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RACE, CLASS, AND THE CONTRADICTIONS OF AFFIRMATIVE ACTION*

*Editor's Note: A panel discussion on "Race, Class, and the Contradictions of Affirmative Action" was held as a part of the Third Annual Conference on Critical Legal Studies on November 10, 1979. Professor Alan Freeman, of the University of Minnesota Law School, convened the panel by setting forth the questions to be discussed and critiquing existing theories that have been offered to address the topic.¹ Professors Derrick Bell and Henry McGee, Professors of Law from Harvard Law School and the UCLA School of Law, respectively, gave brief presentations before opening the discussion for audience participation.

ALAN FREEMAN: The theme for today's panel grew out of my dissatisfaction with the way people on the left have dealt with the question of racism. Racism has been discussed as just another form of oppression. Slogans such as "End Racism, Sexism, and the Oppression of Minorities" are offered without an effort to penetrate the issues relating to the interdependence of these problems and problems relating to the perpetuation and maintenance of the class structure generally. Problems of interdependence, once considered, may well affect one's strategic choices, or remedial programs, or efforts at struggle. Such problems, then, are the target of my questions this afternoon.

The more or less conventional Marxist accounts of our ways of dealing with racism all leave me slightly dissatisfied, or at least with a sense of incompleteness. No one can deny that racism is a distinct and historically separate form of oppression. The statement is almost superfluous, given the actual life experience of people who have been or who are being so oppressed. But that fact does not by itself suggest that it is a problem that can be dealt with by itself as a separate kind of problem. However separate its origins and historical practices may be, racism must be confronted today within the context of contemporary American capitalist society. The problem is how to connect a unique history with a complex present. Traditional Marxist accounts of racism seem often to make the mistake (and this is often a question of emphasis—I don't mean to pigeonhole all thoughts on the subject) of *either* collapsing racism into a problem of class domination generally, as if it were nothing more than a consequential incident of evolving capitalism, thereby denying its experiential reality, *or* treating racism as a mode of oppression so autonomous from capitalist social and economic relationships that it can be remedied and targeted as against oppressors who appear as "white society".

1. The program description for this panel was as follows:

The question to be discussed is whether racism, although a historically separate and identifiable form of oppression, can be approached and remedied in any substantial way without simultaneously confronting the class structure in general. Can remedial goals such as affirmative action programs for racial minorities do anything more than provide some improvement for a small number of middle-class people whose allegiance to the class structure is in the interest of the ruling class? More importantly, does the pursuit of programs like affirmative action, as separate projects, play into the hands of the ruling class by frustrating efforts to develop a more generalized class consciousness?

A.

One traditional view² sees racism as providing an underclass of wage laborers willing to work for wages far below workers not victimized by racism—the “reserve army of labor”. Under this view, racism serves to hold down wages generally by offering the capitalists a ready market of cheap unskilled labor. The net result is additional extraction of surplus value, and greater capital accumulation. This is one of the views that seems to deny the historical reality of racism by almost collapsing it into an economically-motivated capitalist plot.³ In a less simplistic version, however, it cannot be denied that there is some truth in this explanation. What was functional for a period of time in the service of capital accumulation (and the reserve army may well have been) need not have been invented by the capitalists or by the logic of capitalism. The problem, though, is now. And it is questionable whether the reserve army theory is functional at all, any longer, in the service of capitalism, or even consistent with the needs of the modern corporate liberal state. That racism persists (perhaps as a virulent ideological plague from the past) does not make it *per se* economically functional.

The question of function is a difficult one to resolve; one is quickly mired in debates about statistics, job categories, and correlations that may or may not amount to causations. It does seem questionable whether racism of a kind traditionally experienced by Black Americans remains necessary to support capitalist exploitation, or even useful for that enterprise. Factors must be taken into account such as: The growth of technology with its consequent and continuing displacement of unskilled workers, the growth of welfare systems that make membership in the reserve army less functional than it might be otherwise,⁴ the presence of continued high levels of unemployment, and the presence of a genuine reserve army, in the classic sense, in the form of “illegal” aliens. That many such illegal aliens are members of the same minority groups which have suffered under traditional American racism may make it ideologically easier for their exploitation to be tolerated, but does not transform the issue into one of racism *per se*.

B.

Another traditional view, which is basically the economic explanation presented at the level of ideology, or consciousness, is that racism serves to divide the working class by creating internal conflicts and antagonisms that frustrate the creation or awareness of the genuine class consciousness essential to radical change.⁵ While this view may have had, and perhaps still has, some truth in it, it too seems incomplete. For one thing, as noted earlier with respect to the reserve army theory, it does not explain the historical development of racism as a unique form of oppression, but merely asserts its utility for the perpetuation of capitalist class structure. In addition, given the presence of other powerful ideologies that serve to arrest the develop-

2. See R. EDWARDS, M. REICH & T. WEISSKOPF, *THE CAPITALIST SYSTEM* 276-32L (1972). See also *PROBLEMS IN POLITICAL ECONOMY: AN URBAN PERSPECTIVE* 143-205 (D. Gordon ed. 1977).

3. See E. GENOVESE, *CLASS AND NATIONALITY IN BLACK AMERICA* (1971).

4. See generally J. O'CONNOR, *THE FISCAL CRISIS OF THE STATE* (1973).

5. See P. BARAN & P. SWEENEY, *MONOPOLY CAPITAL* 249-280 (1966).

ment of class consciousness, racism seems hardly necessary, and perhaps superfluous, if regarded from a functional point of view. These widespread ideologies include the "liberal" tradition, media-induced consumerism, equality of opportunity, and hysterical nationalism.

In two other respects, the "divide-the-working-class" explanation of racism seems even more seriously deficient. For one thing, it fails to explain how the abolition of racism, at least at the formal level and in the realm of public moral consciousness, has become a project of America's dominant classes in the period since the original *Brown* decision. This pattern of change, however limited to the formal and substantively inadequate, does at least suggest the presence of contradictory forces with respect to the perpetuation of racist practices in the United States. The other problem with this variant of the traditional theory is that it fails to acknowledge that too much racism may be just as destabilizing to the class structure as too little. I suggest that given our knowledge of twentieth-century world history, a critical level of racial division (a growing version of which may have been occurring with the Wallace movement in the late 1960's) may well create white working class hysteria. Such hysteria may seize on latent but powerful hostilities toward bourgeois society, and set loose the uncontrollable and disordering forces of demagogic fascism.

C.

The other traditional Marxist ways of looking at racism belong more in the realm of political strategy than of theory, but their theory is at least implicit in their practice. One is the perhaps opportunistic approach of targeting members of racial minorities as people already sufficiently aware of their own oppression within capitalist society as to be receptive to radical political ideas. The theory is that one has got to start somewhere if one is committed to radical political change, (unless one believes entirely in the inevitable role of impersonal historical forces), and that people already aware of their oppressed status are most likely to form the core of an emerging radical political consciousness. This theory may even be progressive for those to whom it is addressed to the extent that it creates awareness of, and effects some change with respect to, racist practices in an era otherwise dominated by complacent racism. This theory is ultimately counterproductive to the extent that it plays on the historical uniqueness of racism for its appeal, but denies that uniqueness in its actual programmatic goals. Its simultaneous outreach to racism as a unique experience and disavowal of racism's historical uniqueness end up creating more intra-class racial antagonisms than the strategy sought to alleviate.⁶

The final approach is a version of the immediately preceding one as applied directly to legal struggles. That is to argue that the legal struggles, backed up by mass political movements and demonstrations, that have accomplished what progress there has been in civil rights, have in fact been a substantive gain in the class struggle. While I do not deny the actual achievements of the legal struggle for civil rights, I do suggest that this view

6. *But see* CRUSE, BEHIND THE BLACK POWER SLOGAN, IN REBELLION OR REVOLUTION 193-258 (1968).

overrates what has been accomplished. This view ignores the historical uniqueness of racism by substituting limited gains in the struggle against racism for limited gains against the capitalist class structure generally and by remaining embedded in one of the traditional Marxist theories⁷ of racism, it ignores the possibility that some measure of racial change may well be in the self-interest of the contemporary dominant classes. I argued in a long article on civil rights law, which traced doctrinal developments in the Supreme Court, that twenty-five years of civil rights law since the *Brown*⁸ case has served more to rationalize the continued effects of racial discrimination than it has served to promote any genuine liberation from a history of oppression. These developments led me to conclude that the process by which the law absorbed the civil rights struggle, reprocessed it, and turned it out in recent cases, is in some fashion a part of what we have been calling at this conference the legitimization process. The legal ideology of today in many ways pretends that racism has been cured, that the problem has been dealt with, that we can go on to other problems, and that the legal rights that have been created amount to sufficient equality or liberation for formerly oppressed people. This ideology masks rather than clarifies experiential reality.

An adequate contemporary theory of racism must explain both the progressive efforts that have been accepted, and the tenacity with which the conditions associated with racism remain in place. Such a theory would offer a context for understanding the affirmative action issue. I suggest, contrary to some of the traditional Marxist views of racism, that at least since the 1950's it has been in the interest of America's ruling classes to pretend to be ending racism in this country. The major goals associated with that project have been to hold the United States out as an equal society that does not condone the practices associated with racism in the past to avoid embarrassment in the world, and to stabilize the position of the United States in the world. These goals can be regarded as either traditionally economic or as bound up with the role of a state relatively autonomous from the capitalist class in its dealings with both its own oppressed classes and other states in the world arena.⁹ It seems to me that despite the massive struggles underlying the demand for civil rights reform, that acceptance of reform and the shape that it has ultimately taken must be understood in this context.

From this perspective, the goal of civil rights law is to offer a credible measure of tangible progress without in any way disturbing class structure generally. The more specific version of what would be in the interest of the ruling classes would be, to use a cumbersome but accurate phrase, to "bourgeoisify" a sufficient number of minority people in order to transform those people into active, visible, legitimators of the underlying and basically unchanged social structure. The question to be asked is whether particular strategies for fighting racism, such as affirmative action, run the risk of being

7. See Freeman, *Legitimizing Racial Discrimination Through Anti-discrimination Law*, 62 MINN. L. REV. 1049 (1978). See also Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

8. *Brown v. Board of Education*, 347 U.S. 483 (1954) (Brown I).

9. For an excellent account of the role of the state, see Block, "The Ruling Class Does Not Rule: Notes on the Marxist Theory of the State," SOCIALIST REVOLUTION (NOW SOCIALIST REVIEW) No. 33, May-June 1977, pgs. 6-28. See also T. Skocpol, STATES AND SOCIAL REVOLUTIONS 14-33 (paperback ed. 1979).

caught up in that process of improving the lot of a small number of middle-class minority people, while having the simultaneous effect of consigning vast numbers of lower-class minority people (whose membership disproportionately populates lower classes to begin with) to a longer term in their situation. The question is not whether racism in all of its continuing manifestations is no different from class relationships generally—because it surely is different; the question is the extent to which anything significant can be done about the concededly unique problem of racism without paying attention to class structure and the forces that seek to maintain it.

I do not in any way suggest that one should cease struggling against racism. The question is how to struggle in ways that will at least minimize its legitimization aspect. For example, it seems that the whole affirmative action controversy surrounding the *Bakke*¹⁰ case and educational admissions has overemphasized the remedial goal of obtaining a few slots for a few minority persons at the sufferance of benevolent white decision makers, while underemphasizing the ideology and deep illegitimacy of the basic criteria by which people are regularly selected. At the level of case law, to offer a concrete comparison, I have suggested before that as between *Bakke* and *Washington v. Davis*,¹¹ the latter was a much more significant case. It had much more to do with real possibilities of getting at underlying structural problems.¹² But the *Bakke* case got processed as the important one, the significant one, the big battle. There was hardly a mention of *Washington v. Davis* in the public consciousness. There were no political rallies around it in the way there were with *Bakke*. Why? What accounts for that? How can that kind of problem be dealt with? Unless these underlying structures are targeted, it seems to me that very little genuine progress is likely to be made at all.

DERRICK BELL: Today's subject, "Race, Class, and the Contradictions of Affirmative Action" reminds me of Harvard University president Derek Bok's not so "secret" formula for maintaining the status quo during the student uprisings in the early 1970s. At that time, Bok was dean at the Harvard Law School, and he told me, I am sure facetiously, that one way to resist student pressures for reform was to begin the school year with 10 to 20 very repressive student rules. These rules, including mandatory class attendance, no informal dress at the Law School, severe penalties for unpreparedness, Bok predicted would generate a major student reaction. There would be major reform campaigns, and under the pressure of those campaigns, Bok said he would slowly recede from each of the rules, keeping one eye on the calendar so that by the beginning of final exams, he would have been "forced" back to the same policies that were in effect when the school year began.

10. *Regents of California v. Bakke* (Bakke), 438 U.S. 265 (1978).

11. *Washington v. Davis*, 426 U.S. 229 (1976).

12. Editor's Note: In *Washington*, *supra* n.11, the Supreme Court refused to invalidate a qualification test for police officers on the sole ground that the test disqualified four times as many blacks as whites. In *Bakke*, *supra* n.10, the Supreme Court stated that while racial quotas may not be used in a medical school's special admissions program, race may be used as one criterion in a program designed to admit a diverse student body. The employment issue in *Washington* has a greater impact on larger numbers of minorities and disadvantaged persons than does the admissions issue involved in *Bakke*.

While Derek Bok was joking about his distractive rules, it seems to me that universities and employers have discovered that the Bok "distractive rule" formula works just as well affirmatively as negatively. For the sad fact is that affirmative action and minority admissions, although adopted for and at the behest of Blacks and Chicanos, produce results that are quite like Bok's distractive rule formula played backwards.

Affirmative action remedies are sought by the subordinate rather than the dominant group. They distract the subordinate group from the real issues of racial injustice with token benefits while the dominant whites at every level are the short and long-run beneficiaries.

The *Weber*¹³ case is a prime example of the often overlooked benefit to whites of affirmative action programs. Remember that the Kaiser Aluminum Company had steadfastly refused union pressures in the collective bargaining process for the initiation of a training program for unskilled workers. Kaiser initiated such a program under the threat of litigation by the civil rights agencies. When they did establish a program, it was 50% black and 50% white. But whites ignored the benefits for which Blacks had worked and focused on the asserted violation of seniority rules that were necessary to enable black workers to meaningfully participate in the program. Any Black participation at all, not seniority-based, was a threat justifying a major law suit.

A similarly ignored benefit for whites is contained in the minority admissions programs. These serve far more the interests of whites, particularly elite whites, in keeping things as they are, than they do in the furtherance of the overall goals of equality. Still I support them even while saying this, because they are available and little else is.

The acceptance these programs have received should not prevent the recognition of their weaknesses. For example, most minority admissions programs include no more than ten to twelve percent of a particular institution's admissions. Often, to ease the opposition to "racial" standards, the special admissions category has been broadened to include the economically disadvantaged, as well as racial minorities, even though this expansion dilutes the overall claims of injustice that the program was intended to mediate. When you look at them closely you see that the traditional admissions and hiring standards are not altered but remain oriented toward the upper middle class.

Over time, I fear that affirmative action efforts may increase the already real and continuing hostility between poor whites and their Black and Chicano counterparts. This will be true even when these programs are expanded to include as many poor whites as non-whites. (Remember that the open admissions program in the New York City colleges was greatly criticized and fought.) Yet, recent reports indicate that lower middle class white students have been the major beneficiaries of open admissions policies. The hostility created by the advancement of these programs means that once again, in an area where Blacks and whites should be uniting against common barriers to college admissions, Blacks and whites will be fighting one another. Whites do not perceive them as a benefit but rather as another

13. 443 U.S. —, 99 Sup. Ct. 2721, 61 L.Ed. 2d —, (1979).

means, another excuse, for targeting hostility and violence against Blacks rather than against the upper classes.

There is, of course, a long history of such racial conflict. It can be traced all the way back to the beginnings of this country. In the early 1600s, the major land owners in the Virginia colonies exploited both white and Black indentured workers. When both threatened rebellion, Blacks were relegated to slavery, and poor whites were given more of an opportunity to participate in government, convinced that their real enemies were the Blacks and not the big land owners.

During the Reconstruction Era, it was decided that Blacks should have the right to vote to help keep the Republicans in power. Blacks were, at least temporarily, the beneficiaries of that strategy until the Hayes-Tilden Compromise of 1876 when the North and South decided to put aside their differences and sacrificed the rights of Blacks to seal the bargain. Later, the Jim Crow era was, in part, a response of whites upset over their economic condition. Segregation of public facilities was an inexpensive means by which elite whites could reassure poor whites of their superior racial status. Upper class whites did not have to worry about riding street cars and drinking out of the same fountains as Blacks. It was the poor whites who needed this official "guarantee" that they were indeed better off than Blacks. After World War II, due to a number of factors, the scales turned the other way. The policy makers decided that the luxury of segregation to placate poor whites could no longer be afforded. Officially condoned apartheid made it too difficult to win the cold war, particularly in emerging nonwhite countries. It also made the domestic struggle against Communism here at home more difficult. Blacks had been fighting to end segregation, but it is clear that self-interest factors helped destroy the "separate but equal" myth.

It is difficult to know which way the civil rights struggle is going. It would seem, with the emergence of the Ku Klux Klan again, not only in Greensboro, but all around the country, with the racial violence either by the police, or permitted by the police in a way very similar to that which occurred at the end of Reconstruction, that the prospects of Blacks winning this next conflict between poor Blacks and poor whites is not great.

Thus, whether Blacks win or lose battles for rights and opportunities depends on what result will most advantage elite whites. The quasi-winners are a few Blacks who may gain middle class positions and do not feel the full wrath of the society when it turns against the major portion of their group. The losers, again and again, are those poor whites and poor Blacks who are exploited without regard to race and never recognize what is happening to them.

HENRY MCGEE: My remarks are directed to the problem of race and its interaction with class. They examine events of current interest but of more than passing importance. At the outset, the saliency of economic class is acknowledged. In 1969, it was Professor Leroy Clark of New York University who asserted that the problem of the Seventies would be the problem of the dollar line, not as W.E.B. DuBois had predicted, the problem of the color line. Professor Clark's projection was, of course, rooted in an essential aspect of America's social landscape: economic class is determinative of so-

cial status. Surely this reality was not unnoticed by critical theorists, whose work commands special attention in this discussion. Max Horkheimer and Teodor Adorno's *Dialectic of Enlightenment* speaks to this enduring reality of life in America:

Here in America there is no difference between a man and his economic fate. A man is made by his assets, income, position and prospects. The economic mask coincides completely with a man's inner character. Everyone is worth what he earns and earns what he is worth. He learns what he is through the vicissitudes of his economic existence. He knows nothing else. The materialistic critique of society once objected against idealism that existence determined consciousness and not vice versa, and that the truth about society did not lie in its idealistic conception of itself but in its economy; contemporary men have rejected such idealism. They judge themselves by their own market value and learn what they are from what happens to them in the capitalistic economy. Their fate, however sad it may be, is not something outside them; they recognize its validity. A dying man in China might say, in a lowered voice:

Fortune did not smile on me in this world. Where am I going now?
Up into the mountains to seek peace for my lonely heart.

I am a failure, the American says—and that is that.¹⁴

Therefore, in America, one must not, indeed cannot, underestimate the importance of class, but instead should view it as one end of a continuum in which it is linked to race so that at any given moment the relative mix of the two factors is of great consequence. In 1979, it is one thing to be Black and work as a retail clerk in Newark, New Jersey, and another to work as an assistant librarian in a large midwestern state university. Yet, to be a Black postal clerk today, is not vastly different, no doubt, than to have been a Black physician in 1907. There is always the danger that the intractability of the race problem might cause it to be thought of as a variable resistant to the influence of class.

Nonetheless, it must be recognized that the continued decline of the American economy has accelerated the growth of what increasingly appears to be a permanent underclass of racial minorities. As University of California, Berkeley professor Troy Duster has argued, this class/caste predicament of Blacks is, in part, a function of the fact that immigration to the United States, with the exception of that of Latin Americans, has largely ceased. From 1870 to 1930, the United States experienced a period of unparalleled industrial development. This industrialization was built on the backs of European immigrants who streamed into the country during the period in which America became the world's industrial giant.

While this industrial and technological growth was underway, ninety percent of all Blacks were in the South, tied to non-industrial occupations. In the 1920's, Black immigration to the North followed that of the Europeans. By 1950, the distribution of Blacks in America was almost equally spread between North and South. By then, the American industrial machine had reached its maturity, with decline just around the corner. With immigration a thing of the past, an important source of mobility in the United States, constant infusions of new peoples from outside the country,

14. M. HORKHEIMER & T. ADORNO, *DIALECTIC OF ENLIGHTENMENT* 211 (Seabury Press 1972) (Orig. ed. 1944).

was no longer available. There was nothing from below to push Blacks upward through the class structure as had been true for European ethnics during the successive arrivals of ethnics from every corner of the old world.

It is the growth of this underclass, however, which serves as a gnawing reminder of the unique situation in which Americans of color find themselves. A passage from Allen Spear's *Black Chicago* illustrates as much as anything else the terrible and enduring plight of racial minorities:

From its inception, the Negro ghetto was unique among the city's ethnic enclaves. It grew in response to an implacable white hostility that has not basically changed. In this sense it has been Chicago's only true ghetto, less the product of voluntary development within than of external pressures from without. Like the Jewries of medieval Europe, Black Chicago has offered no escape. Irishmen, Poles, Jews, or Italians, as they acquired the means had an alternative: they could move their enclaves to more comfortable environs or, as individuals, leave the enclaves and become members of the community at large. Negroes—forever marked by their color—could only hope for success within a rigidly delineated and severely restricted ghetto society.¹⁵

The contemporary view is that Dr. Spear's words concern the no longer relevant past. But contemporary newspaper articles suggest otherwise. Consider, for instance, current stories about the resurgence of Klan activity. A recent Klan march in Dallas was the first there in more than sixty years. An armed Klan attack on interracial marchers in Greensboro, North Carolina, resulting in several deaths, called attention to the growing militarization of the opposition to Black advancement. The cross of Christ has been burned from one end of the country to the other—in Long Island, New York, and in various sections of Los Angeles. Today's paper suggests a Klan presence at the nation's military Academy at West Point, though the supervising general assured the public that there has been no attempt to threaten or frighten anyone, and that there were no racial overtones in what he viewed as essentially a prank.¹⁶

Concomitant with the obscenity of the Klan is the increasing acceptance of efforts to frustrate enforcement of the *Brown*¹⁷ case's promise of equal education. The increasing and virulent resistance to busing in cities such as Los Angeles suggests that Jessie Jackson is correct when he declares, "[I]t's not the bus, it's us." This sanctification of resistance to effective schemes to desegregate schools is symptomatic of the growing legitimization of efforts to resist further gains by third-world Americans.

As the winds of racial hostility rise, the ruling elites of the United States—the professors, the corporate managers, the bureaucrats—cling evermore tenaciously to the myth of a color-blind meritocracy whose dominance is essentially neutral in terms of both class and race. In the face of this reigning mythology, traditional uses of the fourteenth amendment to complete the liberation of the descendents of the Freedmen appear anachronistic in the context of a social order believed to be open to all on the basis of self-

15. A. SPEAR, *BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO* 229 (1967).

16. San Francisco Chronicle, Nov. 10, 1979, at 5, col. 1 ("[A] male West Point Cadet was thrown into the shower by classmates dressed in Ku Klux Klan costumes, and another male was made to strip and was hog-tied").

17. *Supra* note 8.

will and personal effort. Any doubts as to the dominance of this view would be dispelled by conversations with university faculty who genuinely believe that the doors of the colleges and professional schools as well as other institutions of power and influence are open to everyone on the basis of excellence alone, without regard to class or racial origin.

The *Bakke*¹⁸ case then, might be seen as a synthesis of the confrontation between the apparently irreconcilable demands of reparational justice, and abstract, historically irrelevant, sterile conceptions of equality. Treating the problem as one of racial discrimination in a context in which equity demanded meaningful change in the structures of opportunity for minority Americans, the legal system found itself effectively paralyzed. The old order, pursuing a more traditional historical analysis, viewed the fourteenth amendment as a specific strategy for the elimination of racism. This perspective on Constitutional law was opposed by a literalistic statutory analysis which avoided the central problem presented by America's caste system. Though Justice Powell's opinion in *Bakke* has been hailed in some places as Solomonic, it has little doctrinal or theoretical value and resolved the case on largely fictional grounds, utilizing as its major point of reference the allegedly archtypical, but nonexistent Harvard plan.¹⁹

Bakke's real significance, actually, is that it expresses in a concrete way the pervasive crisis in the law's attempt to remedy racial discrimination in a social context in which racism is at once increasingly more respectable and more virulent. Faced simultaneously with an apparently unsolvable race problem, and with the need to affirm the dominant myth of an open social order which alone can justify the legitimacy of the ascendant liberal elites, the legal system increasingly stresses a colorblind view of social change in the teeth of a color-biased society. The result is that the cleavages and contradictions of contemporary social life are papered over—but only thinly. The principle that a person should not be judged by skin color is affirmed as the parlance of obfuscation transforms quotas into goals.

But the problem of reparations, of justice to third world citizens in America, in the Carriibbean, in Central America, in Africa, remains unresolved if unconvincingly justified at the level of legal theory. Faced with the demands of the system and the needs of racial minorities, the legal order repeatedly compromises the latter. In his article *Legitimizing Racial Discrimination Through Antidiscrimination Law*, Professor Freeman demonstrated that the legal system frequently must choose between what its theoreticians regard as its own internal integrity and the problem of fairness for minorities.²⁰ In *Swain v. Alabama*,²¹ for instance, the peremptory challenge, an integral part of the jury trial process, was upheld, but at the cost of denying equal justice to Blacks in the administration of the criminal law since it was clear that the case permitted prosecutors to manipulate the power to arbitrarily reject jurors so as to fashion all-white juries.

18. *Supra* note 10.

19. The goal of the "Harvard plan" is to achieve a diverse student body by weighing factors such as race and geographic origin.

20. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, 62 MINN. L. REV. 1049, 1077 (1978).

21. 380 U.S. 202 (1965).

Swain's outcome was as predictable as that of *Bakke*. Both cases confirm the direction of the social order and the hegemonic function of its legal system, a path determined by the dominant economic and social classes. Unable to exorcise the demon of racism, the system's mandarins pretend it no longer exists. Unable to solve the racial problem, or unwilling to espouse allocation of the resources necessary to its solution, the system's theoreticians proclaim it solved.

AUDIENCE: I guess one thing that comes to mind is that we don't often talk about strategy, we talk about an analysis of where we have been. The question that I have is, are we going to talk about strategy? Is your view, the classic view of civil rights legislation, one of assuming a social structure which is not going to change except that more Blacks are going to be let in? Basically, a lot of what you're saying is that that has changed. You certainly can view some civil rights strategy as merely opening up an existing structure without changing it. The question is whether there remain strategies open under Title VII²² under the fourteenth amendment, under other civil rights provisions, for changing the structure itself. Ironically, as Allen and Derrick say, Title VII, while never intending to change the structure, has at least opened some possibility for structural change at the margin. It permits this not by denying a meritocracy, but by merely requiring society to redefine merit more precisely.

My sense is that there is some possibility that minority admissions policies in universities and maybe in preferential hiring policies will have that effect. But boy, you will really have to look hard to see that effect. The question is, where do we go from here? Are there civil rights strategies that are aimed at changing the structure of the institutions so that they respond not only to the immediate racial end of the litigation strategy but also to a class consciousness end?

AUDIENCE: I have a general comment on Derrick Bell's remarks. I think it is true, as he says, that many affirmative action policies also benefit poor whites. The open admissions policy of the City University is a case in point. Nevertheless, there is another side to it which I think should be on the book and where a political problem lies. That is, where affirmative action creates a conflict between Blacks and white males, particularly among workers.

AUDIENCE: That was shown dramatically even in the *Weber* case.²³ The quota that *Weber* challenged was a quota for craft training. But there was an earlier quota which was imposed on that plant by the EEOC²⁴ which said that you have to hire Black production workers pursuant to a fifty-fifty quota. This increased the percentage of Blacks and decreased the percentage of whites being hired, creating a conflict between Black and white workers. Such conflicts generally existed in the Sixties when firms that were supervised by the EEOC were hiring a great percentage of Blacks in semi-skilled jobs and therefore a lower percentage of whites. The same problem is politically posed now in the Seventies by layoffs, where women and mi-

22. Equal Employment Opportunity Act, 42 U.S.C. § 2000 (e).

23. *Supra* note 13.

24. Equal Employment Opportunity Commission, *see* 42 U.S.C. § 2000 (e).

norities are being thrown out disproportionately because they have very low seniority and because unions refuse to upset their seniority arrangement in order to take into account affirmative action and retain the minorities and women who have recently been hired. That, I think, is the most important strategic problem that faces the labor movement in the Seventies: layoffs and what to do about affirmative action. One suggestion for a strategy is to place the burden of affirmative action on the employer and not on the white worker. Where white workers, white males, are suffering because of affirmative action, the focus of attack should be on the employers. The employer is responsible for hiring in this fashion so the employer should pay for it, not the innocent white worker.

DERRICK BELL: I agree. Also, I meant to make an additional point. I think that one of the problems with strategy is that the existing civil rights policy makers, whether they are in the government or in private civil rights organizations, are too committed to an ideology from the 1950's, and are so threatened by even a suggestion that there might be other strategies that there is no real perception of the problems we have been discussing. The remedy suggested in a layoff situation is to keep the Black work force which just came in yesterday, even if this requires laying off white workers, disproportionately. This would throw the traditional seniority system out the window and would serve to upset many whites, who have grown to believe that seniority is close to motherhood, when they find that they are laid off while Blacks or women are retained on the job.

The strategies that would help us in the area of employment are those that would illucidate the fact that minorities are not somehow being disadvantaged by affirmative action but rather it is the employer who has been advantaged by discrimination in the past. Layoffs don't occur simply because the employer is going out of business, but because he can lay off people so as to maximize profits. In the school desegregation area, and I shall depart from my friend Hank on this, I think that racial balance remedies in the main are now counterproductive. Black people are concerned primarily about control of the bureaucracy and improvement of education. It is really not the better strategy, in the major urban areas of this country, to begin with a proposition of "racial balance". Such efforts encourage resistance and lead to "Proposition Ones,"²⁵ and increase the hostilities between whites and Blacks without in any way improving the education of either group. What we need, then, are strategies that attack evils that are hurting Blacks rather than focusing on issues that upset upper class Blacks and their white colleagues. What is needed is to improve the position of poor Blacks using programs designed for that purpose.

HENRY MCGEE: Let me just comment again about the problem of making fundamental institutional changes. Just as in *Swain*,²⁶ where the court was unprepared to restructure the way law suits are tried in the United States, so it is in the seniority cases. The courts and those people who think about remedies have been largely unwilling to assault some of the fundamental

25. Antibussing amendment.

26. *Supra* note 21.

ideas and concepts of this society's organization. And so rather than choosing remedies that will be specific and helpful, the system seems to choose a remedy which will maintain the existing institutional orders. That is an analysis. But I would like to put it as a footnote to the two remarks that have just been made about whether you can attack employers and corporate structures. Most of the remedies have gone around the fringes of changing the central institutions in American life.

ALAN FREEMAN: In terms of strategy, I would suggest that instead of continuing to be preoccupied with obtaining a small number of slots under traditional criteria for representative minority people, that we engage in an all-out assault on meritocratic pretenses. This would mean a thoroughgoing scrutiny of the ideology of meritocracy, of ability, of quality, all of which I believe are basically class-loaded concepts that parade themselves as criteria of objective quality, when in fact they are instruments of class domination. That requires a good deal of effort because so many of us have internalized those criteria as genuine measures of self-worth. How many people, having done well on the test, think immediately that they are better people, that the test was a genuine measure of self-worth or self-quality? That ideology has got to be busted up. That is a great, great task, but it is also the point at which race and class intersect. One need not in any way collapse racism into economic class relationships by suggesting that the practices associated with meritocratic ideology are a significant obstacle to all but the most tokenistic racial progress.

AUDIENCE: I just wanted to ask all three of you, how do you do that as a lawyer? That's what I see as the problem.

DERRICK BELL: It's very simple. First you start representing your clients. I mean the problem with people who represent civil rights people today, is that they're representing themselves. They think they are representing their clients, they convince a few people who put their names on the suit that they are representing them. In all too many instances, the relief the lawyers seek, the way they seek it, the willingness to go immediately into court even though it means a five-year legal battle which if won would mean you'd have to come out and organize the community to even understand what the decision is, are not in the best interests of their named clients at all. They repress them and their ideals. Lawyers are not representing poor people or Blacks or Chicano people as well as rich people insist that lawyers represent them.

AUDIENCE: I was thinking more of the point that Alan made, that every time you do something in the law you legitimize the system. And I was wondering what do you do, for instance, if you have as we may have in California, a law suit concerning whether or not the state has a duty to provide free abortions to women who do not have money to pay for abortions. As a lawyer you would say maybe you can try to bring up something. . . .

DERRICK BELL: I think he said it as a truth, as something that you recognize but don't allow to stop you from functioning. I mean capitalism would have

fallen long ago if it had been left to the capitalists to decide when reform was necessary. I mean, as many writers have pointed out, the demands for reform have led us to a post-capitalist era that looks like it may go on for a long time. So the fact that you recognize that doesn't mean that you don't keep on trying with the article of faith that somehow you are finally going to do more good than you do harm.

AUDIENCE: I don't understand. I don't mean to challenge you. I'm really asking a question for enlightenment. It seems to me that if you win that suit by trying to establish some sort of need for minimum welfare, which seems to me a very fine thing to do from what has been said here, you are also legitimizing the class culture that creates the inequality in the first place. And you know, Derrick, it still seems to me, that you are angry with me for saying that, but it is a real question for many people. What do you do as a lawyer?

ALAN FREEMAN: The legitimation process is one that takes place over time. It is not a single stimulus-response kind of event. And it is a process, as I have tried to show in the civil rights area, that is riddled with contradictions, with moments that occur as one goes along which are opportunities that can be seized. It is a question of how to proceed, not whether to proceed at all. We must debunk the illusion that, as I've suggested before, the litigation forum is in fact the class struggle. But that does not mean one should stop litigating; it does not mean one should stop trying. It does mean that one should figure out better ways to do it—better use of publicity about what is really going on, better client education about realistic expectations, more client participation in the process. There are lots of things that can be done.

In addition, the ruling class sometimes makes mistakes, which is hardly surprising. Holes and spaces open up from time to time. I have argued that however accidental its contents may have been, the *Griggs* case²⁷ was such an event, one that people did a lot with for a time. It takes a long time for ideological change to occur. Legitimation is not a neat process of slapping down or reprocessing each thing as it comes up. Ideological forms from the past hang on for a time. One need only watch the struggle, largely within bourgeois legal ideology, between the reactionary "colorblindness" view of affirmative action, and the tentative and limited recognition of voluntary affirmative action.

I do not suggest that one can transform the world through litigation; you are not going to litigate capitalism out of existence. I suppose that some of us believed for a time in the late 1960's that we could litigate in an era of distributive justice. If you think about that, it's kind of silly. But that does not mean there is no role for realistic, aware, radical lawyers today.

HENRY MCGEE: I'd like to answer, too, by saying that I think it's clear that by participating in the system to some extent you affirm its validity. It seems that the more important issue, as Derrick says, is to represent the clients and not take an elitist strategy that we will eschew gradual or incremental changes because somehow the system will collapse. As the talk suggested in

27. *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

part last night, the State has taken on a life of its own in part. It's a very complex social-cultural phenomenon, and while we do participate in it, and therefore affirm its legitimacy, we in the short run can win some short term victories that could be quite important to our clients who don't have the sort of great perspective that we may have on historical change. What I'm saying is that in a sense the question itself is elitist. It's a question we have all asked about whether by participating in the system we are keeping it alive. I think that is a question we may not really have the right to ask. I think the people out there, who are the community and just want to keep the man off their back, even for only a little while, would say that if that's the price of legitimization, we are prepared to pay it. I think, therefore, we have to pay it. So I'd like to capture Derrick's remark that we have a responsibility to represent the people who don't have this perspective, and who have much more at stake, by a capitulationist's strategy than we do.

AUDIENCE: It seems, on this question of the use of the legal system to achieve political victories, that we should address the fact that they are political victories even if they may result in ideological setbacks with respect to people's belief in the system afterwards. The point is that we should not allow these political victories to be reversed. This is basically what happened when Title VII was passed to "outlaw discrimination".²⁸ Yet, it is reversed in a racist way to combat "reverse discrimination". The ideology of that, and how to combat it, is to identify the enemy. The correlation between race and class is a very complex one in this society. Racism has played an incredibly profound role in qualitatively altering the development of capitalism in this country. Even without understanding the qualitative role that it played, I think we can imagine that without the slave or plantation system, we would be in a situation very much like that in Canada or Australia in economic development. Therefore, racism has been absolutely central in this regard. The relationship between race and class seems to be one in which, as the capitalist crisis becomes more and more severe, the corporate interests tend to shift the burden of that economic downturn. That's achieved through class ignorance. Basically, the labor lieutenants of the capitalist class, in a sense, instead of directing their blows at the employers, direct their blows downward at the strata that is less well off. Therefore, a dynamic exists within that which is an obstacle to identifying the real enemy. It's not simply class consciousness, but anti-racist consciousness on the part of white workers. The *Weber* case, it seems to me, indicated this contradiction that existed in the working class: that, in addition, in targeting the ideology you have to target the enemy. I think that this correlation between race and class is one that is very complex and needs a lot of additional theoretical work and thought on behalf of the conference.

AUDIENCE: The question that the last person spoke to on targeting the enemy relates to the questions that Professors Freeman and Bell especially were raising on how you keep from clouding people's consciousness of who the enemy is when victories are won through different reform struggles. It seems to me that one thing that is being missed is that political consciousness

28. *Supra* note 22.

and legitimation are not just created by political events. It's not just *Brown v. Board of Education*²⁹ or the passage of the Civil Rights Acts that creates a certain consciousness in people's minds that, "well, maybe the system can work". What happens is that in every school in every newspaper and on every TV station, and in every political campaign there are people getting up and saying "see the system work." It's an interpretation of political events not just the events themselves. It's a system of propaganda that presents the perspective that this racism thing is just an aberration and we can do away with it if we are just patient enough and keep seeking these reforms. It seems to me that counter to that is a counter-propaganda campaign, that, as Professor Freeman was saying, not only is the class struggle not wholly waged in the courtroom, but the courtroom is only a peripheral aspect of it.

If you believe that political change is made by mobilizing masses of people, then what is needed is an organization or organizations that make it their job not only to participate in and help lead the kinds of political struggles that people are talking about, but to explain what they mean. To explain that *Brown* happened, not because all of a sudden the Supreme Court after sixty years of being morally blind got moral rectitude, but because the United States was in a world situation, as the speakers described, in which this was necessary for its interests. Or the things that have happened in the wake of the Sixties, it is possible to explain that those things happened in order to save the system, but people shouldn't be deluded by it.

Reforms that were referred to as being particularly susceptible, in adaptation, to elevating a few token, fairly privileged middle class members of minorities to positions that they should have a right to can be positive. By that, I mean that it can be a real progressive thing. For example, with Lionell Wilson as the Mayor of Oakland, whites get a chance to see that things don't fall apart and Blacks get a chance to see that nothing really changed. That kind of democratization has its progressive impact, but there needs to be people there explaining why these things happen, what their limits are. If you believe that those reforms aren't enough and that the capitalist system, as it is structured today, has a broad propaganda mechanism on the other side to provide an interpretation of whatever the political events are, then it is necessary for progressive and socialist people to construct their own organizations, with their press, with their people, with their newspapers, and with their schools, for that matter, presenting the counter interpretation too. The answer to this whole question of reform and revolution and a sure fight for reform is to have people in the organizations to explain what the limits of those reforms are.

AUDIENCE: I want to go back to Alan's original remarks. The whole purpose of our coming here was to develop a strategy. But I think many of us felt that we have to have a better theoretical understanding before we can develop a strategy and I'm not sure if any of the presentations here, as yet, have given us that. I would like to take issue with Alan's down playing of the two traditional themes, namely that discrimination is rooted in the historical necessity for what Marx termed the "reserve army of labor" and that it is also a classic device for dividing the working class. I would also take

29. *Supra* note 8.

issue with the theory that the success of the civil rights movement was very much tied in with the need for a positive image of the United States. It was much more tied into the fact that as a result of the two world wars, we had a substantial integration of minorities and, particularly at that stage, Black people entered the industrial work force, and that traditionally, in this country, once a group that has been disenfranchised and discriminated against is integrated into the industrial work force, it is granted certain kinds of political and civil rights. We were able to do that because over a long period of time, we've had an expanding economy. This really gets to the point Hank made, which is the problem of the Eighties, that economy is in the forefront and we have, perhaps, a double crisis of economy coming about, first, from limitations which may be imposed by the environment, and second, from limitations which may be imposed as a result of the greater difficulty of American economic imperialism in bringing back large surpluses to this country.

The problem now is the fact that things are now getting frozen or getting slightly worse as we get into layoffs. The seniority decisions, I think, reflect what I mean. After all, when it comes to getting in we say everybody has to be equal in ability, but when it comes to going out, we forget about ability and the question becomes how long you have been there, and we all know who got there first.

So, that part of the process that is going on now of trying to increase capital accumulation is involved in what is the so-called fiscal crisis, particularly of the cities and local government involving strong reductions of services to poor people. In the cities, in most places, that translates into service to minorities. Yet, the legal doctrine that we have to face is that there is a racially neutral criterion and, therefore, most of the protections that we find in the law do not apply. I mean, I happen to have been litigating some hospital cases and I'll just give you a closing ironic example. I think the law is that if there's one hospital run by a municipality, it's one hundred percent Black and you close it, that's not racial discrimination, you've just eliminated a service. If there are two hospitals, however, and one is fifty percent Black and the other is one hundred percent Black, and you close the one that's one hundred percent Black, maybe you can make out a civil rights violation because there you also have chosen between these two conflicting situations. We're litigating that case now, in several different places. I think the issue of cuts in social welfare benefits is an important racial issue. To the extent that we make it more difficult to politically and legally cut back the cost of maintaining this reserve army of labor we are going to aggravate the contradictions in the system either on the political side of one hand, by making it clear to people what they are losing, or economically, by just making it more expensive to do that. I can say for those of us who are litigating that we are having a hard time. I don't know if this is the appropriate place but it might be if anybody has ideas about these things. It would be a good subject to discuss at some point.

AUDIENCE: I'm going to try to shift the framework for a while. I really have not so much difficulty with the problems of litigations, with which I am very sympathetic but the problem of critical legal theory, which we spent the morning not clearly understanding. There is a third part of the title of the

panel, "The Contradictions of Affirmative Action", and I feel it is incomplete: no one is looking at the tough questions.

It's true that the tactics of school desegregation and the politics of affirmative action are difficult to integrate. At the level of critical theory and at the level of the contradictions of affirmative action the example that comes to mind is the law of the color blind doctrine. What is it about the character of equality as we understand it, the character of race as we understand it, that the central implicit premise in all of the litigation is that somehow justice should be color blind? It seems to me at one level, so long as that's the premise, we've lost. If the notion of affirmative action is that it is somehow illegitimate to consider color to be a social consideration when, in reality, color is the social reality, then somehow the legal premise is that color should not be considered at the level of critical theory. We have got to address that. I don't have a suggestion as to how you do it. Maybe this is obfuscation because it's a different level of abstraction than what we are talking about, but it seems to me that that is the hard question. At some point I hoped to have a few more comments about it at a forum like this. I know I've heard a lot about the problems and frustrations of litigation. Having done some Title VII work on some of those kinds of cases and, at my last job, trying to work on implementing regulations to California's employment discrimination act, at both the government's side and the litigation side it is enormously frustrating.

HENRY MCGEE: I'd like to answer that. I think that is really the best question; I think that's central to our discussion. As we all know, the function of color blind constitutionalism was supposed to suggest symbolically what the society would come to be. That might just be the difference that Derrick alluded to between himself and me, an older liberal civil rights view of the situation. What's happened is that this idea of a color blind society is simply something that has never materialized. So you now have a sort of perversion of the color blind doctrine. Its cynical use is to, in a sense, thwart demands for justice so that those people who want to tailor remedies to our color conscious society are confronted with the color blind thesis. Now, one of the questions I think we ought to consider in this room or think about at least through the day is what a color blind society was really supposed to be about. Was it indeed an ideal of some force? A social cultural idea that had some moral force that we ought to recognize? And that seems to be an internal contradiction, the interaction between morals and ideals and the economic and the real economic world.

In the real economic world there is not a color blind society, it is a highly color conscious society. And the question is what is the function of this legal ideal of color blindness in the long run? I ask, like you. It is an open question. I don't want to preempt the discussion by speaking to it at any great length. One of the central assumptions of the liberal bourgeoisie was that there was an essentially color blind world. Those of us who have lived in that liberal bourgeois world think, I believe, or are convinced at last, that it is a color conscious society at every level and the question is if we should largely abandon that constitutional ideal for something else.

AUDIENCE: I'm a first year Black law student at Stanford. So in one sense I

guess I am one of those people who have been coopted into the system and have been allowed to enter one of the finest institutions of legal studies. But I want to address the question of the future. Having myself grown up a little bit in the Sixties but mainly in the Seventies and having taught both white high school students and Black and Chicano students, I find the future is going to be extremely distressing because unlike the generation that most of you are in, where you are aware of the Sixties or the Fifties or before, you were aware of the concrete kinds of discrimination that people were faced with on a daily basis. The generation coming up, that is in junior high, high school, college and even professional school, is not aware of these things. They do not believe that racism really exists. In spite of the fact that many of them live in all Black areas or all Chicano areas, you cannot tell them that there is really racism. They will question you, they will fight you, they will call you a radical for challenging very basic assumptions of equality. Now this to me is very frightening because we are letting in students now into these so-called top institutions who have no awareness of discrimination, who have no awareness of any of these issues, and they will come out not to be the new leaders, the new people in the National Lawyer's Guild or the NAACP but really thinking more in terms of how can I get my piece of the pie. There is not a generation coming up who is really concerned with how to lead the struggle that we are all involved in here. They are mainly concerned with how they can make thirty-three thousand dollars a year in a Wall Street firm. That is a very crucial problem.

Also in seeking a strategy, which is what I think we definitely ought to do, I think we tend to focus just on what's going on in America. We don't realize or think that America is part of a greater capitalist structure which the Third World is very aware of. We can't come up with some solution for the problems of racism, classism, or sexism in our society while ignoring what America and the whole Western European hegemony is doing all over the world, things going on in Iran, things that are going to be happening in South Africa, in Zimbabwe, and all over the Third World. Those people know what America and the West have done to them and they are facing these issues head on. I think we can draw parallels from some of these nations and examples of how we can attack what is going on in our own society. We can use their example and get more in contact with people in the Third World to see how we can aid their struggles, and how they can give us help in our struggles here.

HENRY MCGEE: I'm going to underscore, and again I don't want to be the great underscorer, but that is the second most important remark of the day. I mean, if you are not in the university you don't have any idea what the ruling elites of the late Eighties will look like. That is the basis of my premise about a theoretical color blindness and a neutrality being the dominant theme in the American universities today. The faculty, the dominant faculty, believe that there is a neutral color blind meritocracy, and they are interacting with you, you who have no sense, who are isolated as much as ever before from the realities in which Third World peoples live, in Los Angeles or in Tehran. Whatever that reality is, the white kids in school know very little about it and couldn't care less. And they are justified in doing that because our colleagues are telling them that the problems of race

have been solved and that if the Negroes will only work harder they'll make it to Montgomery Street, too. I mean that, I think that is what's really going on. Something that you people could be doing, and what we should be doing, especially people no longer trapped within the universities is getting out and doing a great deal of education about what is really going down in this country and not assuming that your brothers and sisters share your consciousness. I think ignorance and a lack of information will be a far greater enemy of Third World people in the late Eighties than all the malevolence of the Forties and Fifties.

DERRICK BELL: I think your point is well taken. Those of us who have lived through this period and look back carefully, can see it was not one massive protest movement, by any means. From the late Sixties when I started teaching through the early Seventies, we certainly had major protests on campus and elsewhere. But it was seldom a universal thing. There have always been more than a few of us who were very happy with the way things were and who were opposed to even protesting for change. So the situation now, while it is perhaps less active than it was then, is not that much different. The other point is that, based on my experience, I have every faith that the oppressiveness of the existing system will manifest itself in the Eighties as it has done during the Seventies so that from time to time in ways not predictable, certain people will rise up and say at least, "this you can't do." I think the role for us is to be aware of these different periods, to not despair during the bad times nor become complacent during the good times. But as someone else said, "keep the faith."

ALAN FREEMAN: Unless anybody has anything else to say, that is a good note to close on.