 2, at 28.

80. Klare, *Critical Theory and Labor Relations Law*, in *THE POLITICS OF LAW* 73 (D. Kairys ed. 1982).

hard pressed to show that all judicial outcomes were decided in favor of “whites” (or even that whites as such are monolithic) as we would be to show that they all favor the ruling class.

Arguments that even decisions in favor of Black plaintiffs only serve to legitimate a system designed to deny ultimate justice to Blacks as a community appear to belie the actual experiences of Black petitioners and the motivations of certain arguably sympathetic actors in the system. This formulation overstates the conspiratorial nature of the legal system (and all the institutional support such a Machiavellian arrangement would imply) and in doing so actually understates the enormity of the problem we are up against. I think that there are simply too many forces at work to explain outcomes of decisions solely on the basis of a racist legal system, racist judges, or the furtherance of a white agenda. (Not that these factors aren't all present and powerfully so.) By the same token, “just” decisions cannot be understood only as evidence of enlightenment or progress. Experience has taught us to know better.⁸¹

Reality appears to unfold in a much more dialectical fashion. Just as race relations law cannot be understood when taken out of the context of the general state of race relations in society, it seems plainly obvious that we must also be conscious of the bigger picture of the form and substance of liberal judicial decision-making which both shapes and is shaped by race law. These decisions don't occur in a vacuum, and they didn't lend themselves to analysis and understanding of only the race component.

The several potential approaches to schooling and race—ranging from segregation (state-enforced separation) through desegregation (some form of state-backed neutrality) to integration (state-imposed “mixing”)—point to what is a recurring contradiction in our constitutional regime. Built into the Constitution as a result of conflicting notions of the individual and the state on the part of the framers (of the original document as well as the Bill of Rights and subsequent amendments) are competing visions of, among other things, the role of the federal government in the area of race relations. The communitarian (or republican) vision, could conceivably

81. I am not suggesting that there is not a certain amount of predictability of judicial outcomes in race cases because there is. Mr. Selbin anticipated accurately that the Supreme Court would uphold *Runyon* but not extend it to cover the facts of the *Patterson* case. See *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989). There is, however, a general indeterminacy of outcomes which is not specific to race cases but has its roots in the ongoing development of liberal constitutional jurisprudence.

have supported either state-enforced segregation or integration as a manifestation of the will of the community (be it white or Black).⁸²

However, the liberal vision, which has predominated since World War II, places a higher emphasis on things like "autonomy" and "freedom of choice," and focuses primarily on the will of individuals (in the case of schooling, on parents and children), and therefore is more compatible with "laissez-faire" desegregation.

The experience of the post-Reconstruction era offers some valuable lessons. The first is that legislation, even constitutional amendments, passed nominally to benefit Blacks, must be viewed with a certain amount of healthy skepticism—the interests of the Black community have time and again been sacrificed in order to insure gains for the ruling class while often masked as gains for the white working man. Second, even short-term "gains" for Blacks may give a false sense of progress. Although there has been a substantial expansion of the "rights" of Black individuals since "emancipation," these rights may only serve to insure the continued subjugation of Blacks as a group.⁸³

But finally, and perhaps overly optimistically, I think the most important lesson may be how contingent and up for grabs many of these struggles are—the outcome of the interpretation of the fourteenth amendment was not a foregone conclusion. It was the product of human choices and decisions based on a particular vision of society. If that's not the vision we share, then we must continually struggle and always be prepared to offer an alternative vision, more compatible with our notions of justice and equality. In this regard, I agree with your admonition that:

The challenge now is to move the document's [Constitution's] protection into the sacrosanct area of economic rights—this time to insure that real opportunity in this sphere is available to all.⁸⁴

82. See, e.g., D. Bell, *supra* note 49, at 4. This unpublished paper was presented at the Smithsonian Institution Symposium on "Afro-Americans and the Evolution of a Living Constitution" on March 16, 1988. The paper notes that: "Slavery was consistent with the spirit of republicanism in its ability to promote freedom and community among whites." *Id.*

83. "Rights" may be the legal form by which we all consent to our own domination, and civil rights law thus may seek to reconcile Blacks to their own domination. There has been a lot written on this recently. I have read little, but the amount of controversy that has been generated by the writings suggests that there are important ideas being considered in the ongoing "critique of rights" debate.

84. D. Bell, *supra* note 49, at 52.