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The Progressive Critique of the Current Socio-legal Landscape: Corporations and Racial Justice*

Cheryl I. Harris¹

I have the honor of serving as the director of the Critical Race Studies Concentration at the University of California, Los Angeles School of Law. Over the past decade in teaching, as well as in my prior life as an attorney, I have spent a lot of time thinking, writing, and talking about race. I have spent relatively little time thinking about the issue of corporations. I am new to this conversation and I would describe myself as not necessarily fully bilingual.

What I want to offer here are maybe just some tentative thoughts, perhaps more reflections on the topic, in terms of thinking about the relationship between corporations and racial justice.

I begin by placing my remarks in the context of my teaching experiences. I teach constitutional law and employment discrimination. Both courses are concerned with the issues of equality. One deals with the basic framework of the Constitution of the United States,² while the other deals with a statute, specifically Title VII, which bans discrimination on the basis of race, sex, and disability in the workplace.³

In viewing corporations and racial equality through the lens of these two bodies of law, one could say that you get a very complex and contradictory picture in terms of the relationship between corporations and racial justice.

On one hand, one could look through the lens of a particular kind of story about constitutional law and see the corporation as a form of organized capital that is infinitely about wealth maximization—a way of diffusing ownership and responsibility by spreading wealth and risk. And through this kind of entity of modernization and progress there is a story in which

one could say that corporations have opposed racial inequality as inherently inefficient, backwards, and out of step with what it takes to build capital.

There is also a story in which private property and capitalism in the free markets generate racial progress. This is a story that corporations like to highlight and one that has both old and new versions in terms of constitutional law.

The old version of the story is one than can be told through *Plessy v. Ferguson*.⁴ *Plessy* involved a Louisiana statute that mandated segregation in intrastate railroad travel. It required the state to provide equal but separate accommodations on the basis of race for all railroads traveling through the State of Louisiana.⁵

The lawyers and activists who saw the law adopted in 1890 correctly recognized it as yet another step in the effort to dismantle the progress that had been made during Reconstruction.⁶ So, they sought to band together and set up a test case.⁷

One of the principal lawyers in the case, who looked at cases prior to *Plessy* in an attempt to interpret the Fourteenth Amendment, correctly understood that the court was going to be very hostile to an equal protection claim. Looking at the cases preceding *Plessy*, it was very clear that the court had no interest in making a robust interpretation of the Fourteenth Amendment that would be friendly to an argument that said separation on the basis of race violated equal protection.⁸

Reading the trend in the court's decisions, the lawyer decided to speak a language that they understood and embraced, and that was the language of property.⁹ Albion Tourgée, one of the lawyers on the case, argued that the challenger in the case should be white.¹⁰ In other words, the person put up to challenge the law in *Plessy* should have been a person who appeared to be white; that is, the person should have been phenotypically white, so that the train conductor's assignment of that person to a car reserved for blacks could be challenged on the grounds that it was a deprivation of property.¹¹ That is, assigning a person that looked to be white to a train car reserved for

those being black was, in fact, depriving that person of the reputation of being regarded as white.¹²

The case then proceeded on two theories: one, an argument of equal protection; and two, an argument about deprivation of property.¹³ Of course, as you would know, neither argument was successful. So why am I telling this story?

I am telling this story because in order for the law in *Plessy* to be challenged and in order for *Plessy* to be utilized in this way, there had to be a test case. In order for there to be a test case, there had to be an arrest. In order for *Plessy* to be arrested, since he phenotypically appeared to be a white man, somebody had to communicate to local authorities that this guy was about to break the law by getting on the wrong train car and therefore, needed to be arrested. If this is the case, then how did local authorities know?

Local authorities knew of this case because it was a test case arranged with the railroad's cooperation.¹⁴ The attorneys went to the railroads and basically sought out one that would agree to a test case.¹⁵ Now, in 1896, why would the railroads agree to a test case? From the railroad's perspective, one of the stories that is told about *Plessy* is that this is an instance in which race discrimination was economically burdensome;¹⁶ that is, it was economically inefficient to have to maintain separate cars.¹⁷ In addition, it was particularly inefficient because depending on what state you were in, a particular fraction of so-called black blood determined whether a person was considered black.¹⁸ If you crossed the state from one to another, a person that is classified as black in State A may not have been classified as black in State B.¹⁹

One of the stories told about *Plessy* is one in which you see the market, or the free market, as a force that is resisting racial discrimination in the name of economic progress. In this story, racial segregation and later discrimination is economically inefficient.

The contemporary version of this story can be told by looking at *Grutter v. Bollinger*²⁰ and *Gratz v. Bollinger*.²¹ These are the two affirmative action cases that came down in 2003 in which the University of Michigan's admissions policy was challenged on the grounds that it violated the equal protection clause. One thing that is interesting in these cases is an amicus brief filed by none other than General Motors.²² General Motors filed on behalf of the University of Michigan and, along with some Fortune 500 companies, made an interesting argument in their amicus brief.

"General Motors employs 388,000 people, including 193,000 in the United States [with annual revenues exceeding \$175 billion]."²³ General Motors situates itself as a major global player. I find this interesting because they are always talking about GM bleeding money, as though it is on the ropes. \$175 billion.

General Motors filed an amicus brief and it said the reason it filed the brief was

to explain that the Nation's interest in safeguarding the freedom of academic institutions to select racially and ethnically diverse student bodies is compelling: the future of American business and, in some measure, of the American economy depends on it. . . . [O]nly a well educated, diverse work force, comprising people who have learned to work productively and creatively with individuals from a multitude of races and ethnic, religious, and cultural backgrounds, can maintain America's competitiveness in the increasingly diverse and interconnected world economy. [The maintenance of global markets requires the development of business elites that have acquired cross-cultural skills].²⁴

What we see here is the corporate articulation of racial justice as good business; that is, that cross-cultural competence is crucial in serving global markets.²⁵ Again the story is one in which a major corporate power aligns itself with racial justice in the interest of diversity because diversity is economically rational and wealth maximizing. Of course, that is not the whole story.

If we take a look at the corporation through the lens of employment discrimination law, we see quite a different face. We see pervasive and rampant racial discrimination in both overt and subtle forms. The overt may be known to many of you. One case in particular involved RR Donnelly, a printing press in Chicago that closed a south-side plant in 1994. Over six hundred black employees sued,²⁶ alleging that there had been systemic racial discrimination in many forms, including the misuse of temporary employment policies that allowed people to work for twenty-three months, one month short of the two years required to become permanent employees and secure health benefits. Instead of hiring the employees, the company would lay them off.²⁷ There were also charges of a racially hostile work environment; that is, supervisors failed to intervene when black workers were harassed.²⁸ One employee told a story about being forced to eat his lunch out of a garbage can.²⁹ There were Ku Klux Klan symbols³⁰ and nooses³¹ all around.

Similar allegations about denial of opportunity and hostile work environments have been made at Kodak, BellSouth, Texaco, and Sodexo, which is a food service giant affiliated with Marriott.³² Interestingly, Sodexo has taken on the contracts for food services at many universities and colleges across the country.³³

A 2002 study published by Alfred and Ruth Blumrosen, at Rutgers University, points out that discrimination is pervasive in the workplace.³⁴ Looking at the Equal Employment Opportunity Commission (EEOC) reports from 1995 to 1999, the EEOC reports indicate that while there have been significant gains for racial minorities in terms of jobs and positions, nearly 40 percent of the 200,000 companies studied discriminated against racial minorities in at least one occupational category.³⁵ Both researchers were looking at underutilization, such as situations where there were clearly qualified racial minorities being underutilized in companies.³⁶

Blumrosen estimates that this intentional job discrimination affected over two million workers among large and medium sized employers.³⁷ Among

these employers, 22,000 were characterized as severe and were found responsible for approximately one-half of all intentional discrimination.³⁸

To put it bluntly, the prevailing idea that intentional job discrimination is a thing of the past or the acts of a few isolated companies is simply wrong. Yet the idea that affirmative action is no longer necessary has taken hold because of these assumptions. In some people's minds, affirmative action amounts to some kind of overcorrection.

At the same time, through the lens of employment discrimination law, we see this pervasive pattern of employment discrimination by corporate actors as both the law and the courts have become more hostile to employment discrimination claims.³⁹ Employment discrimination law has been an uphill battle for about the last twenty years.⁴⁰ And several academics have tried to take an empirical look, and what they found is pretty scary. At the pretrial stage, 80–95 percent of employment cases have been decided for defendants.⁴¹ That is, at the summary judgment level you are out the door—that is it. We can compare that with 66 percent of insurance cases in which defendants have received a summary judgment in their favor.⁴²

Similarly, in California a study was done which indicated that employment discrimination cases are very hard to win, and when you exclude sexual harassment cases from the data, it even shows that those cases are much harder to win. In other words, sexual harassment cases are not easy to win, but they are easier to win than race discrimination cases.

According to a study by David Oppenheimer, “the discrimination cases that are hardest to win are hardest to win when brought by non-whites and particularly black women alleging race discrimination and women over forty alleging race discrimination.”⁴³ God forbid that you should be a black woman over forty.⁴⁴ You are dead.

Non-whites also do dramatically worse on appeal.⁴⁵ When employers win at the trial level, only 5.8 percent of their judgments are reversed on appeal.⁴⁶ When plaintiffs win at the trial level, 43.6 percent of their

judgments are reversed on appeal. So, even if you manage to get through those hurdles and get a trial verdict, it is not safe from the appellate court.

In addition to the question of hostility to the courts, we also see the corporate actors as major players in resisting any sort of changes in anti-discrimination law that might change some of these statistics. The history of the 1991 amendments to the Civil Rights Act, which amended Title VII, includes the 1989 Supreme Court decision in *Wards Cove Packing Co., Inc. v. Atonio*.⁴⁷ This case shows one of the more stark cases of employment discrimination that emerges out of contemporary American legal lore involving a cannery in Alaska which had a very isolated work area.⁴⁸ This particular workforce was predominantly made up of Asian and white people.⁴⁹ In the workforce, the whites had all the managerial positions, all the skill craft positions, and Asians were relegated to line work.⁵⁰ In this work environment, because it was seasonal work, the line workers had separate cafeterias and living quarters from the managers, creating a plantation kind of orientation or organization of the living space.⁵¹

The Supreme Court in *Wards Cove* said the work environment in the cannery did not violate Title VII.⁵² It did not amount to disparate impact.⁵³ It did not amount to disparate treatment.⁵⁴ For those of us that are old enough to remember the senior President Bush, he argued, along with all of his corporate sponsors, that any amendments in the law amounted to an attempt to institute a quota bill.⁵⁵ The magic language of quota was thrown around as the corporate powers resisted any efforts to strengthen anti-discrimination law.

What is my point? What explains this seeming contradiction between the corporate commitment to diversity on the one hand that we see in *Grutter*,⁵⁶ and the simultaneous face of blatant, as well as more subtle, forms of job discrimination? In part, I think this contradiction actually inheres in the very structure of our equality discourse from the beginning.

If we take a look at the Fourteenth Amendment and the language and the structure of the Fourteenth Amendment itself, what does it do? First, the

language within the Fourteenth Amendment says, “No state shall [discriminate].”⁵⁷ The language of the Fourteenth Amendment on its face sets up this dichotomy between public and private power in which only public power is subject to the reach of the equal protection guarantee.⁵⁸ It carves out the entire domain of private power, corporations, as being beyond the reach of constitutional law.

Now, of course, we have reached to some extent into that domain through the statutory mechanism of Title VII. But that is clearly not enough and clearly subject to the political money that the other speakers have talked about. Not only was corporate power left out of the picture right from the very beginning, but the early Fourteenth Amendment cases extended the protection of the amendment to corporations which were declared to be Fourteenth Amendment persons, right?

In other words, corporations are Fourteenth Amendment persons.⁵⁹ They are entitled to the protection of the Fourteenth Amendment.⁶⁰ This is happening at the same time that the court is essentially gutting the Fourteenth Amendment of any meaning in terms of its protections for racially subordinated people. This leaves the private domain free of regulation.

That fundamental omission basically means that racial justice is subject to the corporate determination of when racial justice converges with its economic interest. It explains why a corporation could sign on to a brief in *Grutter* because it is diversity that it is advancing, not the eradication of present racial discrimination, which it does not acknowledge anywhere.⁶¹ Anywhere. There is nothing in that brief that would give you the remotest sign that any of these corporate actors have been hauled into court, maybe successfully or not, but hauled into court for this kind of rampant and blatant discrimination.

What does that leave us with? That leaves us with a need to disrupt the separation between public and private power. At the heart of what we are talking about is a set of arrangements in which private corporate power has

been given carte blanche. I think that at the end of the day what we need to recognize is that some of this stuff is not just about tinkering at the edges. I think, as some of the speakers have mentioned, we are talking about fundamental restructuring. And part of it has to do with really rethinking our understanding of the relationship between public and private empowerment and race.

* This text is a transcript from panel discussion at University of California at Los Angeles School of Law on April 9, 2005 as part of the conference, *New Strategies for Justice: Linking Corporate Law with Progressive Social Movements*, cosponsored by UCLA Law School and the Center on Corporations, Law & Society at Seattle University School of Law. Transcripts from the other panelists, Julie A. Su and John C. Bonifaz, are also featured in this volume.

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² U.S. CONST.

³ 42 U.S.C. § 2000(e) (1991).

⁴ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁵ *Id.* at 540.

⁶ CHERYL I. HARRIS, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, in CONSTITUTIONAL LAW STORIES 181, 201-2 (Michael C. Dorf ed., 2004).

⁷ *Id.*

⁸ U.S. CONST. amend. XIV. *See* *The Slaughter-House Cases*, 83 U.S. 36 (1872); *The Civil Rights Cases*, 109 U.S. 3 (1883).

⁹ HARRIS, *supra* note 5, at 209.

¹⁰ *Id.* at 203.

¹¹ *Id.*

¹² *Id.* at 209-10.

¹³ *Id.* at 209, 212.

¹⁴ *Id.* at 203.

¹⁵ *Id.*

¹⁶ *Id.* at 201.

¹⁷ Michael A. Ross, *Seat of Honor*, TIMES-PICAYUNE, May 25, 2003, at § BOOKS 1, 4 (reviewing KEITH MEDLEY, *WE AS FREEMEN: PLESSY V. FERGUSON* (2003)), available at www.nathanielturner.com/weasfreemen2.htm.

¹⁸ *Plessy*, 163 U.S. at 552.

¹⁹ *Id.*

²⁰ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²¹ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

²² Brief for General Motors as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 399096.

²³ *Id.* at ¶ 1.

²⁴ *Id.* at ¶ 3.

- ²⁵ *Id.*
- ²⁶ *Donnelley Settles Race Bias Lawsuit*, WASH. POST, Oct. 23, 2004, at E02.
- ²⁷ James P. Miller, *Bias Complaint Put in New Light*, CHI. TRIB., Sept. 10, 2000, at 1.
- ²⁸ *Id.*
- ²⁹ *Id.*
- ³⁰ *Id.*
- ³¹ *Printing Giant Ends Decade-Old Discrimination Case with Offer of \$15 million*, USA TODAY, Oct. 22, 2004.
- ³² Berger & Montague, P.C., Eastman Kodak Company Lawsuit, <http://www.kodakdiscrimination.com> (last visited Nov. 6, 2005); Civilrights.org, *Cause for Concern: Hate Crimes in America*, http://www.civilrights.org/publications/reports/cause_for_concern/p4.html (last visited Nov. 6, 2005); Cohen, Milstein, Hausfeld & Toll, P.L.L.C., BellSouth, *available at* http://www.cmht.com/cases_bellsouth.php (last visited Nov. 6, 2005); Erin Teixeira, Corpwatch.org, *US: Sodexo Settles Large Racial Bias Case* (Apr. 27, 2005), *available at* <http://www.corpwatch.org/article.php?id=12160> (last visited Nov. 6, 2005).
- ³³ wkrc.org, *Ribs Chain Ventures onto College Campuses* (June 6, 2005), *available at* http://www.wkrc.com/business/wire/story.aspx?content_id=D7CAA0A7-6862-4BF0-8201-2D6F292BB468 (last visited Nov. 5, 2005).
- ³⁴ ALFRED W. BLUMROSEN & RUTH G. BLUMROSEN, *THE REALITY OF INTENTIONAL JOB DISCRIMINATION IN METROPOLITAN AMERICA—1999*, at xviii (2002), *available at* <http://law.newark.rutgers.edu/blumrosen-eeo.html>.
- ³⁵ *Id.* at xii-xiii.
- ³⁶ *Id.* at xiii-xiv.
- ³⁷ *Id.* at xii.
- ³⁸ *Id.* at xvii.
- ³⁹ See MICHAEL FORMAN, ET AL., *MAINTAINING THE SANCTITY OF THE JURY IN EMPLOYMENT DISCRIMINATION CASES 3-7* (2003), *available at* <http://www.lawyerscomm.org/2005website/features/40thfeatures/PDF/40thpapers/juries.pdf>.
- ⁴⁰ *Id.* at 9.
- ⁴¹ *Id.*
- ⁴² See *id.*
- ⁴³ MICHAEL K. BROWN, ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (Berkeley: University of California Press 2003).
- ⁴⁴ *Id.*
- ⁴⁵ FORMAN, ET AL *supra* note 38, at 9-10.
- ⁴⁶ *Id.* at 10.
- ⁴⁷ The Civil Rights Act of 1991 § 2, 42 U.S.C. § 1981 (2005).
- ⁴⁸ *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 647 (1989).
- ⁴⁹ *Id.*
- ⁵⁰ *Id.*
- ⁵¹ *Id.*
- ⁵² *Id.*
- ⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ George H.W. Bush, President, United States of America, Signing Ceremony in White House Rose Garden: Remarks on the Civil Rights Act of 1991 (Nov. 21, 1991).

⁵⁶ Grutter, 539 U.S. at 330.

⁵⁷ U.S. CONST. amend. XIV, § 1.

⁵⁸ *See id.*

⁵⁹ *Smyth v. Ames*, 169 U.S. 466, 526 (1898).

⁶⁰ *Id.*

⁶¹ *See Grutter*, 539 U.S. at 330.