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Stirring the Ashes: Race Class and the Future of Civil Rights Scholarship

Frances Lee Ansley

STIRRING THE ASHES: RACE, CLASS AND THE FUTURE OF CIVIL RIGHTS SCHOLARSHIP[1]

Frances Lee Ansley †

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† Associate Professor of Law, University of Tennessee College of Law. A.B., Harvard/Radcliffe (1969); J.D., University of Tennessee (1979); LL.M., Harvard (1988).

[1] This paper was conceived in Professor Derrick Bell's seminar "Civil Rights at the Crossroads," given at Harvard Law School in the fall of 1987. The opportunity to work with him and his students in the unique environment he creates in a classroom was a rare privilege. Numerous other people deserve mention, some who knew they were helping in this endeavor, others who did not, and some who contributed to my education about race or class before this Article was dreamed of: Georgia Adkins, Sam Asmar, James Bevel, Anne Braden, Carleasa Coates, Dovie Coleman, Jim Dombrowski, Patrick Hardin, Vincent Harding, Jack Hartog, Betty Herrell, Kay Hocking, Myles Horton, Morton Horwitz, Duncan Kennedy, Namane and Tommy Magau, Eric Mann, Maudie Marcum, Frank Michelman, Pauline Minniefield, Peter Orris, Lucy Phenix, Florence and Sam Reece, Jim Sessions, Vicky Spelman, Jean Tepperman, Peggy Terry, Clara Thomas, Doug Wells, Rosalind and Howard Zinn, friends in East Tennessee and Southwest Virginia, and now on the final cut, the students in my own race and gender class at the University of Tennessee, who gave of themselves so generously. Many of the authors cited in the footnotes below also have my gratitude and respect. The intellectual debt to two writers in particular, Derrick Bell and Alan Freeman, will no doubt be apparent, but is great enough that a careful reading of this piece would probably generate a storm of additional footnotes to each of them. It goes without saying that the politics and errors of this paper are my own.

I
INTRODUCTION[2]

> [Q]uestions arise from the ashes of our expectations: How have we failed—and why? What does this failure mean—for black people and for whites? Where do we go from here?[3]

Derrick Bell poses and explores these wrenching questions in his moving book, *And We Are Not Saved*.[4] The questions are not his alone, nor are they confined to the world of legal scholarship. To

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2 First names of authors are included in footnotes throughout, partly to aid in general differentiation endeavors (*e.g.*, distinguishing Kennedys), but more importantly to provide an imperfect method for allowing identification of female authors in cases where author gender is of interest to the reader but is not clear from the discussion.

3 DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 3 (1987). The vagaries of publication schedules being what they are, there has been a substantive lapse of time between the writing and acceptance of this Article and its appearance in print. It is almost eerie to read these words of Derrick Bell's now, and my ensuing talk of crisis and crossroads, knowing that they were written *before* not only City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989), but also the baleful litter of cases birthed by the Court in the summer of 1989. These cases include Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989) (municipal and state governments not liable for discriminatory practices performed as part of an employee's official duties); Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (§ 1981 does not cover conditions of racial harrassment on the job, but only activities more narrowly confined to "making" contracts); Lorance v. AT&T, 109 S. Ct. 2269 (1989) (statute of limitations restrictively applied to Title VII claimants); Martin v. Wilks, 109 S. Ct. 2180 (1989) (disaffected, nonconsenting white males given great latitude in when and how to attack affirmative action consent decree); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (burden of proof significantly stiffened for Title VII plaintiffs and disparate impact theory significantly weakened). Suffice it to say that the sense of crisis has deepened and intensified.

4 *See* D. BELL, *supra* note 3. Major portions of that book first appeared in Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985). The book is reviewed, *inter alia*, in Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923 (1988); Michael Tigar, *Unfinished Business*, 73 A.B.A. J. (Oct. 1987), at 146; Note, *The Battleground of Experience*, 101 HARV. L. REV. 849 (1988). The partial version that originally appeared in the Harvard Law Review was the subject of a forum in 3 HARV. BLACKLETTER J. 46 (1986) (contributors included Derrick Bell, Regina Austin, Paul Dimond, Jane DeGidio, Linda Greene, Joel Handler, Henry McGee, Daniel Monti, and Patricia Williams).

the contrary, they are questions that haunt many of those caught up in the movement for racial justice and the other struggles that followed in its heady wake.[5] Clearly the answers to such questions will not come easily, and will not come primarily from within the law schools.

Nevertheless, this Article will focus on the world of legal scholarship: specifically, how Derrick Bell's hard questions have struck civil rights scholars.[6] I will trace lines of thought and strategies that are evolving within the bounds of civil rights scholarship. I will also put forward some of my own views about problems that civil rights scholars need to address and about where "we" should go from here.

The choice to focus on legal scholarship is, in one sense, com-

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[5] *See generally* TODD GITLIN, THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE (1987) (a personal political memoir and reflection on the new left politics of the 1960s: antiwar protests, black liberation and beginnings of second-wave feminism); RACE, POLITICS AND CULTURE: CRITICAL ESSAYS ON THE RADICALISM OF THE 1960'S (Adolph Reed ed. 1986) [hereinafter RACE, POLITICS AND CULTURE] (essays exploring the ideology and social context of the black political radicalism and new left politics of the 1960s).

[6] I use "civil rights scholars" here as a term of art. I mean to refer to people largely, but not exclusively, law-trained, both in and out of academia, who are attempting to reflect and write on the current state of race-and-law in the United States and who identify with the words "we," "failure," and "go from here" in Professor Bell's questions. This group is both larger and smaller than a list one might cull from the ranks of published equal protection authors. It consists, in important part, of people of color and/or people on the political left. Its boundaries are ill-defined. Its work, like that of current feminist legal scholars, is differentiated from much traditional legal scholarship by the special tensions, problems and strengths that arise from its partisan relationship to a social movement (however disunified) that has both an independent existence and its own engagement with the courts and with evolving legal norms.

I am aware that choosing the term "civil rights scholar" generates some problems in light of the current "rights debate." See *infra* notes 55-63 for a truncated discussion of this controversy. Clearly some scholars I include in the category wish to reject any valorization of "rights" and have identified a kind of anti-rights theory as an important part of their current work.

I nevertheless choose the term because (I) it summons forth the long shape and history of the movement-rooted legal struggle on behalf of justice for people of color, a shape and history I want to have present in my thinking and in this Article; (2) even those who have attacked rights talk see themselves, for the most part, as members of a partisan discourse about the meaning and future of "the civil rights struggle;" (3) important writers in the group have explicitly refused to reject rights discourse; and (4) all the alternatives I have imagined seem highly unsatisfactory. (The list of alternatives includes the option of no-label-at-all, with occasional resort to a vague "we," "us," "ourselves," etc. It also includes various phrases such as "anti-racism scholars," "race-and-law scholars," "movement lawyers," "partisan scholars," and "anti-discrimination advocates." In light of common sense and the discussions below, I believe it will be clear why none of the above appear acceptable.)

I am, in any case, certain that this difficulty in terminology reflects the crossroads condition in which we find ourselves. There may be a number of serious thinkers who believe my assumption that any meaningful "we" or "us" or "ourselves" exists at this point is wishful thinking, bankrupt nostalgia, or both. I suppose the coherence and identity of the band of travelers is as much in dispute as what road the journey should take.

pelled by personal biography: issues of competence are daunting enough even within the sphere where I am privileged to make my living, let alone beyond it. The choice, however, also springs from my conviction that prevailing legal doctrines and ideologies have power and force, beyond the academy and the courtroom, to shape racism in its real manifestations and metamorphoses. It follows that legal thought can be a fruitful focus for those who believe the battle for racial justice has thus far failed in important ways, and who want to be part of propelling it on a better path.

Recent scholarship,[7] drawing on eclectic sources,[8] has argued persuasively that legal doctrine has important social power, that it shapes people's consciousness of themselves and their world, enlarging or restricting their vision of how things are, could be and should be. Historians also have pointed out the important role of law as mediator and unifier for Americans in particular,[9] and the intense and intricate involvement of law and legal doctrine in the history of African-American people in this country.[10]

Race law doctrine has an effect, for example, on those of us considering Professor Bell's questions, and on others, in and out of the legal profession, who perhaps want no part of the questions, or have not yet dreamed of them. If the ideology of civil rights law itself, its spoken and unspoken message, is an active agent in our

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7 Despite the embarrassment of finding myself in the backwash of an evolving convention (first the tradition of the obligatory Critical Legal Studies footnote, then the counter-tradition of the obligatory disavowal of the obligatory Critical Legal Studies footnote), I think I should indicate that I refer here primarily to the work of people associated with the Critical Legal Studies, or "CLS," movement. Papers that have paid particular attention to the question of legal ideology as shaper-of-consciousness (and therefore as shaper-of-world) include Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3 (1980); Karl Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981); Karl Klare, *Law-Making as Praxis*, 40 TELOS 123 (1979).

8 The following incomplete list gives some sense of the breadth of the sources people claim: SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Q. Hoare & G. Smith trans. 1971); WOLFGANG KOHLER, GESTALT PSYCHOLOGY (1947); GEORGE LUKAS, HISTORY AND CLASS CONSCIOUSNESS (R. Livingstone trans. 1971); KARL MANNHEIM, IDEOLOGY AND UTOPIA (1940); JEAN PIAGET, STRUCTURALISM (C. Maschler trans. 1970); Douglas Hay, *Property, Authority, and the Criminal Law*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND 17 (Hay, Linebaugh, Rule, Thompson, and Winslow eds. 1975).

9 *See, e.g.*, Morton Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 60 (1987) ("As is typical of American history . . . the central arena of controversy in this country over the liberal idea of the neutral state was constitutional law.").

10 *See generally* DERRICK BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980); DERRICK BELL, RACE, RACISM AND AMERICAN LAW (1st ed. 1972); A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR (1978); Haywood Burns, *Law and Race in America*, in THE POLITICS OF LAW 89 (D. Kairys ed. 1982).

social reality, then a real understanding and analysis of race and law in our system would be an important contribution toward change, not simply an academic exercise.

Certainly there are pitfalls in focusing on legal doctrine, especially at the level of abstraction with which this Article concerns itself. Social engineering delusions may overestimate the real-world significance of legal moves, and a self-absorbed discourse may isolate speakers from people they need to know and from crucial worlds of insight and power beyond the academy. Nevertheless, if we are able to discern patterns in the ways that civil rights doctrine has intersected with real gains and losses for women and men of color, if we can see a drift in the ways it has shaped popular perceptions of racial rights and racial wrongs, if we can trace the sources of the differences among intellectuals presently struggling with the past meanings and future directions of race law, such insight into legal doctrine should be of use to people seeking deep societal changes.

Of course, we cannot legislate or litigate an end to racism "from above,"[11] and doctrinal analysis alone will not magically translate even into changed consciousness, much less into changed social or economic relations. The ending or crippling of American racism will require unprecedented participation and involvement of people, black and white, throughout the lower ranks of our society. Such participation must be both lively and dead serious. It is my hope that legal scholarship will be useful in such a larger push toward participation by broad numbers of people. It is in that spirit that I offer this paper.[12]

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11 Deep doubt about the ability of law and legal process to play a significant role in further social change is one feature of the crossroads we confront. Bernadette Chachere states: "I . . . question the potential of civil rights to significantly improve the economic condition of the poor. . . . I . . . broaden the issue and ask to what extent the United States Constitution and the legal process can be used as vehicles for economic change." Bernadette Chachere, *Welfare and Poverty as Roadblocks to the Civil Rights Goals of the 1980's*, 37 RUTGERS L. REV. 789, 789 (1985). Tilden Lemelle notes:

> Whether a society in which racism has been internalized and institutionalized to the point of being an essential and inherently functioning component of that society—a culture from whose inception racial discrimination has been a regulative force for maintaining stability and growth and for maximizing other cultural values—whether such a society *of itself* can even legislate (let alone enforce) public policy to combat racial discrimination is most doubtful.

Tilden Lemelle, in RICHARD BURKEY, RACIAL DISCRIMINATION AND PUBLIC POLICY IN THE UNITED STATES 38 (1971), *excerpted in* DERRICK BELL, RACE, RACISM AND AMERICAN LAW 100 (1st ed. 1972).

12 It troubles me that I feel distinctly uncomfortable making statements like those in this paragraph. The statements are hardly novel. But in this context they sound somehow inflated? . . . silly? I trace my discomfort to a desire for a diction appropriately (1) scholarly and/or (2) post-modernly sophisticated. Only in the most qualified way do I in fact want to honor either of those desires in this context.

Part II will try to give some sense of the "ashes" of Professor Bell's questions, to convey the widely-shared feeling that we have come to a charred and barren place, that past directions, at best, have petered out or, at worst, have led us astray, and that we are facing a crossroads. I will sketch the picture first by narrative, describing some of the features of the journey to this point, and then by doctrine, taking a focused look at a special piece of the present landscape, the "innocent victim" in affirmative action jurisprudence.

In Part III I will leave the microlevel of affirmative action to set out two "models" of white supremacy that I hope will be useful for understanding what may animate different approaches currently being explored by civil rights scholars in the search for legal and political tools against white supremacy.[13] Each model offers, in a crude way, an explanation of why the conditions of white dominance and black subordination have survived and proved so resistant to change, how this racial system has attained its apparent ability to withstand attacks that were at many junctures so well-fought and that seemed so often to offer resounding victories. Neither model represents an embraced position or a coherent theory that current literature actually advances;[14] they are simply constructs posed for discussion. The models are: White Supremacy as a Feature of Class Domination (the "class model") and White Supremacy for Its Own Sake (the "race model"). I will offer ideas about why neither model alone recommends itself to the civil rights scholar as an adequate approach to our dilemmas.

Part IV will discuss where we might go from here, beginning with an observation on what civil rights scholars are presently saying about the conjunction of race and class, going on to examine some current methodological questions, and finally proposing several specific projects I want to urge upon civil rights scholars. Part V is a conclusion.

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13 By use of the word "model" I do not mean anything at all fancy. My intention is to set out a series of schematic, skeletal, largely fictional pictures whose simplicity will, I hope, aid discussion. They are hypotheticals.

14 A partial exception is Alan Freeman's thesis about the constraining effects that liberal ideology and the needs of our class system exert on racial remediation. *See generally* Alan Freeman, *Antidiscrimination Law: A Critical Review*, in THE POLITICS OF LAW 96 (D. Kairys ed. 1982) [hereinafter Freeman, *Critical Review*]. Freeman is nearly the individual architect of the "class legitimation model" I discuss below. *See infra* notes 146-48 and accompanying text. I have simplified, polarized and "thingified" Freeman's ideas to the point where I suspect I diverge from what he meant to say in 1982 or would want to add today. Since this paper was written, Professor Freeman has in fact said some more. Readers should consult Alan Freeman, *Racism, Rights, and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988) [hereinafter Freeman, *Racism, Rights*].

II
"THE ASHES OF OUR EXPECTATIONS"

A. The Journey Here

Civil rights scholars in the late 1980s find themselves surveying a bleak landscape in anger and confusion.[15] In 1984, Professor Bell described this landscape: "[O]ne is tempted to borrow the marathoner's hitting-the-wall analogy in analyzing the barriers to further progress in the once-vibrant movement to end racial discrimination, a movement now brought to a virtual halt."[16]

The sense of pain so frequently evident in the recent writings of civil rights law crusaders[17] stems in large part from two related, yet seemingly contradictory, phenomena. First, the ground is strewn with slain dragons and proofs of victory. Within our lifetimes, people of color have overcome legal and illegal obstacles alike, one after the other, through offensive and defensive courtroom and legislative strategies (sparked and supported by masses of people in motion whose courage and resourcefulness in the buses, courthouses, restaurants, jails and streets we must remember).[18] Superb

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15 I should, of course, acknowledge that in this regard the civil rights scholar is marching to a radically different drummer than are others in our society. As Alan Freeman notes, "there seems today to be a dominant mood of complacency, a sentiment, however inaccurate, that blacks and other minorities have gotten enough and should now make it on their own." Freeman, *Critical Review*, *supra* note 14, at 96. Walter Williams concedes that some blacks have been left behind, but denies that this fact is attributable to race and insists that the overall picture is one of "tremendous socioeconomic gains of blacks in general over the last forty years." Walter Williams, *The False Civil Rights Vision*, 21 GA. L. REV. 1119, 1139 (1987).

John Calmore quotes a Reagan domestic affairs adviser as follows: "The 'War on Poverty' that began in 1964 has been won; the growth of jobs and income in the private economy, combined with an explosive increase in government spending and income transfer programs, has virtually eliminated poverty in the United States." John Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 214 (1982). Few would go this far, but many think minorities have gotten all they need, or if they have not, it is because of their own failings. Civil rights scholars, however, see matters differently, as will become clear below.

16 Derrick Bell, *A Hurdle Too High: Class-based Roadblocks to Racial Remediation*, 33 BUFFALO L. REV. 1, 1 (1984) [hereinafter Bell, *Hurdle*] (This article presents the 1983 James McCormick Mitchell Lecture. Derrick Bell was the lecturer. Panelists were Alan Freeman, Monroe Fordham, and Sidney Willhelm).

17 "[M]any of us felt that there was a crisis of confidence and a growing sense of despair among those involved in the Civil Rights Movement." *Foreword: Civil Rights Developments*, 37 RUTGERS L. REV. 667, 667 (1985). Vocabulary alone reveals this pain. One scholar talks of the "premature death" of the civil rights movement. Calmore, *supra* note 15, at 215. Another discusses "paralysis." Ralph Smith, *Alternatives to Paralysis: A Working Paper Precipitated by the Affirmative Action Cases*, 61 OR. L. REV. 317, 317 (1982).

18 *See generally* WILLIAM BEARDSLEE, THE WAY OUT MUST LEAD IN (2d ed. 1983); *Eyes on the Prize* (six-part video documentary, produced by Blackside, Inc., first aired on Public Broadcasting Service 1987); *You Got to Move* (80-minute film featuring civil rights activists produced by Lucy Massie Phenix, Veronica Selver, and Cumberland Mt. Film Cooperative 1986).

work by courageous and inventive attorneys like William Hastie and Thurgood Marshall achieved astounding results.[19] Though the picture dimmed in the seventies and eighties, it is nevertheless undeniable that dramatic gains were made in dismantling Jim Crow laws and practices and in establishing rights of access and participation for blacks in all kinds of settings and institutions.[20]

Equally clear, however, are the stubborn and devastating realities of present life for the vast majority of black people. They continue to constitute a disproportionate number of those who live in unemployment and poverty. They reside in largely separate and unequal neighborhoods and attend largely separate and unequal schools. Their health and mortality statistics are shocking. They are still regularly subjected to behavior ranging from the minor insult to the life-taking assault at the hands of consciously and unconsciously bigoted whites.[21]

Adding salt to the wound is the fact that the dragon-slaying sword of anti-discrimination law, which the crusaders forged and wielded so handily against the enemy, has lost most of its power to defend, rescue or avenge people of color. "[W]ith each passing day the remedial relevance of law becomes more nebulous and less hopeful."[22] Perhaps most disturbing, anti-discrimination doctrine is even being turned, in dramatic instances, upon the victims of white supremacy themselves, "the very group the fourteenth amendment was created to protect."[23] Lawyers have found themselves question-

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19 *See generally* GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE (1984); and CATHERINE BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT (1983).

20 The gains have been such that the *New York Times* could, in its front page story of Jesse Jackson's amazing sweep in the Southern primaries, quote civil rights soldier John Lewis:

> To me, it is unbelievable, extraordinary to see the distance we have come. . . . If someone had told me 23 years ago when we walked across that bridge—I couldn't register and vote in Alabama, my mother and father couldn't vote in 1965—if someone had told me I would have the opportunity to vote for a black man for President, I would have said, "You're out of your mind."

Blacks, Years After Selma, Share in Jackson's Victory, N.Y. Times, Mar. 10, 1988, at A1, col. 4, and A27, col. 1.

21 For numbers and analysis on the plight of the black underclass, see generally WILLIAM WILSON, THE TRULY DISADVANTAGED (1987). *See also* A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (G. Jaynes & R. Williams, eds. 1989).

22 Calmore, *supra* note 15, at 203.

23 Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1335-36 (1986). *See also* Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (describing how, in the face of antidiscrimination law, blacks remain disadvantaged in many settings). For a particularly high-pitched example of the new uses of anti-discrimination rhetoric, see William Bradford Reynolds, *An Equal Opportunity Scorecard*, 21 GA. L. REV. 1007 (1987).

ing both the future and the past.

Some have even argued that the civil rights struggle may have done more harm than good.[24] Some victories that seemed, for a time, like a ladder out of oppression have begun to feel more like a demonic ferris wheel, grinding ever onward in its oppressive and repetitive round, and driven more by the force of white advantage than by any imperative for black justice.

In several articles Derrick Bell reconsiders the history of civil rights gains and concludes that a major dynamic is what he calls the "Interest-Convergence Dilemma."[25] In his rendition, the fate of African-Americans has not been constantly bleak. Rather, there have been cycles, variations and moments of improvement.[26] Unfortunately, however, these moments have little or no relation to black need, black power or black influence. Instead they are dictated by *white* needs, desires and interests. Even if a reform follows organized demands, it is on terms molded to white ends and vulnerable to white changes of heart. "Reform is seldom forthcoming until white policymakers perceive some self-interest-based benefit for themselves or, occasionally, for other whites. When the reform is adopted, justice for blacks is given as the sole motivation. . . ."[27]

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24 "[R]eal gains may have deepened the legitimacy of the system as a whole." Robert Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW 286 (D. Kairys ed. 1982). One civil rights scholar claims that "antidiscrimination law as it has evolved from 1954 to the present has served more to rationalize the continued presence of racial discrimination in our society than it has to solve the problem." Freeman, *Critical Review*, *supra* note 14, at 97. *See also* Adolph Reed, *The "Black Revolution" and the Reconstitution of Domination*, in RACE, POLITICS, AND CULTURE, *supra* note 5, at 61-95 (arguing that both the new left and the civil rights movement aided capitalism in rationalizing and modernizing its fundamentally oppressive consumption system).

25 *See, e.g.*, Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); D. BELL, 1 RACE, RACISM AND AMERICAN LAW (2d ed. 1972), *supra* note 10.

26 Bell, *Hurdle*, *supra* note 16, at 2-3.

27 *Id.* at 3. Derrick Bell has come up with myriad examples of the "interest-covergence" principle at work. He argues, for instance, that abolition was finally implemented as a military necessity and to help northern industrial and commercial interests achieve national dominance. *See, e.g.*, Derrick Bell, *An American Fairy Tale: The Income-Related Neutralization of Race Law Precedent*, 18 SUFFOLK U. L. REV. 331 *passim* and sources cited therein (1984) [hereinafter Bell, *Fairy Tale*].

After encountering Bell's analysis in this regard, I was amazed, upon re-reading *Dred Scott*, to find Justice Taney explaining, "The unhappy black race . . . were never thought of or spoken of except as property, and when the *claims of the owner or the profit of the trader were supposed to need protection.*" Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 410 (1857) (emphasis added). The Court continued:

> [Even the 1774 Connecticut statute forbidding slave importation was] carefully introduced, in order to prevent any misunderstanding of the motive which induced the Legislature to pass the law, and places it distinctly upon *the interest and convenience of the white population*—excluding the inference that it might have been intended in any degree for the benefit of the other.
>
> And in the [1784 Connecticut abolition statute] the section is again

Thus blacks can always hope that their situation might improve, but if that happens, it will be for reasons extraneous to themselves—for someone else's (probably undisclosed) purposes. They must therefore endure the twin torture of having their gains always vulnerable and their oppressors repeatedly making off with the prize.[28]

Developments in the legal climate have, of course, been accompanied by parallel changes in the world of political and social action. A reactionary federal administration openly opposes a wide array of civil rights gains, and has impressed its stamp on every aspect of the federal governmental apparatus, including the judiciary. White public sentiment widely perceives "reverse discrimination" as abhorrent and prevalent.[29] The number of reported acts of racially-motivated violence is increasing.[30] The coalition that pushed the Civil Rights Act of 1964 and the Voting Rights Act of 1965 through Congress has splintered[31] and the mass movement is largely quiescent, at least for the present.[32] The Supreme Court, with a spate of

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> introduced by a preamble assigning a similar motive for the act . . . showing that the right of property in the master was to be protected, and that the measure was one of policy, and to prevent the injury and inconvenience, *to the whites*, of a slave population in the State.

Id. at 414 (emphasis added). We must presume, of course, that Justice Taney knew, as well as we do, that one cannot take self-serving legislative declarations at face value. At first reading *Dred Scott* is remarkable to modern ears for its lack of inhibition in stating "true facts" about American ante-bellum treatment of blacks. On closer examination, however, Taney is performing deep slights-of-hand in maintaining that the Court had no choice in the matter. I do not quote *Dred Scott* as "proof of the truth of the matter asserted." But the opinion certainly shows that Bell's thesis is not a new one, nor is it restricted to friends of black progress.

28 An opening for hope consistent with Bell's thesis is that oppressed people can *change* what rulers perceive to be in their own best interests. The destabilizing effects of protest and resistance can *alter* the cost-benefit calculus so that change favorable to blacks actually comes to be in the interest of dominant forces. This was clearly part of what happened during the 1960s.

29 Apparently some members of the Supreme Court share this perception. *See* Justice Scalia's dissent in Johnson v. Transportation Agency, Santa Clara County, Cal. 480 U.S. 616, 677 (1987) (Scalia, J., dissenting) (affirmative action is a "powerful engine of racism and sexism"). *See infra* note 298 and accompanying text. Scalia's views on affirmative action were no secret prior to his appointment, of course. *See, e.g.*, Antonin Scalia, *The Disease as Cure*, 1979 WASH. U.L. Q. 147.

30 *See They Don't All Wear Sheets: A Chronology of Racist and Far Right Violence—1980-86*, Center for Democratic Renewal (Atlanta 1987) (report on incidents of racial, religious and homophobic violence).

31 The recent resurrection of old (and the creation of some new) alliances during the struggle to defeat the nomination of Robert Bork to the Supreme Court qualifies this statement in hopeful ways, as did some aspects of the Jesse Jackson presidential campaign.

32 To characterize the mass movement as quiescent may be a distortion. People are clearly in motion on a number of issues related to race, and in several different places, from Forsythe County, Georgia, see David Treadwell & Barry Bearak, *20,000 March Against Klan Attack in Georgia: 60 Arrested but No Major Violence or Injuries Reported in Biggest Rights Protest in Decades*, L.A. Times, Jan. 25, 1987, at 1, col. 2 (Sunday final ed.), to Howard Beach, New York, see Margot Hornblower, *N.Y. marchers protest racial attacks;*

cases announcing serious set-backs for civil rights claimants, seems recently to have shed its skin and announced a new era.[33]

These developments have a particularly sharp and bitter sting for civil rights scholars who, as I have defined them,[34] are partisan in this project. Many of these people had expected that by this time they would be living in a different and more just world.[35] They had dared to dream that their children's youth would be largely free of racial wounds.[36] They had envisioned themselves working for dif-

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hundreds gather in neighborhood where black died in chase, Wash. Post, Dec. 28, 1986, at A1, col. 1. The fact that this still does not feel like a national "mass movement," seems palpable, but also somewhat mysterious to me. The role of the media in creating or blocking consciousness of movement needs further exploration. *See* Murray Edelman, *The Construction of Soeial Problems as Buttresses of Inequalities*, 42 U. MIAMI L. REV. 127 (1987).

33 See *supra* note 3 for citation to some of the cases of the summer of 1989. Of course, reactions to the Court's recent moves differ. A recent article in the ABA Journal by an attorney who represents defendants in civil rights cases applauds the Court's recent cases and pooh-poohs what the author perceives as overblown reactions from the civil rights community:

> [The recent cases are] welcome news for employers . . . because these decisions give them the chance to defend against civil-rights related employment suits on an equal footing with their adversaries.
>
> On the other hand, the decisions should not be cause for alarm among civil-rights proponents; contrary to the more intemperate reactions on both sides, the major victories of the civil-rights movement of the 1960s have been left intact.

Francis Coleman, *New Rules for Civil Rights*, A.B.A. J., Oct. 5, 1989, at 78.

Conversely, civil rights activists and scholars have greeted the summer's opinions with marked alarm. The National Lawyers Guild in the Fall of 1989 issued an informational packet on the summer's cases that opened with the following:

> In a series of dramatic decisions all issued in June 1989, the United States Supreme Court made the most sweeping roll back of civil rights laws since the Civil Rights Act of 1964 was passed. The decisions, which vastly narrow the scope and strength of the two major Civil Rights Acts, also overrule nearly unanimous Circuit Court and Supreme Court precedents, many issued during the Nixon appointed Burger Court years. The decisions thus overrule a mainstream consensus, joined by liberal and conservative judges as to the proper reach of the civil rights laws.

National Lawyers Guild, "Supreme Court Dramatically Rolls Back Civil Rights Laws," Fall 1989, on file with Cornell Law Review.

34 *See supra* note 6.

35 Derrick Bell recounted a telling anecdote in his seminar, *supra* note 1. As a young aspiring civil rights lawyer fresh out of law school, he visited a great civil rights litigator. After hearing of Bell's desire to join the effort, the older lawyer praised him for his worthy motives. "I am proud of you, young man, but you've come too late. The battle has been won." Few people in the civil rights movement were this optimistic for long, if ever, but the story is a poignant one, and suggests something of what I mean to say here. Conversation with Derrick Bell (1988).

36 Professor Charles Lawrence tells a haunting story of his own and his young daughter's encounters, twenty-eight years apart, with *Little Black Sambo* in the classroom. Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 317-18 (1987). And I recall vividly the high hopes of the Quaker-sponsored bi-racial "Creative Writing" classes for young people that I attended in Atlanta in the summer of 1961. These classes proposed to smooth the way for the cautiously tiny beginnings of high-school desegregation in the coming fall. I felt then that I

ferent clients or masters than those for whom they now labor.[37] They (particularly scholars of color) had not foreseen the dynamics working to separate them so painfully from the many still "left behind."[38]

A number of civil rights scholars have moved into academic settings[39] where they can direct their time and resources to thinking and writing about the state of white supremacy and civil rights law.[40] This paper reports on some of the results of this thinking and writing, and explores possible assumptions and theories that may be at work.

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was part of a great historic step into a new world. Now I find *de facto* segregation alive and well in my children's "unitary" schools in Tennessee. These are patterns of pain and disappointment.

37 Joel Kovel's satisfyingly sardonic comment is "[t]o have begun political life so spectacularly and to end up in the iguominy of a tenure battle is galling in the extreme." Joel Kovel & Adolph Reed, *What's Left: An Exchange*, in RACE, POLITICS AND CULTURE, *supra* note 5, at 263.

38 Derrick Bell observes: "Intended or not, those of us who bave 'moved on up' serve as a ready rationalization for others who wisb to blame the suffering of poverty-level blacks on the victims." Bell, *Fairy Tale*, *supra* note 27, at 345.

John Calmore voices a common concern when he pleads, "It is now very important for upwardly mobile blacks to view their marginality in a positive light and to choose conscientiously to remain on the margin if black unity and functional communal responsibility are even to approximate meaningful reality." Calmore, *supra* note 15, at 239.

39 Of course, some fine civil rights scholars *began* their careers in academic settings as well.

40 It must be said, however, that in the case of female and male scholars of color in academia, the time and resources are won at great cost. There is a growing body of testimony about life for minority scholars in legal academia which deserves serious attention and response. *See, e.g.*, BELL, *supra* note 3, at 140-61; HANDBOOK FOR WOMEN SCHOLARS (M. Kehoe ed. 1982); Regina Austin, *Resistance Tactics for Tokens*, 3 HARV. BLACKLETTER J. 52 (1986) [hereinafter Austin, *Resistance Tactics*]; Derrick Bell & Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 347 (1989); Derrick Bell, *The Price and Pain of Racial Perspective*, Stanford L. Sch. J., May 9, 1986, at 5; Derrick Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Schools*, 20 U.S.F. L. REV. 385 (1986) [hereinafter Bell, *Strangers in Academic Paradise*]; Roy Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome?*, 20 U.S.F. L. REV. 419 (1986); Richard Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988); Andrew Haines, *Minority Law Professors and the Myth of Sisyphus: Consciousness and Praxis Within the Special Teaching Challenge in American Law Schools*, 10 NAT'L BLACK L.J. 247 (1988); Charles Lawrence, *A Dream: On Discovering the Significance of Fear*, 10 NOVA L.J. 527 (1986); Charles Lawrence, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429 (1986); Rachel Moran, *Commentary: The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503 (1986); Regina Austin, Sapphire Bound! (Oct. 24, 1987) (unpublished text of talk given to AALS Workshop for Women in Legal Education, on file with Cornell Law Review) [hereinafter Austin, Sapphire Bound!]; Derrick Bell, Memorandum to Harvard Law School Record (Nov. 22, 1987) (on file at Cornell Law Review) [hereinafter Bell, Memorandum] (documenting an incident that transpired while Bell was a visiting professor at Stanford Law School in the spring of 1986). *Cf.* Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (questioning some of the assumptions and approaches reflected in some of the works just cited while further documenting past and continuing abuses).

First, however, I will take a more focused look at one specific area of contemporary doctrine, namely the current state of affirmative action in the Supreme Court. This is a particularly charged and difficult area of present civil rights law, one that I believe is emblematic of our present condition. In many ways present affirmative action doctrine is the open wound of contemporary civil rights jurisprudence. It reveals important failings in our present efforts to understand and end white supremacy.

B. Troubled Doctrine: Affirmative Action

1. *The Innocent Victim Introduced*

Affirmative action has been the most harrowing and publicly-debated issue in civil rights law of the last decade. The question of the "innocent victim" has in turn been the most harrowing and publicly-debated issue in affirmative action.

The sudden appearance of the innocent victim upon the constitutional stage has been amazing to behold. Shuffling out from the wings, blinking in the glare of the stage lights, this guy, it turns out, has rights he never even dreamed of, like a right to his job! Well, sometimes. At least if the immediate threat to that job is a black and/or a woman. Where did this figure come from? Why the starring role? What exactly is his (or occasionally her) role? Why is he being treated this way? And how did he get here, assigned top billing as the principal reason why society can no longer justify or tolerate race remediation in many of the areas where it might matter most?

In wrestling with the preceding questions and in the related project of trying to speak persuasively about the justice of affirmative action, I have been circling back to allegory for years. Many whites are critical and impatient with continuing black demands. ("We (or somebody) already opened the door and told these people to join the party. Now they are here. Why are they still complaining? What they're asking for now is just special favors, and that's not fair.") In the endeavors of understanding and persuading, metaphor has often seemed to serve more fruitfully than the circuitry of equal protection doctrine. Emboldened by my creative predecessors,[41] I now propose an excursion. I want to try out on

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41 Derrick Bell, Patricia Williams and others have done us the exemplary service of demonstrating the uses in legal scholarship of radically "different" voices. Bell's recent book was treated as fiction in the N.Y. Times Book Review, Oct. 11, 1987, at 7, col. 1. Williams used fable and allegory powerfully in her article on Critical Legal Studies, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987). We have been shown the magical uses of a homemade scholarly telephone booth: into tbis space tbe academic disappears, to emerge a few lines later in tbe exhilarating garb of fable, poetry, italics—whole new worlds. In my own case, the move is

you, patient readers, a polemical tale.[42]

The scene is a party. The people in charge of the party, after tremendous pressure from previously excluded social groups, have at last opened the gates and let some of these people in to join the festivities. Most of the new admittees are low on funds and, since it takes resources to participate in this party, the authorities have been giving them a few bills at the door, along with a few special passes to allow them to catch up on the special activities within. In other words, this is a party with Affirmative Action.

> The party is troubled. The supply of bills is rumored to be getting low and some of the party goers have heard reports about the special distributions to newcomers and are beginning to complain. Uniformed people are circulating through the party trying to keep a lid on things: some are bouncers and some are people with special training in the Rules of the Game. One of the latter, known to the assembly as Doc, is scanning the crowd when someone yells out to him.
>
> "Hey, Doc! How come they're giving bills to these guys when they come in the door? You didn't give me any bills when I first got here. Isn't that against the Rules? What about the Rules?"
>
> And sure enough, if you look around at the party decorations, you will find that there are posters everywhere announcing and explaining the Rules. They display slogans like:
>
> ———EVERY BILL A RIGHTFULLY OBTAINED BILL———
>
> ———BILLS GO TO THE SWIFTEST———
>
> ———NO FREE BILLS———
>
> ———A BILL IN THE HAND OF ONE IS EQUAL TO A BILL IN THE HAND OF ANOTHER———
>
> ———EVERYONE HAS AN EQUAL RIGHT TO SEEK BILLS———
>
> ———RESPECT YOUR NEIGHBOR'S BILLS———
>
> There are other slogans too:

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made at some cost: I step forth. Alas, inescapably NOT the new Nadine Gordimer. These things are hard to face at my age. Nevertheless, I am grateful for the encouragement.

42 For another use of storytelling and story reading, see Robert Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory For Peoples of Color*, 5 LAW & INEQUALITY 103 (1987). The author, a member of the Lumbee Indian tribe, retells and rereads the Parable of the Grandfather and the Elevator as part of a longer project of rediscovering his own people's suppressed but "discrete insurrectionist discourse." *Id.* at 104.

———EACH PERSON CAN SPEAK HIS OR HER MIND———

———BE KIND TO OTHERS———

———DON'T FORGET: NOW WOMEN AND BLACKS CAN PLAY TOO———

———CAST YOUR VOTE ON ELECTION DAY———

———EXPRESS YOURSELF———

———ENJOY LIFE———

But it is the Rules about the BILLS that are making people angry.

"Hey, Doc, it's not fair!"

Pretty soon a few scuffles break out. Exhausted and confused newcomers who have been given a few bills at the door are attacked by old timers. It appears that most of these attacks come from those who lack the bills to pay for any of the delicious snacks displayed on lovely banquet tables. Apparently the snacks are unavailable to those who cannot pay. There is no other source of food immediately in sight. This is a confusing party. The lights are dim, and suspended above the party-goers heads is a revolving ball of mirrors; it turns to the beat of loud dance music and casts sliding, dizzying chips of light over the throngs of partygoers at this affair.

There are knots of people scattered about playing different games, taking bets and exchanging bills. In fact, the main concern of everyone seems to be getting more bills. Many are standing in lines waiting for an opportunity to join a game. Some of the games require that you put up a substantial number of bills before you are allowed to play. At some of the cheaper games there are long snaking cords of people waiting for their chance. Some people are beginning to get irritable.

For someone who just came in from outside, or who has been recently admitted to an unfamiliar game line, it is difficult to figure out exactly what is going on. Some women and blacks are wandering around looking a little dazed and trying to learn how to join one of these knots, how to get more bills. It is beginning to dawn on them that the bills are crucial. They find that some of the old-timers are hostile and don't want to show them how to play. Some of the old-timers can be heard grumbling about the new dance music coming over the sound system and about the fact that women and coloreds used to serve the food and sweep up at the end of the day instead of trying to push their way into the game lines. If you look closely, you will see that some old-timers seem to be wandering too; they are complaining that a game they played for years has inexplicably been withdrawn from play. Peo-

ple who have given up trying to find a game they can join sit at benches around the sides of the dance floor.

Few at the party have ever seen the room upstairs where the bills are counted and where decisions are made about what games will be set up below. Few have seen the trucks that periodically pull up to the side door and haul bills away. For those on the floor it is hard enough to keep up with what's going on around them. Just now the arrival of the newcomers is causing friction.

A newcomer walks up to one of the longer lines. This is Ashanna. She is black and lean, with a tight jaw and a tiny muscle that jumps too often at the corner of her eye. She is carrying an official document with her, a special pass. It took her a long time to convince the guy at the door that she ought to get it, but now she has it held fast in her hand. It has her name on it, and a big gold seal, and it says she is to be allowed to break in line. She finds the right game, counts ten back from the head of the line, as her pass instructs her to do, and prepares to step into the indicated spot to begin what looks to be a lengthy wait. She lets out a sigh. Her jaw allows itself an almost imperceptible degree of slack. She is here. She has done it.

"Hey, you can't do that!" The newcomer feels herself pushed back roughly, loses her balance and falls awkwardly to the floor. Looking up she sees a wild figure standing over her. It is apparently the person now just behind her in line. He is a white man in his late thirties; he is wearing a dirty shirt with the sleeve half torn. He is yelling at her, something about having been standing in line since last Thursday, something about two sick kids in the back room with his wife, something about the medicine they've got to have. Suddenly his glance falls on the newcomer's hand.

"Where the hell did you get those ten new bills?" he shouts. "And what's that damn piece of paper with the seal on it? Are you one of the ones they've been giving them out to at the door? I heard about you!" The mood is getting uglier as several nearby people overhear this "conversation," and edge over to get a word in. They are muttering, and she wishes they didn't sound so ominous, wishes she could convince herself that the "slut" and "nigger" and "bitch" that she hears roll up from the low voices were all just her paranoia.

One penetrating voice hisses above the rest, "I don't care HOW she got her bills, she's not welcome here. She doesn't belong, and nobody can force her down our throats. I mean it."

The distraught man standing over Ashanna finds his voice again. "My old man played this game for years, and his old man before him. He promised me his place in line ever since I was a kid. I know how to play this game with my eyes shut. Who do you think you are, butting in here, anyhow? And where did you get

that stinking note, and who gave you those bills? . . . Hey DOC!" the man finally bellows, "It's not FAIR!"

As if in a dream, our newcomer remembers how she got here: her mother's struggle in past years to gain admission to the party met by repeated rejection, her grandfather's arm lost in an accident with the garbage truck out behind the party hall, half her neighborhood on the streets since the old segregated plant they used to work in had shut down, her own youngest home sick needing medicine, and her with no helpmate to care for the child while she is here. For a fleeting moment she thinks of trying to explain all this, but her assailant, groggy from anger and worry and lack of sleep, has a glazed look in his eye. Besides, a crowd is gathering, and she knows it is not a friendly one. In the process of struggling to her feet, she glances hastily around for help. To her chagrin, she sees a number of people who appear to have *no* bills. They are huddled in a corner, away from the lights, the music, the comfortable chairs, the banquet tables. "Who are they?" she wonders. So many of their faces are dark. So many are women and children. Just then she feels the hand of one of the party givers on her elbow, and hears him whisper in her ear, "It's all right. I've got you covered. These guys are a bunch of rednecks."

"All right," his voice booms out authoritatively. "Break it up. Settle down. Get back to the game. You know the party needs these games. The games mean more bills for all of us." He glances at Ashanna's angry attacker and says, "Calm down, now, Joe. The Committee has reviewed the Rules. We talked it over for a long time. After a lot of thought we've been forced to admit that we agree with you. It just doesn't seem fair. None of you people are responsible for what may have happened to her mother or her grandfather or whatever. There will be no more distributions at the door under these circumstances. But Joe, if you cause another disruption like this again, I'm not sure I can let you stay in line. You understand? And you . . ." (here he turns to Ashanna) ". . . absolutely no breaking in line. That's the Rule." Before he strides off, his lips barely brush her ear as he whispers, "I'm sure you understand—just look at the situation. It's for your own good, really. We're having a little trouble upstairs, so we need things to go smoothly down here. And these guys have had it rough too, you know. Good luck at the game! We're glad to have you aboard."

At first a hoarse cheer goes up from the angry crowd gathered around the scene of conflict. "Hooray for Doc! And good for you, Joe." A shy crooked grin plays fleetingly across Joe's face, as he realizes he has won his point. He has always felt that people ought to play by the Rules. But soon he and the others realize they need to get back to business.

"Step right up," says the barker who manages the game at the head of this particular line. The music swirls around them. The

> party goes on. The newcomer, her thoughts reeling, moves to the back of the line, as those in front of her move ever so slightly, just enough to keep that certain distance. Somewhere barely beyond the periphery of consciousness Ashanna's mind resumes a fretful, chronic, half-heard tune: rent, doctor bills, electricity, doctor, furniture payment, rent, groceries, birthday, rent, doctor . . . Nothing gives. Meanwhile, her attacker hangs onto his precious spot, runs rough fingers through his already rumpled hair, and glances feverishly at the watch on his arm. His stomach is in knots. The kids got their last dose of medicine two hours ago.
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> * * *

You recognize Joe, don't you? He is our Innocent Victim. But victimized by what or by whom? And what about Ashanna? Is she not a victim as well? What is to become of her?

2. *The Innocent Victim Examined*

We live in an economic system founded on inequality and our legal system is centrally organized around justifying, explaining, and legitimating that inequality. Consequently, those who come to the legal system complaining of unequal conditions are fighting an incredibly strong force field.

The tactic of black people in the face of this reality has been to show that *their* unequalness is different. It is a special, *illegal* kind of unequalness that should be legally cured. This argument might have worked. It actually *did* work a little. Although this matter is in some doubt, I believe our legal and economic system might have been willing and able to handle that kind of demand—if only the debt were not so large and the available resources under such pressure.

At present, however, we are forced to acknowledge that this tactic has not worked. Society has not made reparations to black people as a group. Much recent civil rights jurisprudence has concerned itself largely with how to put credible limits on the genie of race remediation once it escaped its bottle and once the magnitude of the debt became manifest. The "innocent victim" has become an indispensable key to confining the genie, so he merits further examination.

One is initially impressed with how late this innocent victim arrived on the scene, or at least how late it was before he achieved significant constitutional or other legal stature. In an earlier time, courts that were asked to end or to remedy racist practices did not give the "innocent victim" much more than the time of day. And this is so despite the fact that ending racist practices and remedying their effects has *always* upset the expectations of white "innocent vic-

tims." One wonders why these expectations have become legally significant only recently.

In *Buchanan v. Warley*,[43] for example, the Supreme Court declared unconstitutional a "checkerboard ordinance," which imposed a pattern of mandatory racial segregation on all land acquisitions in Louisville. The Court faced the argument that striking down this ordinance would unfairly diminish the value of property held by white property owners in the city. The Court rejected the argnment, observing: "[i]t is said that . . . acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results."[44] The Court was seemingly convinced that an owner's legal vulnerability to whites undercut his claim to protection from blacks.

Similarly, white property owners in *Shelley v. Kraemer*[45] pointed out to the Court that if it did not uphold the always-heretofore-recognized racist covenants in their neighbors' deeds, their property rights, long established under state common law, would be infringed. The Court said simply, almost casually, that it found their equal protection access-to-the-courts claim to be without merit.[46] Whatever our present national consensus on the acceptability of racially restrictive convenants, such covenants once had substantial economic value and represented well-settled expectations.

Likewise, in the days of Jim Crow, white people who lived in that system had emotional, cultural and financial stakes in the continuation of a segregated way of life. Segregation had become a settled expectation that, for most whites, represented their "chosen" preference about everything from their children's schooling to the environment they could expect in restaurants, movie theaters, public transportation, and on the job. From the point of view of blacks, these arrangements may have looked unjust and bizarre. Of course, the arrangements *were* unjust and bizarre. But they nevertheless clearly represented settled expectations, and to many ordinary white people these arrangements seemed natural and essential to their fundamental rights to private property and personal liberty.[47]

Nevertheless, in *Brown II*,[48] despite a well-mounted defense of

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43 245 U.S. 60 (1917).

44 *Id.* at 82.

45 334 U.S. 1 (1948).

46 *Id.* at 22.

47 No less a figure than Hannah Arendt opposed the federal enforcement of school desegregation. *See* Marie A. Failinger, *Equality Versus the Right to Choose Associates: A Critique of Hannah Arendt's View of the Supreme Court's Dilemma*, 49 U. PITT. L. REV. 143 (1987). Arendt apparently saw the issue as one of equality for blacks versus the associational interests of white parents.

48 Brown v. Board of Educ., 349 U.S. 294 (1955) [hereinafter *Brown II*].

white educational prerogatives, and despite recognition of the need for "adjusting and reconciling public and private needs,"[49] the Supreme Court refused to back down from the requirement of desegregation. The Court noted that "it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."[50]

To the extent that whites live in a racist society where power and resources are allocated largely on the basis of skin color, they inevitably have privileges and expectations based on these inequalities. For example, white voters in the South were accustomed to having disproportionate electoral power. When blacks began to register and vote, they caused a real and concrete dilution of political power of every individual white voter in the electorate.[51]

Similarly, white male craft unionists who are used to handing down their craft jobs to their sons as a "natural" part of life in their craft will understandably think of their union as a family affair. When newcomers of color are forced into this scene, even given priority over the sons of existing members, it destroys a strong and dearly-held tradition. Nevertheless, the federal courts of appeals have unflinchingly dismantled such expectations.[52] Likewise, in abolishing dual seniority systems in a segregated plant and ordering plant-wide seniority, the United States Court of Appeals for the Fourth Circuit felt unconstrained by the expectations of white workers:

> We recognize [defendant's] point that changing the seniority system may frustrate the expectations of employees who have established departmental seniority . . . . Where some employees now have lower expectations than their coworkers because of the influence of one of these forbidden factors, they are entitled to have their expectations raised even if the expectations of others must be lowered in order to achieve the statutorily mandated equality of opportunity.[53]

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49 *Id.* at 300 (footnote omitted).

50 *Id.*

51 *See* Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973-73bb-1 (1982). For economically disadvantaged whites, black voting strength represents the *potential* for greater empowerment of all poor people, including themselves. The struggle against the poll tax, for instance, had a checkered career, but included support from groups cognizant and critical not only of racial exclusion but also of the wide-spread underrepresentation of poor and working-class whites and of women generally. *See* VIRGINIA DURR, OUTSIDE THE MAGIC CIRCLE (H. Barnard ed. 1985).

52 *See, e.g.*, United States v. Local Union 212, Int'l Bhd. of Elec. Workers, 472 F.2d 634 (6th Cir. 1973); Local 53 of the Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); Rios v. Enterprise Ass'n Steamfitters Local Union No. 638 of V.A., 326 F. Supp. 198 (S.D.N.Y. 1971).

53 Robinson v. Lorillard Corp., 444 F.2d 791, 800 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

When whites are used to having a disproportionate share of municipal funds spent in their neighborhoods, while black neighborhoods are allowed to languish, a requirement that city services will be subject to equality review is unsettling. Whites as a group, though no doubt unevenly, will either have to enjoy fewer services or pay heavier taxes. Either way the new burden is undeniable. Yet the United States Court of Appeals for the Fifth Circuit did not allow this concern to deter it from seeking equality.[54]

In short, while I believe that the right choices were made in the Civil Rights Act and the Voting Rights Act and in the cited decisions, we need to recall that during the days of the early civil rights advances the courts "trammeled" real interests[55] and inflicted real costs upon people who, although probably harboring racial prejudice, had probably not created the segregated schools themselves or lobbied for racist ordinances. In fact, these injured people may have done nothing more than inherit land or other social privileges in the normal way. Still, the courts did not hesitate to rule that their expectations must give way in the interest of equality.

After the enactment of the Civil Rights Act of 1964,[56] its challengers argued that the legislation unconstitutionally invaded private liberty and property interests. The Supreme Court readily disposed of their objections:

> It is doubtful if in the long run appellant will suffer economic loss as a result of the Act. . . . *But whether this be true or not is of no consequence* since this Court has specifically held that the fact that a "member of the class which is regulated may suffer economic losses not shared by others . . . has never been a barrier" to such legislation. . . . [T]his Court has [similarly] rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty.[57]

This language is a far cry from the civil rights talk of courts in the 1980s.[58] A radical change has come about in the courts' willing-

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54 *See* Hawkins v. Town of Shaw, Miss., 461 F.2d 1171 (5th Cir. 1972).

55 The allusion is to United Steelworkers v. Weber, 443 U.S. 193, 208 (1979) (the Court stated, in this more recent civil rights case, that a dispositive issue for constitutionality of an affirmative action plan is that it "does not unnecessarily trammel the interests of white employees").

56 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1982).

57 Heart of Atlanta Motel v. United States, 379 U.S. 241, 260 (1964) (emphasis added) (citations omitted).

58 *See infra* notes 93-124 and accompanying text. Of course this specific passage refers to the Commerce Clause, U.S. CONST. art. 1, § 8, cl. 3, rather than the equal protection clause, U.S. CONST. amend. XIV. The different treatment accorded state action under these two provisions is a subject of interest, but beyond the scope of this Article. Has the ghost of Lochner v. New York, 198 U.S. 45 (1905), long since banished from the field of economic regulation, now come back to haunt us in "reverse discrimination" jurisprudence?

ness to impose burdens on whites in the process of ordering race remediation from the days of the cited precedents to the contemporary twilight of affirmative action jurisprudence. What is this shift about?

A closer look at specific language in some opinions past and present reveals interesting patterns. There has been a turn away from an earlier language echoing with high public purpose, toward a language of individual dispute; a turn away from a discourse calling for a rally to common ideals, toward a discourse calling for the management of competition among conflicting private claims and entitlements.[59]

I am not sure what to make of this, nor do I want to overstate the case. Both kinds of language occur in both eras. I do not propose that "public" is always "good," and "private" is always "bad."[60] But the change in tone is clearly discernable and significant. It indicates a more general drift in civil rights policy and in popular consciousness about matters of race.

Too often in the eighties the courts and predominant political discourse have ignored large questions or responsibility, interdependence and transformation, instead emphasizing tight questions of individual guilt or innocence.[61] They have shifted from halting altruism to unvarnished individualism,[62] from an announced aspiration of civic virtue to one of self-protection.[63]

The relationship between judicial rhetoric on the one hand and public opinion or popular consciousness on the other is surely complex and uneven. My observation about a change in tone is not intended as a statement of cause or effect. But the change is striking enough to call for examination.

The following excerpts from civil rights cases give some flavor of the two dictions I have identified. In earlier cases, despite plenty of equitable balancing, despite discernable efforts by courts to tone things down (one presumes exactly *because* sweeping changes were

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59 *See infra* notes 64-122 and accompanying text.

60 For sketchy hints of the twistings of the public/private distinction in civil rights law, see *infra* note 124 and accompanying text. *See also* Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982).

61 *See* Kathleen Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986). Recent cases accentuate this trend. *See* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

62 *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

63 Civic virtue (an amalgam of the qualities that allow persons to come together as a political collectivity and engage in high-quality deliberative communication and decision-making for and about the common good) is valued in the republican vision and is currently under scrutiny in the republican revival now underway in some academic circles.

being ordered), the opinions frequently convey the sense that a high social project is underway. The following phrases should give some sense of what I mean:

> "nationwide importance of the decision . . . ."[64]
>
> "urgent concern to the entire country . . . ."[65]
>
> "The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. . . . [I]t persists on a pervasive scale."[66]
>
> "insidious and pervasive evil which had been perpetuated . . . through unremitting and ingenious defiance."[67]
>
> "After enduring nearly a century of widespread resistance . . . Congress has marshalled an array of potent weapons against the evil. . . . Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live."[68]
>
> "[School boards are bound] to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. . . . The constitutional rights of Negro school children articulated in *Brown I* permit no less than this."[69]
>
> "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act."[70]
>
> "[T]he record . . . is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. . . . [O]ur people have become increasingly mobile with millions of people of all races traveling from State to State; . . . Negroes in particular have been the subject of discrimination . . . and . . . these conditions had become . . . acute. . . . These exclusionary practices were found to be nationwide . . . [and] indicated a qualitative as well as quantitative effect on interstate travel by Negroes."[71]

These cases talk of "millions," of "entire generation[s]," of "root and branch" commitments, of "nationwide" effects and efforts. The affirmative action cases, however, more often speak the language of private dispute, of one-on-one conflicts of interest. The infusion of such private law language into civil rights cases is re-

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64 *Brown II*, 349 U.S. 294, 298 (1955).

65 South Carolina v. Katzenbach, 383 U.S. 301, 307 (1966).

66 *Id.* at 308.

67 *Id.* at 309.

68 *Id.* at 337.

69 Green v. County School Bd., 391 U.S. 430, 437-38 (1968) (citations omitted).

70 Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (1968).

71 Heart of Atlanta Motel v. United States, 379 U.S. 241, 252-53 (1964) (citations omitted).

markable. Once in place, this diction begins to affect law-trained and law-conditioned readers. It evokes a whole series of ideas and notions about how things "like this" (*i.e.*, individual conflicts between private rights-bearing self-interested units) ought to be resolved.[72] Similarly, when lawyers begin to think of race remediation in private law terms, it excludes from our vision many larger, trans-individual social problems, as well as many social solutions that are not established parts of private law norms, despite the fact that those problems and solutions may well be part of our past reality and future possibility.

Franks v. Bowman Transportation Co.[73] exemplifies a case poised on the fulcrum of this shift from public to private. In *Franks*, an employment discrimination case, the Supreme Court found that an award of retroactive competitive seniority[74] was a presumptively necessary form of relief for "identifiable victims"[75] of illegal hiring discrimination, despite the ambiguous language and complex legislative history of Title VII's partial immunization of "bona fide" seniority systems.[76] The majority opinion is full of public language.[77]

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72 In a different context Karl Klare has noted:

> The leading theorists of collective bargaining law have in large part based their work on an analogy between governance of the workplace and governance of society. This way of thinking has naturally inclined labor lawyers to import the vocabulary of constitutionalism into their work. Analogizing collective bargaining to law making and treating collectively bargained plant operating procedures as an "industrial rule of law" caused the reproduction within labor law of the categories, problems, and inflections of liberal theory.

Karl Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1359 (1982).

73 424 U.S. 747 (1976).

74 "Benefits" seniority entitles the worker to certain benefits from the employer, whether they be fringe benefits or wages. "Competitive" seniority, on the other hand, entitles the worker to a certain "place in line" relative to fellow workers. It comes into play when an incumbent wants to bid on a job, bump another worker from a particular job or shift, and—usually by far the most crucial—withstand the threat of a lay-off. Competitive seniority, however, is not entirely a matter between and among the workers themselves.

Seniority of either kind is worth nothing at common law, where freedom of contract and employment-at-will theories reigned before the advent of statutory labor law. Competitive seniority is a hard-fought and much-prized achievement of the labor movement. It serves as a bulwark against employer favoritism, protecting individuals against arbitrary treatment, and also protecting their ability to organize collectively. It severely restricts the employer's power to punish leaders or to use workers against each other in the day-to-day struggle over working conditions and relative bargaining power.

Therefore, seniority should be recognized as mediating both the relationship of one worker to other workers *and* the relationship of workers collectively with their employer. No discussion of seniority is realistic if it fails to take this important dimension into account. Civil rights scholars should recognize that while seniority is often a matter of skin color privilege, it is also a matter of class.

75 *Franks*, 424 U.S. at 774.

76 *Id.* at 757-62.

77 *See infra* text accompanying notes 81-83.

In counterpoint, the concurring and dissenting opinions in *Franks*[78] provide one of the first occasions on which our Innocent Victim can be heard, rustling about in the wings, getting ready for his starring role in subsequent affirmative action cases. We thus find in *Franks* both styles of discourse side by side.

The employer in *Franks* argued that victims[79] should not receive retroactive competitive seniority because such an award "will conflict with the economic interests of other Bowman employees."[80] The majority makes short shrift of the argument, noting:

> [W]e find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. "If relief . . . can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."[81]

The dissent criticizes the Court's result as not sufficiently cognizant that it will

> directly implicate the rights and expectations of perfectly innocent employees. We are of the view, however, that the result which we reach today—which, standing alone, establishes that a sharing of the burden of the past discrimination is presumptively necessary—is entirely consistent with any fair characterization of equity jurisdiction, particularly when considered in light of our traditional view that "[a]ttainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies.[82]
>
> Certainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract. This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest. The Court has also held that a collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other em-

78 *See Franks*, 424 U.S. at 780 (Burger, C.J., concurring in part and dissenting in part); *id.* at 781 (Powell, J., concurring in part and dissenting in part).

79 The argument included "identifiable" victims, those odd birds who have gradually acquired substantial entitlements, even as membership in their talismanic ranks has narrowed.

80 *Franks*, 424 U.S. at 773.

81 *Id.* at 775 (quoting United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971) (footnote omitted)).

82 *Id.* at 777-78 (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1941) (citations and footnotes omitted)).

ployees under the previous seniority agreement.[83]

In this opinion we continue to hear the public tone, the voice of "great national policy,"[84] "strong public policy,"[85] and "public policy interests."[86] Chief Justice Burger's and Justice Powell's dissents, however, usher in a new discourse, a new point of view. Burger begins:

> [C]ompetitive-type seniority relief at the expense of wholly innocent employees can rarely, if ever, be equitable . . . . In every respect an innocent employee is comparable to a "holder-in-due-course" of negotiable paper or a bona fide purchaser of property without notice of any defect in the seller's title.[87]

Powell stresses that courts must be very concerned about "perfectly innocent employees"[88] and "other workers' legitimate expectations."[89] For the first time we are exposed to the amazing line of reasoning that is soon to become commonplace:

(1) The incumbent worker is "innocent," so burdens of past discrimination should not be put on him;

(2) But it is okay to let the burden remain on the victim of

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83 *Id.* at 778 (citations omitted).

84 *Id.* at 778-79 (citation omitted).

85 *Id.*

86 *Id.*

87 *Id.* at 780-81 (Burger, C.J., concurring in part and dissenting in part).

88 *Id.* at 788 (Powell, J., concurring in part and dissenting in part). Elsewhere I have noted the irony that the "perfectly innocent employee" should get his first bit part in *Franks*, because when, (at least according to the employer), it was the refusal of white drivers to share cabs or showers with black drivers that "necessitated" the discrimination in the first place. *See* Note, *Cost Allocation in Title VII Remedies: Who Pays for Past Employment Discrimination?*, 44 TENN. L. REV. 347, 366 n.89 (1977) (authored by Frances Lee Ansley).

I do not suggest that we should deal with the "innocent victim" by exposing him as "guilty" in discrete instances like this one, though such a task would often prove easy enough to accomplish. Nor does it make sense to say that employment security for blacks should hinge on whether they can prove overt bigotry among incumbent employees. That has no more logic than the current rule, whereby white incumbents' job security may hinge on whether their employer has overtly or "egregiously" discriminated in the past. *Compare* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (incumbents' expectations protected) *with* United States v. Paradise, 480 U.S. 149 (1987) (incumbents' expectations thwarted).

Fueling *any* white person's notion that she is entirely free of benefit from or responsibility for white supremacy is a disservice. All whites benefit in some ways and we are all responsible. Some are more responsible than others. *See infra* notes 295-96 and accompanying text for one idea (a "burdensharing" project) of how to approach the question of differential responsibility.

89 *Franks*, 424 U.S. at 791. I find myself particularly aware in this instance—perhaps because of the jarring juxtaposition of the two levels of discourse—of the Legal Realist attack on this line of reasoning. Isn't it the Court's very actions that in large part determine what workers' "legitimate expectations" will be during the unprecedented process of attempting to undo three hundred years of vicious subjugation of one race to another? *See* Robert H. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

discrimination;[90]

(3) And it is all right to ignore the option of putting the burden on the employer.[91]

Since *Franks*, the innocent victim has taken center stage, and the language of private law has begun to dominate the cases. Below are some examples of "private law talk." The phrases and sentences obviously are taken out of context. I quote them not to comment on the situated and individual meaning of each, but to highlight the diction emerging in this line of cases. Suddenly we find ourselves out of the land of civil rights, and back in the land of private law. The turns of phrase and logic are frequently those of traditional contract, tort, and property jurisprudence. We find ourselves concerned with concepts of fault, with causation, with proof of particular injury to the particular plaintiff, with notions of consent and free will, with carefully drawn damages, and with "legitimate" expectations.[92] We also find much concern for protecting private spheres from public intrusion.

From *United Steelworkers v. Weber*:[93]

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90 The rule as it has evolved, of course, is not quite as strong as this. After all, the majority in *Franks* did prevail. The present rule is that if the victim of discrimination is "identifiable" it is presumptively *not* permissible to place all the seniority burden on him. However, where an affirmative action beneficiary is not the individual victim of a discrete prior incident of discrimination by the particular employer involved, the rule governing court-imposed relief is narrower, and the loss falls on the victim. Of course, on the private law analysis the "unidentifiable" victim is really no victim at all, having suffered nothing that this analysis calls relevant "discrimination."

This reluctance to recognize the realities of societal discrimination is one of the greatest failings of current civil rights law, and is intimately tied to its privatization. Blacks still suffer tremendous cumulative disadvantages and are clearly victimized by the prevalence of racism in society. Each black person is concretely injured by discrimination against others, because her own experience, as well as other people's perceptions of her, are conditioned and limited by what happens to her sisters and brothers of color.

91 To give Chief Justice Burger his due, he did suggest such an option. Willing to follow the logic of his Holder-in-Due-Course analogy, he proposed letting the victim have his remedy against the "Thief," in the form of some kind of front pay arrangement from the employer. *Franks*, 424 U.S. at 781. I take it that this was the root of his difference with Powell and Rehnquist, who joined in a separate concurring and dissenting opinion.

Some lower courts, like Burger, have explicitly rejected step three in the above line of reasoning, and have suggested that employers shoulder some costs. In McAleer v. A.T. & T., 416 F. Supp. 435 (D.D.C. 1976), for instance, Judge Gesell awarded the job standing (in that case a promotion) to the affirmative action candidate, but also awarded damages for the lost raise to the skipped-over plaintiff, on the theory that it was not he, but the employer, who should take responsibility for past discrimination. This solution is clearly preferable because it furthers our common interest in an integrated work force, by requiring the employer to share costs with the women excluded in the past and the men (temporarily?) held back by the present remedy.

92 *See* Christopher Edley, *Affirmative Action and the Rights Rhetoric Trap*, 3 HARV. BLACKLETTER J. 9 (1986) for some discussion of the tensions and inadequacies of common law liability frameworks in this context.

93 443 U.S. 193 (1979).

". . . voluntarily adopted by private parties . . ."[94]

"[L]egislators demanded . . . that 'management prerogatives . . . be left undisturbed to the greatest extent possible.' "[95]

"Congress did not intend to limit traditional business freedom. . . ."[96]

"[T]he plan does not unnecessarily trammel the interests of white employees."[97]

"[The] plan falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action. . . ."[98]

From *Firefighters Local Union No. 1784 v. Stotts*:[99]

". . . agreement of the parties . . ."[100]

". . . purpose or intent to discriminate . . ."[101]

"[E]ach individual must prove that the discriminatory practice had an impact on him. . . ."[102]

". . . certainty of obligation . . ."[103]

"[T]hey waived their right to seek further relief. . . ."[104]

". . . hold [] respondents to the bargain they struck . . ."[105]

From *Local No. 93, International Association of Firefighters v. City of Cleveland*:[106]

". . . voluntary compliance . . . the preferred means . . ."[107]

". . . consent decrees . . . closely resemble contracts"[108]

"[W]hen it enacted Title VII . . . Congress was particularly concerned to avoid undue federal interference with managerial discretion."[109]

"[N]one of the whites denied promotion was shown to have been responsible or in any way implicated in the discriminatory practices recited in the decree."[110]

"[T]he . . . union . . . never consented to the decree at all."[111]

From *United States v. Paradise*:[112]

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94 *Id.* at 201.
95 *Id.* at 206 (quoting H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2 at 29 (1963)).
96 *Id.* at 207.
97 *Id.* at 208.
98 *Id.* at 209.
99 467 U.S. 561 (1984).
100 *Id.* at 575-76.
101 *Id.* at 577.
102 *Id.* at 579.
103 *Id.* at 589 (O'Connor, J., concurring).
104 *Id.*
105 *Id.*
106 478 U.S. 501 (1986).
107 *Id.* at 515.
108 *Id.* at 519.
109 *Id.*
110 *Id.* at 535 (White, J., dissenting).
111 *Id.* at 537 (Rehnquist, J., dissenting).
112 480 U.S. 149 (1987).

"[This] . . . does not 'impose the entire hurden of achieving racial equality on particular individuals,' and does not disrupt seriously the lives of innocent individuals."[113]

". . . protection of the rights of nonminority workers . . ."[114]

From *Johnson v. Transportation Agency, Santa Clara County, California*:[115]

"[P]etitioner had no absolute entitlement . . ."[116]

"[D]enial of the promotion unsettled no legitimate firmly rooted expectation. . . ."[117]

". . . potential for intrusion on males and nonminorities . . ."[118]

". . . Congress' concern in Title VII to avoid 'undue federal interference with managerial discretion' "[119]

". . . effects of the affirmative action plan for black employees on the employment opportunities of white employees . . ."[120]

". . . conflicting concerus of minority and nonminority workers . . ."[121]

"[T]he 88th Congress did not wish to intrnde too deeply into private employment decisions."[122]

The language of privatization is related to two destructive phenomena. First, it is part of a reduction in our aspirations from a vision of an interrelated community to one of isolated and barricaded selves. Implicit in this reduction is the idea that race discrimination is now an episodic matter, where the Court's proper purpose is to detect and remedy the isolated, exceptional, highly individual case that will occasionally arise.[123]

Second, the reduction from public to private is part of a more complex development. It lowers the focus of discourse from the level of public social decision to that of private conflict, but in addition it shifts our attention from one set of private relationships to another. The new discourse most frequently casts the relevant parties not as the excluding employer versus the black aspirant, but as the black aspirant versus the innocent white incumbent. Accordingly, the new style results not only in reduction from public to pri-

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113 *Id.* at 189 (Powell, J., concurring) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986)).

114 *Id.* at 199 (O'Connor, J., dissenting).

115 480 U.S. 616 (1987).

116 *Id.* at 638.

117 *Id.*

118 *Id.* at 640.

119 *Id.* at 645 (Stevens, J., concurring) (quoting Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986)).

120 *Id.* at 649-50 (O'Connor, J., concurring).

121 *Id.* at 650.

122 *Id.* at 669 (Scalia, J., dissenting).

123 For an extended discussion of the power of the individualist ideal and the strong tension between that ideal and affirmative action, see Andrea Giampetro & Nancy Kubasek, *Individualism in America and its Implications for Affirmative Action*, 14 J. CONTEMP. L. 165 (1988).

vate, but in a radical misalignment of the parties.[124] It allows us to refuse to end the conditions of white supremacy while portraying the refusal as a valiant defense of a powerless underdog. Such a stance is comfortable for white Americans, who typically cherish both prerogatives and commitment to a democratic ideal.

Too often modern affirmative action doctrine invites us to misperceive the basic problem. In some instances the cases are treated as a private contest for scarce resources between a white and a black worker[125] who are fundamentally selfish, at odds, and in need of regulation by a neutral and superior force. In other instances the picture is of an embattled white, male worker in need of protection from an overbearing and intrusive government or employer (often in cahoots with greedy, non-victimized, "minimally qualified" minorities or women).[126] In other instances the protagonist is presented as a benign and well-meaning corporation who simply needs some flexibility and general guidelines to insulate it from the selfish demands of shortsighted child-like workers, so that the corporation can go about its business of responsibly allocating fixed resources among the rival siblings in the workplace family.[127]

I believe the real picture is radically different. Workers are not selfish children who must always be told from above who wins and who loses. They are adults with abilities, who, if given the opportu-

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124 A look at the ways American statutory and common law have worked to "misalign" blacks and whites is beyond the scope of this Article, but would nonetheless be fascinating. Judge Higginbotham reports that under certain colonial statutes both black and white indentured servants were subject to stiffer punishments if they ran away "biracially" than if they made segregated escape attempts. A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR 34 (1978). Miscegenation laws worked to keep interracial sex extra-legal and primarily a matter of white male privilege. The infamous statutes that severely restricted manumission, but allowed an owner to grant freedom to a black in exchange for the latter informing on fellow slaves who planned escape or revolt pushed blacks away from solidarity with other blacks and toward collaboration with slaveholding whites. *Id.* at 48.

125 *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979). For a discussion of "zero-sum game" theory, *inter alia*, see Williams, *supra* note 15, at 1128-32.

126 *See* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 575 (1984) (holding that "it is inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy [for past discriminatory practices]"); *cf.* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (recognizing that sometimes "innocent" persons must bear some remedial burdens). This man-against-the-monster picture is particularly galling when minorities are essentially written out of the equation. The most damaged victims are thus rendered invisible. Scholars have launched excellent critiques of the *Bakke* litigation and its often highly questionable process on these grounds, and have hopefully prepared civil rights scholars to be watchful for such exclusion and silencing in the future. *See, e.g.*, Derrick Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979).

127 *See United Steelworkers*, 443 U.S. at 210 (concurring opinion by Justice Blackmun highlights the employer's dilemma when it faces "liability for past discrimination against blacks . . . and liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks").

nity to participate in hard management decisions, have the capacity to fashion creative and equitable solutions for all kinds of problems facing them and their employers, even those involving explosive issues of race.[128] Though resources are not unlimited, and concern about their division is therefore justified, there is, nevertheless, already *enough for all*. The more important and powerful conflict is not the one between a black worker and a white worker, but the conflict between all poor and working people on the one hand and those who manage and profit from the economy on the other.

Costs associated with race remediation should be borne primarily by the people and institutions most responsible for the original injury and most able to institute lasting social changes. Further, a community facing up to the legacy of a racist past and moving toward increased security for all in need will find it more politically acceptable to ask all of its members to pull its share.

My criticism of contemporary affirmative action rhetoric is therefore two-fold. First, that rhetoric reinforces and valorizes the idea that our response to profound and deep-rooted post *de jure* inequities can and should be seen as a matter of individual entitlements and respect for vestedness, rather than as a matter for social and political responsibility and generous vision. Second, it misaligns the parties, obfuscating some crucial conflicts and solutions and destructively exaggerating others.

In Part IV of this Article I will suggest a few directions that scholars might explore to begin forging a better affirmative action doctrine, one that could be fair and empowering for both Joe and Ashanna. Before doing so, however, I want to take a larger view. What lies behind the distressing state of affirmative action doctrine?

III
"How Have We Failed—And Why?"

Civil rights scholars have offered various analyses to explain the development of the civil rights movement, civil rights litigation, and civil rights legal doctrine. Implicit in these analyses are different ideas about the nature of racism. In asking how and why the existing system of racial dominance and subordination has survived the powerful waves of opposition and resistance that have broken upon it, scholars have necessarily confronted, directly or indirectly,

128 For a number of provocative explorations of workers and community residents as local and regional planners, see Labor Tackles the Local Economy: Reindustrialization from Below, Vol. 9, Labor Research Review (Midwest Center for Labor Research: Chicago). For a description of how rank-and-file unionists and community activists might approach designing a plan for equitably modernizing, even closing, plant capacity in a major corporation, see Eric Mann, Taking on General Motors: A Case Study of the UAW Campaign to Keep GM Van Nuys Open 365-94 (1987).

the question of white supremacy's origin in America and what makes it tick.

I intend to develop two possible models of white supremacy:[129] the "class" model and the "race" model. In many arguments and conversations of my own, and running through published civil rights scholarship, the themes, tensions and ambiguities of race and class are pervasive.[130] Of course under the regime of non-American chattel slavery, race and class were virtually one and the same. Not all slave societies have been built on white supremacy, but ours was. Slaves were, by definition, an economic class and (after some ambiguity in colonial beginnings) slaves were, by definition, "black."[131] However, with emancipation, and more completely with the end of *de jure* segregation, race and class have taken on more complex and divergent meanings.

When I discuss the "class model," I use "class" to mean a group defined by its relationship to economic power and resources.

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129 By "white supremacy" I do not mean to allude only to the self-conscious racism of white supremacist hate groups. I refer instead to a political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.

A few years ago I probably would have called this system "institutionalized racism." Today, however, in an era of so-called "color-blindness," when "racism" can mean the disfavoring of a white person for the most transitory and isolated purpose, I believe white supremacy to be the more helpful and accurate term. While not denying that a system of black supremacy is conceivable in the abstract, the term "white supremacy" reminds us that the institutional racism of *our* place and epoch (our planet?) has been a racism of white over black. To my mind, any jurisprudence or politics of racial justice that fails to recognize and incorporate this overwhelming reality has missed the boat. (See discussion of anti-subordination and anti-subjugation, *infra* notes 267-86 and accompanying text.)

Therefore, my choice of words is made with an eye toward helping us consciously situate ourselves in reality. The term "white supremacy" is emphatically *not* used here to inflate rhetoric, or to deny that some forms of white supremacy are more virulent than others. The white supremacy in the United States today is better than what we had in 1855 or 1919, and better than the white supremacy that presently reigns in South Africa. On the other hand, I fail to see how Americans can avoid recognizing that we still live in a white supremacist system.

130 *See, e.g.*, Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). Professor Crenshaw's article appeared after this one was written. Readers moved by the issues raised here should consult her important piece.

131 The quotation marks serve only as a reminder that race is a social convention rather than a biologically definable fact. The laws governing the definition of who was to be considered black in slavery days are only one of the more graphic demonstrations of race's social construction. *See, e.g.*, WINTHROP JORDAN, THE WHITE MAN'S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES (1974). For an example of homemade judicial theorizing on racial identity, see Hudgins v. Wrights, 1 Va. (1 Hen. & M.) 134 (1806). *See generally* A. Leon Higginbotham & Barbara Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989).

I presume that people of all races may be included in a given class, that they may, for instance, share the position of having no legal access to socially productive property without the consent of others and of having to exchange their labor for a livelihood or depend upon benefits from the welfare state. When I discuss the "race model," I use "race" to mean a group defined socially by physical characteristics or genetic heritage. I presume that people within that group may hold different class positions. These presumptions may well prove inadequate for some purposes, but they provide a starting point.

This exercise tries to imagine two polar theories that offer opposing explanations, that strongly "take sides" in this conversation, and then tries to examine society from each theory's point of view. This tactic suffers from all the problems of over-simplification and false polarization that artificial categories entail. I hope, however, that the categories help to highlight common and differing threads in arguments and proposals currently offered by civil rights scholars and help identify some of the choices confronting lawyers and others interested in fighting racial injustice.

A. White Supremacy as a Feature of Class Domination

The "class model" of white supremacy portrays white supremacy as primarily a means to justify and enhance class dominance and thus to strengthen existing relations of economic power. According to the class model, this function gives racism its central status in American political life and motivates those in power to assure its survival. This is the source of racism's strength and resilience. The class model addresses the fact that in a white supremacist system, the poor people of all races so often come out on the short end while the people of the dominant classes so often appear to extract extraordinary benefits.

Within the class model I describe two variants. Both focus on economic class relations as the prime explanation for modern white supremacy. But these (stylized and overdrawn) variants also differ in important ways.

I call the first variation the "class domination model."[132] It sees racism as an economic tool of the dominant classes, a secondary and derivative adjunct to class rule, to efficient generation of profit and to control of the economic apparatus. This model, for instance, depicts white supremacy as a method for assuring the existence of a reserve army of labor. Minorities are forced into a marginal under-

132 *See generally* Freeman, *Critical Review*, *supra* note 14 (arguing that antidiscrimination laws have been used more to rationalize continued discrimination than to solve the problem).

class. This cuts them off from their natural class allies and makes them vulnerable to abuses and economic manipulation.

The class domination model offers the insight that this system of super-exploitation sanctions extra profit but, equally importantly, creates an underclass that can be summoned, moved, or rebuffed almost at will, thereby facilitating the mobility of capital and improving the system's ability to control and channel investment. Economic realities such as the great migrations of black labor earlier in this century, the marginal character of many black jobs, the high unemployment among minorities and the low wages of many people of color support this picture of white supremacy.[133]

The class domination model has a "political face" in addition to its economic one. Its political aspect points out that white supremacy not only allows super-exploitation of blacks, but also blocks potential class-based action by splitting the working class. It is axiomatic that exploited classes divided against each other have less power compared to the relatively united exploiting classes. The constant reminder to whites that others are willing to work for less (because they are forced) makes minority workers into a helpful instrument of discipline to be used against their relatively privileged white counterparts. Concrete historical examples confirm that a divide-and-conquer pattern can and does exist. The frequent use of blacks as strike-breakers during Jim Crow days and the well-known contributions of racism to breaking unions in the South and elsewhere are two obvious instances where this dynamic has been at work.

Under a class domination model one would expect racist structures to change if conditions changed so as to make them unhelpful in maintaining economic relationships. As a matter of logic, the class domination model does not require a vision of white supremacy as inevitably and inextricably linked to the class system. Its link could be contingent and dependent on how valuable a tool of class domination or legitimation it was turning out to be. This contingent view would require that any opponent of white supremacy achieve a sophistication about the workings of the economic system and how that system uses and exploits people of color. On the other hand, it would allow such a person to remain essentially agnostic about the underlying class system itself, as long as that person could perceive some dynamic that promised to dis-

133 Students in my discrimination course discovered during interviews with local citizens that virtually the entire black population of a nearby town was imported from the Deep South in the 1930s and 1940s to work at the hottest, dirtiest jobs in the plant at a wage that white workers had refused.

connect the class structure from the race structure.[134]

Further, if such a disconnection appeared as a present possibility, and if one had decided to remain uncommitted on the "class question," then it might very well make just as much sense to look to the dominant classes for relief as to look to whites in the working class to shed their racism and join an alliance. Some interpretations of the civil rights movement, in fact, explain it precisely as an alliance between the "leading edge" of the dominant white classes in America and aspiring middle class elements in the black community.[135]

As changes have occurred in our economy and in public opinion, civil rights scholars have found cause for both hope and fear. A deep shift away from industrial production, increasing automation of everything from agricultural to clerical work, and a decrease in the domestic demand for unskilled labor, are trends that make the old economic uses of racial oppression look less and less functional. The effectiveness of race as a dividing wedge has certainly not disappeared, but it has changed. For example, overt bigotry, despite its resilience and undeniable presence among us, has suffered significant blows in popular consciousness as a result of the civil rights struggle.[136]

Meanwhile, the *costs* of racism to our system have dramatically increased since the close of World War II. These costs include domestic unrest and damage to our national prestige in a post-Nazi, Cold War, and decolonizing world. The fate of blacks in this country has been an international question since the American slave trade began, but we have often lost sight of that dimension.[137]

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134 Whether or not our hypothetical anti-racist would favor agnosticism and disengagement on questions of class may depend, at least in part, on her own class position (or perhaps on the class position she might reasonably anticipate if racial barriers fell and people of color were arrayed across the class spectrum in the same proportions as whites).

Thus, white professionals deeply opposed to racial discrimination might feel relatively unconcerned with non-racial disparities of power and resources, believing them to be less inhumane or degrading, or perhaps natural, or simply not so bad. Similarly, a black person committed to fighting racism might feel quite differently about non-racial matters of power and privilege depending on whether she was an auto worker, a welfare mother, an attorney, or an aspiring junior executive.

135 Adolph Reed speaks of "an elite brokerage relation [of black civil rights leaders] with powerful whites outside the South." RACE, POLITICS & CULTURE, *supra* note 5, at 71; *see also id.* at 67. It is painfully obvious that Martin Luthur King, Jr. was trying to forge very different alliances and directions for the civil rights movement at the time of his assassination.

136 Of course, racism is not the only ideology that divides. Numerous other belief-clusters and attitudes appear to function in this way: sexism, consumerism, religious intolerance, anti-communism, homophobia, fear of personal economic disaster, xenophobia—all these are powerful and have real effects in our society.

137 For an eye-opening first look at the link between civil rights and anti-communism

Civil rights scholars have noted these changes and have drawn different conclusions about them. Adolph Reed recognizes the altering landscape but still pictures economic realities as the driving force behind race policy, noting:

> [T]he castelike organization of southern society seriously inhibited development of a rational labor supply. While much has been made of the utility of the segregated work force as a depressant of general wage levels, maintenance of dual labor markets creates a barrier to labor recruitment. . . . Given this state of affairs, the corporate elite's support for an antisegregationist initiative makes sense.[138]

Sidney Willhelm sees the change in economic conditions as evidence of a worse fate for blacks who, rather than being liberated, are now expendable: "[B]lack labor is no longer necessary to economic needs of capitalism or for the state economy; black people are increasingly becoming superfluous. . . ."[139] Willhelm continues, "[T]here is no white need for blacks. . . . [We are now confronted with] an economy of uselessness."[140]

On the other hand, some civil rights scholars have found hope in the changing geopolitical pressures and in the rising costs of white supremacy to those in power. For example, as Derrick Bell notes, the NAACP argned to the Supreme Court in *Brown v. Board of Education*[141] that visible race remediation would help the United States defeat Communism in the war "for the hearts and minds of Third World people. . . ."[142] Their argnments clearly expressed the hope that racism and our economic system could be uncoupled.

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in the pre-*Brown* era, see Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

138 Reed, *supra* note 24, at 65-66.

139 Bell, *Hurdle*, *supra* note 16, at 25 (Sidney Willhelm speaking).

140 *Id.* at 26 (emphasis omitted).

141 349 U.S. 294 (1955).

142 D. BELL, *supra* note 3, at 62. In similar fashion, the government's brief in Shelley v. Kraemer, 334 U.S. 1 (1948), cited infant provisions of 1940s international human rights law in urging the Supreme Court to outlaw enforcement of racially restrictive covenants in deeds to real property. *See* Brief for the United States as amicus curiae at 97-98, Shelley v. Kraemer, 334 U.S. 1 (1948) (Nos. 72, 87, 290, 291).

One episode of the television documentary *Eyes on the Prize*, *supra* note 18, makes this point graphically. The narrator recounts the history of the desegregation campaign in Birmingham, which culminated in mass demonstrations. The camera moves from footage of the demonstrations to a sequence of photographs and articles published at that time in the international press featuring children being attacked with dogs and fire hoses under the direction of then police chief Bull Connor. Following this montage, the viewer watches Alabama Governor George Wallace's reaction to the international coverage. While the governor vociferously maintains supreme unconcern about world opinion, we are led to the firm conclusion that worry about the "outside world" provided protest leaders with important leverage for change. *See also* Dudziak, *supra* note 137.

They tried to persuade the Court that such an uncoupling would serve the long-term interests of the existing order.

At any rate, a number of developments challenge the class domination model. Traditional benefits of white supremacy appear to be waning while costs increase. Meanwhile, during recent decades of civil rights struggle, many members of dominant elites have aligned themselves with the opponents of old-style racism. How then does one explain the continued force of racial division?

The class domination model's answer questions the "obsolescence" notion itself. In its view, the economic system still needs, and will continue to defend, white supremacy, particularly when the global economy is taken into account.[143] Regardless of whether class and race could ever be disconnected, they show no signs of being so to date. The role of color in producing and assuring sizeable stable profits for those in a position to enjoy capturing them is hardly over. We may have witnessed a *change* in white supremacy, but not its withering away, and certainly not the end of its economic usefulness.[144]

The race model gives a second answer, which I will discuss at some length in the next section.[145] The race model argues that

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143 One of the "traditional benefits" noted above was the increased labor mobility that results from maintenance of a group of super-exploited laborers in the workforce. The dazzling increase in capital mobility displayed in our global economy today may mean that labor mobility is now less important. Capital can come to the worker—in Korea, in Singapore, in the maquiladora belt along the U.S.-Mexican border. Perhaps this alters some of the old equations. On the other hand, racialism still plays an important role in shaping our attitudes and policies toward third world lahor, and in keeping people divided from each other.

144 Derrick Bell insists on the importance of blacks as a kind of ace in the hole for the dominant classes. He sees racism as a valuable splitting mechanism in reserve, even though it may occasionally fade from view or sink into disuse. "[B]lacks . . . serve as the society's involuntary sacrifice on those all-too-rare occasions when whites awaken to the facts that they, too, are being exploited in this land of supposed equal opportunity." Bell, *Hurdle, supra* note 16, at 28 (Derrick Bell speaking). In his view, then, the explanatory force of the class domination model would not rise or fall with temporary changes in the usefulness of racism.

145 *See infra* notes 214-30 and accompanying text. Sidney Willhelm's nightmare vision contemplates a convergence of class and race explanations:

> There is a big debate over the autonomy of racism. Some argue that it is a reflection of economic forces, a component of the capitalist system. Others contend that it is a force in its own right and not a reflection of the dynamics of capitalism.
>
> Clearly, it has to be dealt with in the capitalist system, and if the economy is now forcing blacks out, racism is a force that will push whites to exterminate blacks. In that event, blacks will be like the Indians, free only to go to their ghettos, reside there, and not resist. They will then be tolerated until, of course, some sort of economic resource is discovered on the ghetto-reservations.

Bell, *Hurdle, supra* note 16, at 29 (Sidney Willhelm speaking).

white supremacy's staying power derives from something other than the class structure.

A third answer arises from a different version of the class model, which I will call the "class legitimation model." Alan Freeman suggests this version in two seminal and overlapping essays published in the early 1980s.[146]

Freeman first expresses strong doubt that white supremacy is any longer of significant material aid to dominant classes: "That racism persists (perhaps as a virulent ideological plague from the past) does not make it per se economically functional. . . . It does seem questionable whether racism of the kind traditionally experienced by black Americans remains necessary to support capitalist exploitation or is even useful for that enterprise."[147]

Despite this vision of white supremacy as a sort of anachronistic societal appendix, Freeman nevertheless argues that its endurance is based on "needs basic to the preservation of the class structure. . . ."[148] But the vision that Freeman then presents of this "class structure" and its "needs" is more complex than the racism-as-tool instrumentalism of the first version of the class model suggested above.[149]

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146 Freeman, *Critical Review*, *supra* note 14, at 96-116; Alan Freeman, *Race and Class: The Dilemma of Liberal Reform* (Book Review), 90 YALE L.J. 1880 (1981) [hereinafter Freeman, *Race and Class*]. Since this Article was written, Freeman has published another article explicitly and movingly treating many of the issues I attempt to engage here. *See* Freeman, *Racism, Rights*, *supra* note 14. Another recent article which advances the discussion of the relationship between racism and legitimation, is Crenshaw, *supra* note 130.

147 Freeman, *Critical Review*, *supra* note 14, at 108. Freeman hedges here by confining his observation to racism "of the kind traditionally experienced by black Americans. . . ." This passage does not address what *other* kind might exist, and whether it might be "economically functional." The relationship between the class legitimation model discussed below, and an updated version of the class domination model, therefore, remains to be explored.

148 *Id.* at 111.

149 *See supra* notes 132-44 and accompanying text. To this extent Professor Lawrence is simply wrong when he says that "implicit in most of the leftist scholarship" is the idea that "ideology [is] a consciously wielded weapon, an intellectual tool that a group uses to enhance its . . . power . . . ." Lawrence, *Unconscious Racism*, *supra* note 36, at 326 n.35. This, however, is not the place for an extended discussion of such a complicated topic, nor does one misstatement by Lawrence detract from his extremely interesting discussion of ideology. *See, e.g.*, *id.* at 326 (noting that ideology functions as "a defense mechanism against the anxiety felt by those who hold power through means and with motives that they cannot comfortably acknowledge.") It is plainly inaccurate, however, to say that Freeman, or "leftist scholarship" in general, views ideology as a "*consciously wielded* hegemonic tool. . . ." *Id.* at 387 (emphasis added). In fact, it is my impression that most CLS scholars have taken great pains to say otherwise, and generally fall all over themselves to reject vulgar Marxism. *See, e.g.*, Robert Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW 281, 285 (D. Kairys ed. 1982) ("[A]nyone who thought about it would begin to see a great many problems with crude instrumentalist theory."); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L.

Law plays an important role. Law functions not as a weapon wielded so that, say, bosses win and workers lose in every legal conflict, but more subtly and powerfully by convincing us that the status quo is natural and just. Law plays a "fundamental social role . . . as legitimation of existing social and power relations."[150] According to Freeman, the redress of centuries of discrimination was simply too unsettling for the system to accommodate.[151] Undoing black subordination turned out to require massive social dislocation and redistribution. But our legal ideas and institutions are strongly, centrally anti-redistributionist. Concepts like the legitimacy of existing rights, the myth of equal opportunity and the sacredness of formal equality are lynch-pins in rationalizing class domination, and in justifying substantive inequalities in our class system.

For Freeman, this account explains the uneven shape of Supreme Court civil rights doctrine.[152] Having committed itself to ending race discrimination, the Court soon found itself under tremendous pressure (both external and internal) to achieve *results*. In ordering remedies,[153] and sometimes even in finding violations,[154] the Court was pushed to try to end *conditions* of injustice, not simply instances of discrimination. In attempting to do so, the Court stretched traditional jurisprudence quite far. Eventually, however, this impulse was contained and anti-discrimination law was restricted within "safer" bounds not so potentially destabilizing to the system.

The long history of civil rights law's push against many of our legal system's strongest central doctrines makes a fascinating story. The public/private distinction,[155] the substance/procedure distinc-

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REV. 209 (1979); Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA FORUM 32 (1982) [hereinafter Kennedy, *Antonio Gramsci*].

150 Freeman, *Critical Review*, *supra* note 14, at 107.

151 *Id.* at 97.

152 *See id.* at 102-05.

153 *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

154 *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

155 Despite The Civil Rights Cases, 109 U.S. 2 (1883), which held that the fourteenth amendment's guarantees of full citizenship to blacks cannot reach private action, and which stands as a Constitutional symbol of the fourteenth amendment's "long sleep" in relation to the people it was drafted to protect, civil rights cases and statutes eventually made significant inroads on formal boundaries of "public" and "private" spheres. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (public laws forbidding race discrimination can constitutionally extend to private parties); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Shelley v. Kraemer, 334 U.S. 1 (1948) (court enforcement of the will of private discriminators is itself the exercise of public power). *But see* Patterson v. McLean Credit Union, 485 U.S. 617 (1988) and 109 S. Ct. 2363 (1989). Of course it is important to recall cases where the force of the public/private distinction has cut the other way, and where anti-racists have found themselves defending "private" realms from the exercise of "public" power. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (public laws imposing racist restrictions cannot constitu-

tion,[156] and the notion of the protected legitimacy of vested rights,[157] have all been pushed far and hard by cyclical pressures for real relief from the effects of white supremacy. Freeman contends that the system cannot afford to strain these notions as far as would be necessary to "undo" racism, at least absent a booming, expanding economy.

Achievement of substantial equality of conditions for blacks, given their history and present situation, could only be achieved by overcoming traditional public/private and substance/process constraints, by challenging present notions of vested rights, and by rejecting the myth of equal opportunity.[158] This the system cannot afford to do, says Freeman, because such a major disruption would irreparably damage its underlying architecture. All groups and people disadvantaged under the present system might begin to lay claim to the principle that equal conditions, rather than mere equal opportunities, should be their right, that radical redistributions of resources and power are not only possible, but are permissible under our law. After all, poor and working class whites have been enjoying the dubious benefits of "equal opportunity" for generations, and they, too, have reason to question the justice of its starting points and its end results in real social practice.

According to the class legitimation model, the threat of such ideological destabilization is what halted the civil rights movement's legal momentum. Although the system may not "need" white supremacy for "purely" economic reasons, neither can it afford to undo the white supremacist legacy. As a result, "the history of an-

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tionally extend to private individuals who desire to marry); Berea College v. Kentucky, 211 U.S. 45 (1908) (public laws imposing racist rules can constitutionally extend to a private corporation).

156 *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (even though the defendant school board no longer "discriminates" on the basis of race, but uses a formally neutral rule, the conditions of white supremacy continue, so something must be done); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (even though the defendant employer administers a "neutral" test and decides to hire applicants only on the basis of "neutral" test scores, the conditions of white supremacy have unfairly burdened the black test-takers before they even arrive, and the assumptions about what "qualifications" are measured are too untested, vague and unrelated to job performance to stand in the face of proof that blacks are disproportionately affected).

157 *See, e.g.*, The Emancipation Proclamation, No. 17, 12 Stat. 1268 (1863) (privately-owned human property, granted special constitutional recognition and protection since the original drafting, is an intrusive exercise of public power); U.S. CONST. amend. XIV, § 3 (furthermore, not a penny of compensation is paid for all this confiscated/appropriated/liberated property).

158 Specifically, Freeman argues that the system cannot afford to destabilize the legal doctrines of (1) formal (as opposed to substantive) equality; (2) legitimacy of vested rights; and (3) equal opportunity. Freeman, *Critical Review*, *supra* note 14, at 111-12. Karl Klare discusses the public/private distinction and the substance/process distinction in relation to civil rights law and the constraints they impose on race remediation. Klare, *supra* note 60, at 173-85.

tidiscrimination law suggests that no genuine liberation or change in the conditions associated with the historical practice of racial discrimination can be accomplished without confronting class structure . . . ."[159]

Implications of either class model extend, not only to courtrooms or law journals, but also to the streets. Building multiracial class unity would be crucial. On the shop floor, in rural communities, in urban neighborhoods, or in whole cities or regions, this view has traditionally meant working to forge alliances across race lines in furtherance of common class goals.

Litigation and legal scholarship also would have a role to play. The struggles of the fifties and sixties to abolish *de jure* racial classifications were consistent with a class domination model. In that vision, such classifications contribute to the artificial division of black and white workers. Therefore, destroying such classifications should undermine arrangements and relations that promote racist ideas and should help create unity. Popular movements need legal representation to advance their concrete programs and to defend such programs from attacks by opponents and by the state. The legal fight against racial segregation appears more problematic from the viewpoint of a class legitimation model, but nevertheless is supported.

In a post *de jure* world, however, the implications of either version of the class model are not so clear. One possibility is that the time for attention to law as an instrument of serious change is over. A campaign newspaper distributed by organizers for Jesse Jackson in the South reads:

> Twenty years ago racial violence in the Old South was not only constant, but legal. Today racial violence still occurs but it's illegal, so we can struggle effectively to end it.
>
> But economic violence is legal and is devastating the lives of Americans of all races. On March 8, we can begin to move forward from racial battlegrounds to economic commonground to achieve economic justice in a New South.[160]

However, a turn from law to economics or politics may not be entirely within the power of those seeking to overturn white supremacist practices and institutions. After all, civil rights scholars did not *ask* for most of the affirmative action cases, but were forced

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159 Freeman, *Critical Review*, *supra* note 14, at 97.

160 This excerpt suggests a turn not only from law, but from race as well. It is questionable whether that message should be taken at face value, however. Reverend Jackson carries a racial battleground everywhere like a force field in this culture, whether he chooses to or not. It seems fair to surmise that he sees little reason to fear that the *racial* significance of his campaign will be lost on anyone.

to defend affirmative action against attack when the struggle over race was brought before the courts by the opponents of change.

The class legitimation model suggests that we attend to law for our own reasons as well. Under the class legitimation model, the *ideological* needs of the system have determined the forward boundaries of racial progress. It follows that the analysis and critique of ideology itself needs to become a focus of anti-racist work.[161]

Freeman says, "the belief structures we accept without thinking are the real impediment to any genuine steps in the process. . . ."[162] Although nothing inherent in the model I have drawn limits scholars to any one methodology,[163] scholarship explicitly in this vein[164] has thus far tended to present itself as an act of sophisticated legal consciousness-raising rather than as a message to the bench, a practical aid to argument-seeking civil rights litigators, or a plan of action for lawyer-organizers. It has concerned itself with finding links between race and class, and with discerning large trends and patterns in the way civil rights law has functioned to legitimate class and racial hierarchies.[165] At any rate, the stress in such work is usually to look beyond and through race to class.

A model of white supremacy which portrays that system as interlocked with class dominance or with the legitimation of class hierarchies, and which insists on the (contingent or inevitable) interconnectedness of race and class, has powerful explanatory force but serious potential weaknesses as well. Those weaknesses will be discussed below. The next section, however, will focus on a

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161 The focus on ideology suggests a central and strategic role for the intellectual and is in this way nicely self-validating for academic lawyers. The class legitimation model directly implicates the world of legal scholarship. However, its significance for the world of social action is much less clear. The implications of the class domination model, on the other hand, point unavoidably toward the world of political action and mass organizing, while its implications for legal work are less certain.

162 Bell, *Hurdle, supra* note 16, at 16 (Alan Freeman speaking). But note that both Klare and Freeman do discuss the "real world." Freeman notes that "[t]here has to be a coalition of lower-class whites and blacks to solve the economic problem." *Id.* And Karl Klare says, "[l]abor and civil rights activists could enrich one another's efforts and learn from each other's failures. . . . Neither movement has a chance to break out of its current malaise without championing the goals of the other." Klare, *supra* note 60, at 158.

163 See the discussion on methodology, *infra* notes 242-86 and accompanying text.

164 *See, e.g.*, Freeman, *Critical Review, supra* note 14; Freeman, *supra* note 23; Klare, *supra* note 60.

165 The work that I have identified as consistent with this version of the class model of white supremacy reflects its assumptions in two ways. First, its focus is on law as ideology; second, it chooses to examine in a substantive way the relationship of race to class. Alan Freeman, for instance, attempts to show why the logic of race remediation collided with entrenched legal ideas related to the legitimation of class hierarchy. *See* Freeman, *Critical Review, supra* note 14, at 110-14. Karl Klare asserts a series of parallels between labor law and civil rights law, and suggests that understanding the interconnectedness of race and class is necessary for progress. Klare, *supra* note 60, at 157, 158, 200.

second possible model of white supremacy, a model that offers a different explanation for that system's amazing powers of resistance.

B. White Supremacy for Its Own Sake

The second model I want to pose, what I call the "race model," characterizes white supremacy as an evil standing on its own base. In this view there is no reason to look beyond the system of racial hierarchy itself to understand its well-springs and strength. White supremacy produces material and psychological benefits for whites, while extracting a heavy material[166] and psychological price from blacks. White supremacy is concretely in the interests of all white people. It assures them greater resources, a wider range of personal choice, more power, and more self-esteem than they would have if they were (1) forced to share the above with people of color, and (2) deprived of the subjective sensation of superiority they enjoy as a result of the societal presence of subordinate non-white others.[167]

According to the race model, this is the reason white people resist an end to white supremacy. They have a real stake in the system and, with the exception of a few idiosyncratic and often not very reliable defectors, they will fight to defend it. The explanation, then, for the halt of the civil rights movement is simply the entrenched power of resistant whites who refuse to give up further privileges.

Even in the pure and unreal form in which I am casting this model, divisions and inequalities among whites would be recognized. However, those divisions would be seen as relatively shifting and episodic. Faced with a serious challenge from people of color, whites would join ranks despite internal rifts. Race is key, not class.[168]

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166 This reminds us that the race model is by no means "non-economic." Clearly economic exploitation of blacks is one central pillar of white supremacy under *either* model.

167 Peggy McIntosh recently has made two further interesting points. First, whites in our society enjoy not only the subjective sensation of superiority, but also a kind of unconscious "non-sensation" of well-being and security, all the more meaningful and valuable because those who enjoy it are largely unaware that they "have" it while others do not. Her second point, and perhaps the more contestable in this context, is that whites are in some ways privileged, but in other ways profoundly damaged and retarded, by this system of "unearned advantage and conferred dominance." PEGGY MCINTOSH, WHITE PRIVILEGE AND MALE PRIVILEGE: A PERSONAL ACCOUNT OF COMING TO SEE CORRESPONDENCES THROUGH WORK IN WOMEN'S STUDIES 14 (Working Paper No. 189, Wellesley College Center for Research on Women) (emphasis omitted) (on file at Cornell Law Review).

168 Class and race are the dimensions around which I have built the models, but they are hardly the only significant divisions in our society. Gender is for me the other great category, as profound as race and class. But there are other divisions as well: religion, ethnicity, sexual orientation, age, disability, nationality, etc. I do not wish to discount them. To my mind, one of the most difficult and important lessons a person seeking to

Several elements of our experience suggest the power of the race model. White supremacist regimes are, in fact, not confined to any particular political economy.[169] They can be shown to exist in non-capitalist economies as well as in socialist ones.[170]

The long cycles of American race law lend strength to the supremacy-for-its-own-sake argument. Despite a sequence of dramatic changes in underlying social and economic conditions from colonial times to the present, and despite unparalleled legal upheavals, blacks as a race are still subordinate:

> American society periodically produces a symbol of redemption in the wake of unspeakable cruelties to its blacks. At the national level, the symbol is usually a document with liberating potential: the Emancipation Proclamation, the post Civil War Amendments, the Civil Rights Acts of the 1960s and, of course, the decision in *Brown v. Board of Education*. Each of these documents, while issued out of the honest commitment of some and the selfish self-interest of many, contained language with the potential to expunge our national Bluebeard image, the dark stain of

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understand society could learn is to keep at least "The Three," and often more, of these divisions in mind simultaneously.

Nor can I adequately defend my reasons for claiming special status for "The Three." These particular divisions are closely linked to suffering and injustice, of course, but mere quantitative suffering is not a satisfactory criterion. Otherwise we could focus on a hospital burn unit or death row. I believe my choice instead involves a sense that these divisions and their resolutions hold power for change. I continue to sense this, and to push for larger meaning despite my suspicion of the claims of grand theories that purport to solve all problems at once.

From a more practical perspective, we can certainly say with confidence that issues of gender and race *must* be on the agenda of the labor movement, that issues of race and class *must* be on the agenda of the women's movement, and that issues of class and gender *must* be on the agenda of the civil rights movement. We can further say that this imperative springs from the need for internal vision, strength and coherence as much as from any pressure for tactical external alliances or public relations.

Finally, if all of that is so, then gender must be on the agenda of civil rights scholarship. Yet here I am constructing a bipolar system of race and class. I have no defense, only an acknowledgment that much work remains. We especially need the wisdom of our sisters of color in legal scholarship. (We must therefore discover the ways they need and want our help in making law schools a better place for them to hone and speak that wisdom. *See* Austin, Sapphire Bound!, *supra* note 40; Austin, *Resistance Tactics*, *supra* note 40; Moran, *supra* note 40).

169 "[R]acism in America is an enormously powerful ideological institution, considerably older than the political institutions of our republic." Kennedy, *supra* note 23, at 1342.

170 Clearly this observation lends support to the idea that race can transcend class and can outlast class hierarchies. On the other hand, Derrick Bell has observed that to the extent we recognize the existence of ruling elites or privileged sectors in socialist countries, the persistence of white supremacy in those countries may be interpreted as supporting the class model as well. He suspects that racism plays a stabilizing role in all kinds of regimes to preserve existing class hierarchies and to mute "social upset." Personal interview with Professor Bell, November 1987. (This Article does not attempt to discuss the serious and closely-related problems of anti-semitism, but the continuing virulence of those problems in Eastern European socialist regimes bears mention here.)

> slavery and racism. Without looking closely at the motives behind the drafting of these documents, black Americans have accepted the language for its redemptive promise and have urged its fulfillment. . . . [But after] a brief period of hope, blacks once again find themselves trapped in the darkness of a new and more subtle set of subordinating social shadows.[171]

Another piece of social experience that suggests we ought to take the race model seriously is the tendency of whites to choose race over class in their social and political allegiances. With disturbing consistency, whites, who would appear from the standpoint of either class model to have an identity of interest with oppressed blacks, fail to act on that purported interest, and instead identify and side with fellow whites. Time and again fragile alliances between blacks and whites fall apart when the time comes to take a stand about racism. Too often blacks experience white allies as more opportunistic than reliable.

The racism-as-tool model explains this phenomenon as the success of a ploy: the racist system has successfully instilled false consciousness in the white worker, who ends up worse off due to his own ignorance and error. Race model proponents, to the contrary, would acknowledge that the bigoted white worker may in some sense be misled in his convictions, but would also point to the gains all whites enjoy at the expense of blacks under a regime of racial dominance.

What are the implications of the race model of white supremacy? For one, a race model thinker would want to preserve a conscious focus on race and white supremacy as the subjects to be addressed.

A focus on race in the world of political action might lead to wariness of the very coalitions that the class model would celebrate. It suggests resistance to doctrines or attitudes that distort or distract from efforts to end white supremacy. Jesse Jackson's talk of moving on from racial battleground to economic commonground might be worrisome. On what basis will we be "moving on" and toward what end?[172] John Calmore, for instance, advocates that blacks should even resist too easy an alliance with other people of color, that they "get off the minority bandwagon."[173] Although he acknowledges that competition for scarce resources "*unduly* sets various groups against each other," he asserts that "the plight of poor blacks is worsened as the civil rights movement has now been expanded to

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171 Bell, *Fairy Tale, supra* note 27, at 334-35 (footnotes omitted).

172 *See supra* note 160 and accompanying text.

173 Calmore, *supra* note 15, at 217.

include others who threaten to siphon benefits. . . ."[174] If alliances built around common interests offer no long-term hope, then all alliances are *suspect*, but almost any alliance (including one with ruling white elites) could be justified on temporary and tactical grounds.

Beyond wariness of actual political coalitions, the race model further entails wariness of "coalitional doctrine." In this view, blacks have much to be proud of in their role as drum-majors for constitutional and social justice in America, but much to regret as well. It is ironic that black legal battles have so often been in the forefront of successful efforts to expand the creation, recognition and enforcement of individual rights, yet the majority of black people have so little to show for these gains.[175]

One response to this pattern is to develop a doctrine that consciously takes white supremacy into account and resists "deracialization" of the legal protections and entitlements sought. Thus, black scholar Charles Lawrence notes specifically that he is "attempting to limit the merging of economic and racial discrimination . . . ."[176]

A race model analysis might lead one to look for "black law;"[177]

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174 *Id.* (emphasis added). But note that Calmore later specifically approves of coalition-building. He argues that it will be safer if pursued on the basis of a well-defined, "indigestible," and self-consciously black presence. *Id.* at 219-20.

175 As Professor Bell has put it:

> [W]hile the Constitution, by its terms, specifically excluded blacks from its historic recognition and protection of individual rights, the major implementation of individual rights for all Americans has come through the efforts by blacks and their supporters to use the law to eliminate first slavery and then racial discrimination.

Derrick Bell, Victims As Heroes: A Minority Perspective on Constitutional Law 14 (May 21, 1987) (unpublished text of remarks delivered at Smithsonian Institution's International Symposium, "Constitutional Roots, Rights, and Responsibilities") (on file at Cornell Law Review). *See also* David Hall's eloquent article, *The Constitution and Race: A Critical Perspective*, 5 N.Y.L. SCH. J. HUM. RTS. 229 (1988) and Vincent Harding, *Wrestling toward the Dawn: The Afro-American Freedom Movement and the Changing Constitution*, 74 J. AM. HIST. 718 (1987).

176 Lawrence, *supra* note 36, at 365 n.227. Lawrence suggests a new set of operations for equal protection doctrine, to allow and even force that doctrine to take account of unconscious white racism. From a tactical point of view, Lawrence may need to characterize his proposal as a narrow one. To that extent, the cited statement may simply represent skilled persuasion. However, my sense is that the argument also rests on a judgment that it is in the interest of blacks to aim for a certain separatism in civil rights doctrine. This is so even though it may mean Lawrence must ignore some issues of wealth and poverty that deeply affect blacks. For instance, he is careful to point out that his proposed test (for unconscious intent) would leave "untouched non-race-dependent decisions that disproportionately burden blacks only because they are overrepresented or underrepresented among the decision's targets or beneficiaries." *Id.* at 324.

177 This formulation uncovers an ambiguity that is endemic in this Article, and which exemplifies the difficulties of trying to maintain multiple visions. This Article seldom discusses differences between blacks and "other minorities." The race model itself contains this ambiguity. There are real ways in which the experiences of BLACK Americans are *sui generis*. And some civil rights scholars want to recognize and preserve and move on that difference. There are also many ways that white supremacy is just that: a

to stress, for example, the special claim blacks have upon the post-Civil War amendments and civil rights statutes.[178] Such a claim is true to the history of these enactments and justified by the special harms suffered by blacks in America.[179] Alternatively, the race model might lead one to propose new and expanded legal protections for specifically racial wrongs.[180]

The race model also suggests that we need to devote serious attention to understanding the sources and construction of individual ideas about race—the "psychology" of racism.[181] The race model suggests that racist beliefs are deeper than mistakes of fact, and that it is necessary to understand race at the level of individual personality. This is so not only because racism at an individual level can be seen as "pathological," but also because the power and strength of white supremacy seem to come largely from its deep roots in individual consciousness and self-concept.[182] The race

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racism of whites over all others. For this reason blacks and other minorities will often make common cause, common doctrine, etc. I have decided for purposes of this discussion to live with the ambiguity and let it remain vague.

178 The thirteenth amendment to the United States Constitution, of course, abolished slavery. The fourteenth amendment guaranteed the rights of national citizenship to all citizens and forbade the states to interfere with those rights (at least on its face, though the path of the amendment's judicial interpretation has been checkered, to say the least). The fifteenth amendment extended the franchise to male blacks. For an important article treating the special status of blacks in the Constitution as central, see Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967). *See also* Robert Sedler, *The Constitution and the Consequences of the Social History of Racism*, 40 ARK. L. REV. 677 (1987) (discussing "the black freedom value").

179 A slightly diluted version of this approach suggests, if not an explicitly pro-*black* doctrine, then at least a pro-*minority* doctrine. *See* Smith, *supra* note 17, at 334-41 (suggesting a "minority advantaging principle," and analogizing to *contra proferendem* rules in contract and the liberal construction doctrine as it applies to Native Americans).

180 *See, e.g.*, Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) and Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

181 *See* Lawrence, *supra* note 36. Of course, psychologists and social scientists have been concerned with this dimension for some time, and the literature is voluminous. Lawrence is not the only legal scholar to have specifically pointed out the importance of this dimension to legal thought about race. *See, e.g.*, DERRICK BELL, RACE, RACISM AND AMERICAN LAW 84-85, 89-93, 270-74 (1st ed. 1972) (assorted materials on the psychology of racism). The relative lack of attention to psychology by civil rights scholars "leaning toward class" has been the subject of criticism by some "leaning toward race." Richard Delgado notes, "I was unable to locate *any* CLS articles or books on the psychology of racism." Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 315 n.86 (1987) (emphasis added). He also deplores the "ironic failure" of CLS scholars "to articulate a satisfactory theory of . . . the genesis . . . of racism." *Id.* at 322.

182 In this regard, the challenges facing feminist and anti-racist scholars show strong kinship. Much recent feminist work, both legal and non-legal, has concerned itself with the societal and inter-personal processes involved in the "construction of gender." *See, e.g.*, NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978). Ann Scales makes a comment that is relevant for its unfortunate lapse in awareness of race, but also for its provocative suggestion about psy-

model and the class legitimation model may be approaching each other on this ground, at least insofar as the legitimation model concerns itself with problems of consciousness and consent.

C. Criticism

Of course, no model alone yields an adequate understanding of white supremacy. Even the simplest formulation of each implies a powerful critique of the other. In this section I will touch on the major problems with each model and suggest directions that I think might be fruitful.

The class domination model has a tendency either toward crude instrumentalism with an associated unhelpful characterization of white supremacy as a conscious plot of a rnling class, or toward blind determinism, with its equally unhelpful characterization of white supremacy as a necessary consequence of a particular set of economic relations. The class legitimation model, on the other hand, tends to ignore or dismiss the influence of economic developments on legal and popular ideologies.[183] Both versions of the class model fail to offer an adequate theory of racism itself.[184] If white

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chology, law and domination of one group by another: "Feminist jurisprudence is unique [sic] in its demand for an adequate psychology. . . . In making the connection between domination and mechanisms of sex-role differentiation, feminism also goes beyond Marxism. The latter sees domination as imposed by external economic and political factors; feminism attends fully to the powerful oppressive forces within us." Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1389-90 (1986).

It is to be hoped that efforts focused on the construction and operation of gender and race can aid and inspire each other. There are intersections as well as parallels. *See, e.g.*, ELIZABETH SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988) (the importance of recognizing issues of race and class when dealing with issues of gender). *See also* Derrick Bell, *The Race-Charged Relationship of Black Men and Black Women*, in AND WE ARE NOT SAVED, *supra* note 3 (discussing the tortured effects of racism on gender identity and the relations between black women and men).

One, but by no means the only, sex-race link is the fact that racist psychology is often sexualized and eroticized. This is an old and powerful insight, with a sizeable (and predominantly male-centered) literature. *See, e.g.*, DERRICK BELL, RACE, RACISM AND AMERICAN LAW 271, 285-93 (1st ed. 1972); ELDRIDGE CLEAVER, SOUL ON ICE (1968); JORDAN, *supra* note 131; LILLIAN SMITH, KILLERS OF THE DREAM (1949). *See also* Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989) (arguing that black women form their own group for many purposes; not black-plus-woman, but somehow blackwoman; not blue-plus-yellow, but somehow green).

183 A real comparison of the strengths and weaknesses of the class domination and class legitimation models as they relate to, illuminate, and implicitly criticize each other is beyond the scope of this Article. Rather, the focus here is primarily on the relation of both class models to the race model. Questions dealing with the two class models *inter se* are addressed only sketchily. They certainly merit further development.

184 There is a sense in which the problem of the class model of white supremacy in America is related to the problem that leftist political analysis faces around the world. The exhilarating simplicity of the original Marxist vision, with its perfect fusion of moral outrage, strategic acumen, and certain victory, has run upon unexpected turns. The

supremacy is supposedly a dependent variable, why is it acting so independent?[185]

White supremacy is treated by the class models as a derivative or secondary phenomenon. It does not receive the independent and focused attention necessary for us to understand and change it. Richard Delgado maintains that CLS (in this instance a stand-in for my "class model") "simply assumes that racism is just another form of class-based oppression, a product of a hierarchical social structure."[186] In a similar vein, Andrew Haines has accused both Alan Freeman and Karl Klare of "economic reductionism" in their approach to race questions.[187]

Delgado's and Haines's accusations are overdrawn. CLS scholars have attempted to eschew reductionism. Alan Freeman has asserted: "There is no doubt that racial discrimination in American life and history has been a distinct form of oppression, something different from other relations of exploitation,"[188] and has rejected "theories that merely collapse race into class."[189]

In a sense, Freeman *himself* is rejecting the class model, or at least taking the position that the class model alone provides an insufficient explanation of white supremacy. Nevertheless, it is fair to say that proponents of a class model—whether the domination or the legitimation version—have failed to take up the challenge of this insight.[190] When critics of the class model challenge it as "eco-

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powerful role played by multi-class movements for national liberation, the failure of the working classes of the advanced industrial countries to rise up and take control of national economies, the dismal record of Eastern Europe and the U.S.S.R., and the power of race and gender as social forces have all created tremendous strains on the original theory.

Nowhere does class alone appear to be an adequate explanation for what has and has not happened in the distribution and redistribution of power and wealth around the world. The civil rights debate over the relevance of class echoes parts of this global conversation among leftists of different persuasions. Our "American Dilemma" is now, more than ever, globally situated, though American critics and activists have thus far failed to adequately appropriate this reality.

185 Derrick Bell reflects one way of looking at this problem in his anecdote about the old Harlem resident who responded to a young leftist's harangue in the 1930s with the query, "when the revolution is over and the communists are in power, will they still be white?" Bell, *Strangers in Academic Paradise, supra* note 40, at 391. *See also* Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988).

On the problems of anti-communism for the civil rights movement, see discussion *infra* notes 192-93 and accompanying text. Of course, the joke's barb could be aimed as much at opportunism and racism in the practice of white communists of the thirties as it is at the inherent inadequacies of the class model.

186 Delgado, *supra* note 181, at 315.

187 Andrew Haines, *The CLSM and Racism: Useful Analytics and Guides for Social Action or An Irrelevant Legal Skepticism and Solipsism?*, 13 WM. MITCHELL L. REV. 685, 723, 726 (1987).

188 Freeman, *Critical Review, supra* note 14, at 97.

189 *Id.* at 115 n.28.

190 White scholars of race do face difficulties in pushing further. Richard Delgado,

nomic reductionism," they may be unfairly ignoring important indications to the contrary, but they may also be reflecting the fact that, thus far, even the sophisticated versions have done little to flesh out a theory of racism.[191] The legitimation model offers a helpful explanation of why race remediation at this point would destabilize our class-justifying legal regime, but it fails to address the ways in which racism has such a unique, positive value for stabilizing class inequities.

While the class models do not offer an adequate theory of race, the race model provides too few tools for understanding pressing issues of class.[192] It fails to contend with class divisions and con-

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for instance, launched a widely-noted criticism directed at white civil rights academicians for their high-handed domination of the field of civil rights legal analysis and their failure to take the work of minority scholars seriously. He suggested they give up this domination by leaving the field, a move which he suggested would open the way for scholars of color to shape the discourse. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 577 (1984). Randall Kennedy, another scholar of color, has recently criticized Delgado's approach, and the trend he believes it represents, in a controversial article, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). Delgado will respond in a forthcoming issue of the Virginia Law Review.

In my view, white civil rights scholars should (1) listen carefully to Delgado's telling words and to the energy and anger behind them, (2) work well past the boundaries of their personal comfort zone in efforts to converse inclusively, interactively and attentively with scholars of color, and (3) keep thinking and writing about race. I believe white scholars have a special responsibility to deal with white supremacy and the social and legal construction of racial visions and identities, particularly white visions and identities.

191 Freeman's review of the second edition of Professor Bell's law textbook attempts to go further. First he reiterates his declaration that "collapsing" race into class would be an error. However, he says, it would be equally foolish to "[treat] racism as a mode of oppression so autonomous from capitalist social and economic relationships that it can be rectified by aiming at a target of oppressors that appears as (classless?) 'white society.' " Freeman, *Race and Class, supra* note 146, at 1891.

Admitting that what he proposes will be difficult, Freeman points to GEORGE FREDRICKSON, WHITE SUPREMACY (1981), a comparative history of race relations in the United States and South Africa, as a model for a properly sensitive treatment of the race-class puzzle. These latter statements show a commendable effort by Freeman to put more substance into his "distinct but not autonomous" formulation, but they constitute only a bare beginning.

Eugene Genovese's ROLL, JORDAN, ROLL (1972) is another example of what some CLS writers see as a work that properly recognizes the force of both race and class. This important study of African American slavery explores the themes of race and class in a conscious and sophisticated way. It leaves us, however, with intimations of what is to come rather than with a realized theory. In the Preface, Genovese cryptically refers to the question of a distinct African American nation and to "[his own] reading of the evidence as constituting a national thrust." He soon retreats, however, ". . . knowing that the ambiguity of the black experience as a national question lends the evidence to different readings, I have chosen to stay close to my primary responsibility: to tell the story of slave life as carefully and accurately as possible." *Id.* at xvi. The limits of a "pure class" model have not yet been overcome, though they may have been recognized.

192 One example of the pressing nature of the class issue is the controversy over

flicts among whites and it helps us little in coming to grips with the increasing black stratification that has been an ironic result of the civil rights movement and societal reactions to it.[193]

Both the race and class models suffer from problems in their visions of the future. The class models have their roots in a leftist tradition that once saw the unfolding of a new egalitarian and participatory communism from the deep logic of capitalism itself. Since racism was seen as derivative, it was thought that it (along with racial and cultural differences?) would fall away once class solidarity was achieved and class contradictions overcome. This initial optimism has suffered hard historical knocks. The Eurocentric whiteness (and maleness) and the arm-and-hammer imagery of its notion of the "working class" have proved all too inaccurate and impoverished. To have persuasive power as a vision, the class model must come to grips with race not only in present analysis, but also in future vision. That vision must include meaningful autonomy for blacks and other minorities. It should show that it accounts for the social value of minority cultures built under fire, and understands the necessity for long-term vigilance and opposition toward white supremacist beliefs and behavior patterns.

The race model also has problems with its vision of the future. Within our current national boundaries, blacks are a relatively small

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WILLIAM WILSON, THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS (1978). Wilson posited that the changing economic structure and the outlawing of overt discrimination led to a situation where blacks' opportunities are now founded far more from their economic class position than from their status as black Americans. *See generally id.* This position generated heated debate about race and class. Many civil rights scholars and activists greeted Wilson's apparent discounting of race with distress and apprehension that serious attention might shift completely away from the uniqueness of black oppression. For a critique of Wilson's thesis and some reportage on other scholarly reactions to it, see Calmore, *supra* note 15, at 210-15.

193 Professor Bell has noted "the steady slide of a full third of blacks beyond poverty and into an underclass status where the hopelessness is vast and devastating, even as Dr. W.E.B. DuBois's 'The Talented Tenth' rise ever higher in the ranks of their chosen endeavors." Bell, *Fairy Tale, supra* note 27, at 333. It is important, of course, not to exaggerate the significance of such stratification. Many of the gains of the Talented (and Lucky) Tenth are still tenuous. Frequently those gains are more cosmetic than real. The stresses of race still impose themselves even on those able to benefit from the new opportunities. (*See* Welsh, *The Black Talent Trap*, Washington Post, May 1, 1988, at C1.) Adolph Reed, on the other hand, appears to perceive more fundamental differences of interest between an elite stratum of blacks and the majority. Reed, RACE POLITICS AND CULTURE, *supra* note 5.

Meanwhile, Scripps Howard reported in fall 1988 that a new study revealed that the gap between rich and poor blacks was widening faster than the gap between rich and poor Americans as a whole. *Rich-poor black gap growing rapidly*, Knoxville News-Sentinel, Oct. 18, 1988, at A7. An article published after this one was first written does try to focus directly on class divisions within the black community and affects those different strata. Roy Brooks, *Racial Subordination through Formal Equal Opportunity*, 25 SAN DIEGO L. REV. 879 (1988).

minority.[194] Black resort to unilateral armed rebellion looks suicidal in this setting.[195]

So where does change come from, according to the race model? Some appear to have given up hope:

> [T]he socio-economic deterioration of blacks will continue and will do so to the point of extermination. Any effort to reverse this *inevitable* outcome will have to take the form of violent confrontation; to respond violently in a nation so dedicated to white supremacy over a black minority is an open invitation to extermination.
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> [S]tatistics make it clear that the economic road to black redemption may be a dead end . . . . [T]he political road to black survival does not offer more promise . . . . [T]here is little reason to place much faith in the law.
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> Perhaps, under these circumstances, the solemn admonition from Dylan Thomas might do well: Do not go gentle into that good night.[196]

If blacks are an isolated and stigmatized minority and cannot ultimately trust coalitions, then even gains achieved through massive pressure and mobilization will remain perpetually vulnerable.[197]

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194 This is not to deny what lies beyond our boundaries. As Nina Simone sang more than 20 years ago:

> Mr. Backlash, Mr. Backlash,
> Just who do you think I am?
> The world is *full* of folks like me
> Who are black, yellow, beige and brown.

Langston Hughes & Nina Simone, *Backlash Blues* (on Nina Simone Sings the Blues, RCA 1967) (emphasis added). The domestic significance for blacks in this country of global sisters and brothers of color has yet to reach its climax. Professor Bell remarks, "[p]erhaps the emerging Third World will finally become a factor." Bell, *Hurdle, supra* note 16, at 29 (Derrick Bell speaking). *See also* Dudziak, *supra* note 136. At any rate, blacks domestically are a minority, and one that is shrinking in relation to other minorities. Demographic predictors are firm that by the end of the century blacks will no longer be the largest of our minority groups, but will have been surpassed by Hispanics.

195 As James Weldon Johnson put it eloquently over 50 years ago: "We would be justified in taking up arms or anything we could lay hands on and fighting for the common rights we are entitled to and denied, if we had a chance to win. But I know and we all know there is not a chance." JAMES JOHNSON, NEGRO AMERICANS, WHAT NOW? (1934), quoted in D. BELL, *supra* note 3, at 70.

196 Bell, *Hurdle, supra* note 16, at 25, 28 (Sidney Willhelm Speaking).

197 Linda Greene, for instance, cogently sketches the "blurred" and uncertain nature of Reconstruction reforms and 1960s civil rights gains even at the moments of their inception. Linda Greene, *Twenty Years of Civil Rights: How Firm a Foundation?*, 37 RUTGERS L. REV. 707 (1985). Professor Greene reflects on the fact that when the Civil Rights Act of 1964 was enacted, its constitutionality was in serious doubt because it purported to reach private action and was therefore in direct tension with The Civil Rights Cases, 109 U.S. 3 (1883), and years of settled fourteenth amendment jurisprudence. Under the circumstances, she accepts as tactically prudent the decision of congressional drafters to rely on the Commerce Clause as authorization for the legislation. (This strategy was ultimately successful in preserving the Act from constitutional attack. *See* Heart of Atlanta Motel v. United States, 379 U.S. 715 (1961)). However, Greene

Economics Professor William Darity noted at a 1984 Rutgers Law School conference: "[L]egal evasions of a legal apparatus that is not widely endorsed will accumulate over time . . . . [J]udicial remedies become an illusory solution for excluded groups that lack the power to impose a change."[198]

A deep pessimism thus haunts the race model. (To say this is not, in itself, a meaningful "critique" of the model, of course. If it is true that white supremacy binds all whites together so that their solidarity will ultimately reassert itself in perpetuity to conquer differences among them and confirm black subordination, then American black people and their anomalous friends *should* be pessimistic.) I will argue, however, that the pessimism implied by a pure race model is unwarranted.

An article by Richard Delgado reveals themes relevant to this discussion.[199] He distinguishes two theories of how best to end racist behavior by whites. One is the "social contact" theory, which holds out the hope that white people can actually change deeply-held and mistaken beliefs about race through exposure to, and interaction with, people of color. Delgado implicitly rejects this theory, favoring instead the " 'confrontation' approach—where prejudice is publicly confronted and discouraged through formal structures."[200]

Delgado's choice rests in large part on his experience that "formal public settings are relatively safe for minorities, while informal private settings present risks. To minimize racism, one should structure settings so that public norms are enforced, and prejudice openly confronted and discouraged. Society should avoid creating intimate, unguided settings where highly charged interracial encounters can take place."[201]

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points out that it was only because of the great weakness and vulnerability of the fourteenth amendment from its infancy that such a tactical approach even had to be considered. Greene, *supra* at 710. The Court's ominous decision to re-examine Runyon v. McCrary, 427 U.S. 160 (1976), is further proof of the fragility of many civil rights precedents. Massive political response and concern for stare decisis have left *Runyon* intact for now. Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). But the unraveling of previously established doctrine continues apace, with politics playing a particularly open role in determining its extent and effect.

198 William Darity, *Comments*, 37 RUTGERS L. REV. 977, 980 (1985). At times the picture looks even bleaker. Not only are black gains constantly vulnerable to erosion, but even the temporary victories often strengthen the hand of those in control. At a moment of apparent victory for the civil rights struggle, when Lyndon Johnson ringingly announced "We Shall Overcome" in a dramatic televised statement to the nation (*see Eyes on the Prize*, *supra* note 18, Episode 6), many civil rights activists found themselves paradoxically seized with dread and loathing.

199 *See* Delgado, *supra* note 181.

200 *Id.* at 317-18.

201 *Id.* at 318. One might think of this as a behavior modification approach as opposed to encounter group. I now teach a course on Discrimination and the Law and

These observations by a committed and perceptive person of color should be important and troubling for whites. The aim of this strategy is not white conversion or education (an apparently hopeless task), but black protection. It rejects strategies that involve risk for blacks in the hope that whites can be redeemed.[202] This position appears to be founded in an attitude of hard-nosed realism about what minorities can expect. It presumes that prospects for deeper transformation (personal or societal) are dim. It does preserve an important role for scholars and activists. There is room in this vision for smart people to contain damage and build defenses. It may even be possible to work the system against itself in order to pry open a little sheltered breathing room for the oppressed.[203]

White civil rights scholars need to appropriate this message, to understand and examine what Delgado means when he says, "We know by a kind of instinct that there are times when our white friends can be trusted and times when they cannot . . . that there are occasions . . . when we are comparatively safe, and that there are other occasions when we must be careful."[204] But I continue to believe a real possibility of deeper change exists. We need not, and should not, settle for damage control alone, or concentrate only on assuring effective defenses for people we assume to be inevitably isolated and powerless.[205]

A pure race model, given United States demographics and the present national economy, sees solid change coming only from without. Its notion of the best blacks could aim for is to use their limited leverage and to maximize building formal constraints against racial harms. While it is important to appropriate the real and immediate

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have thought of Delgado's thesis when I observe that concerned white students who are worried about racism frequently announce their belief that increased social contact and personal interaction are the most important single ingredients in the fight to end racial injustice. Concerned black students worried about racism almost never voice such a belief.

202 To use Duncan Kennedy's term, this is the voice of one who has experienced too much "bad fusion" on too many occasions to want to keep at it any longer. *See* Kennedy, *The Structure of Blackstone's Commentaries*, *supra* note 149, at 211-13. *Compare* Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407 (1988).

203 "[R]acism runs counter to the body of public principles that form our national ethos, including fairness, egalitarianism and humanitarianism . . . . Americans are influenced by . . . public . . . norms." Delgado, *supra* note 181, at 317.

204 *Id.* at 318. The fraternity-style racial harassment that has broken out on college campuses around the country is a gloomy example of these insights. *See, e.g.*, "In the Face of Racism," U.: The National College Newspaper, September 1988, at 4, and "Deep Racial Divisions Persist in New Generation at College," New York Times, May 22, 1989, at A1, col. 1.

205 I am not suggesting we ignore or abandon formal protections. On the relative importance of formal defenses for those traditionally disempowered and excluded, see Williams, *supra* note 41, at 407-09.

value of Delgado's observations about white behavior, it is also imperative to realize that any strategy based on formal norms and sanctions inevitably depends on the good will of those with the present social power to create and impose them. It would be folly for African Americans or other minorities to place any long-term hope or faith in the good will of those whites who are in a position to control and implement such norms and sanctions in our society. And if that is so, then strategies built solely on formal protections are built on sand.

More positively stated, people of color do not have to go it alone.[206] Many white people in our system need deep societal changes despite the undeniable benefits they gain from white supremacy. Given our history, whites will be just as unable to achieve such change alone as minorities are.

Strategic weakness for these whites does not come from lack of numbers. In order to be strong enough to move toward change, people must be able to understand the large questions of power and justice in their society. They must become students of those who have encountered and taken up those questions. In this society, race is one of those important questions of power and justice, one on a very short list of *the* most important. People in America who fail to see and understand white supremacy can and will be stopped time and again in their own tracks. For this reason, whites and blacks needing change are in a position of mutual dependence.

Bringing an end to white supremacy, and otherwise redistributing power and resources, will require the union of many kinds of people who have suffered many kinds of harms, sometimes even at each other's hands. Nothing in history has shown either that white supremacy will end, or that it cannot end, through such a coming together.

The problem of vision in the race model has another aspect. A race model faces more than the problem of how to achieve change when those who need it are a disempowered minority. It must also deal with what the future would hold if we could bring about the

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206 Professor Williams says:

> I am . . . not one of those who believes that the future and well-being of blacks lie solely with ourselves. Although I don't always yet trust this imagery of dependence, I think it is the reality, and necessity, if balanced coexistence is to occur. Blacks cannot be alone in this recognition, however. Whites, too, must learn to appreciate the communion of blacks in more than body, as more than the perpetually neotenized, mothering non-mother. They must recognize us as kin . . . . They must learn to listen and speak to the grieving, *enraged* black-people-within-themselves and within our society.

Id. at 429.

change we seek. If race is the sole axis of the model, then the vision of the "good society" that it projects is problematic.

The logic of an unmodified race model in this regard appears unavoidable. The good society, the non-racist society, is one of two things: a self-contained black society that (somehow) has separated itself from the problem of white racism (the vision of an independent black nation); or instead a society that is racially mixed but (somehow) has rearranged itself so that blacks are treated and situated precisely like whites (the vision of equal stratification). In our society the latter vision would mean that blacks would be arrayed across the class spectrum in the same (grossly unequal) proportions as whites, would exercise control over their own lives in the same (grossly unequal) degree as whites, and would enjoy access to material resources in the same (grossly unequal) manner as whites.

Neither vision is currently advanced as a goal by civil rights scholars. The reasons for this are not hard to summon. The vision of an independent black nation suffers from the odds against its realization. Derrick Bell tries to provide a separatist pole for the dilemma confronting the characters in his book by having one of his supernatural "curia sisters" advocate black emigration.[207] This device works heuristically but has little persuasive force as a real option. Predominant opinion has tended to marginalize nationalism, to push it to the edge and beyond respectable academic discussion.[208] The differing treatment of Malcolm X and Martin Luther King by mainstream cultural organs (like those that are educating our children) is emblematic.[209] Even accounting for this bias, however, visions of a separate black society must be so modified to feel plausible that they encounter the same problems they were meant to overcome.

The vision of an equally stratified society is a more plausible (and socially acceptable) goal for American civil rights scholars, but it is not being explicitly advanced in the literature any more than the separatist vision.[210] A likely reason for this silence is that most civil

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207 D. BELL, *supra* note 3, at 188-90.

208 An exception to the silence about black nationalism in legal academic writing is Donald Hall, *Paths to Equality: A Constitutional Theory of Collective Rights*, 5 HARV. BLACKLETTER J. 27 (1988).

209 On a grass-roots level, consciousness may, of course, be otherwise. The Boston Globe recently reported that 25% of black residents polled favored the secession of Roxbury from the city of Boston and the formation of an independent city to be called Mandela. This is obviously not a majority, nor is it a trivial percentage. *Leaders Get Low Performance Rating*, Boston Globe, June 14, 1988, at 10, col. 6. Since this Article was written, Spike Lee has taken an eloquent stab at projecting Malcolm X uncomfortably back into mainstream view in his film, *Do the Right Thing*. It comes as a shock.

210 The only explicit announcements I have found of the "equal stratification vision" to date are by writers who want to expose and then criticize such a vision. William Darity states:

rights advocates do not really accept equal stratification as an ultimate goal. Rather, the civil rights movement has projected a deeper aspiration than mere equivalent treatment. The animating spirit of the civil rights movement was "Freedom," not "Equal Opportunity."[211] Its driving vision was the creation of a transformed and transforming community whose members would treat each other with respect and dignity, where the last would come to be first, and where each person would be a cherished member. No one who was part of that movement would have recognized as an acceptable outcome a world in which blacks ended up as a collection of competing individuals, the racial ceiling on individual achievement for the lucky few removed at last, but the vast majority still poor and powerless. Mrs. Hamer said it best: "We didn't come all this way for no two seats when ALL of us is tired."[212]

Civil rights scholars who stress race over class appear to do so most often out of a sense that looking away from race will end up hurting blacks, again submerging the needs and demands of black people to one more white project. Few of them would embrace the vision of a mirror-image stratified black population as even coming close to the goals that got them involved in the civil rights movement and civil rights scholarship in the first place.

> [T]he notion of racial equality . . . postulates that in a society that is intrinsically hierarchical, blacks should simply share equally in the general inequality . . . . I am left with the sense that all would be right with the world . . . if 10% of all Wall Street lawyers were black and 10% of all college professors were black and, dare I say it, 10% of all NBA basketball players, 10% of all doctors and 10% of all executive officers of major corporations were black.

Darity, *supra* note 198, at 978, 980.

Alan Freeman states: "There is nothing particularly radical about the goal of ending racial discrimination. The goal would be achieved if nonwhites were stratified across American society in percentages similar to whites. The class structure would remain intact." Freeman, *Race and Class, supra* note 146, at 1895.

211 Of course an impoverished formalized version of what the struggle was about has also been voiced and, especially in the legal world, has had effects. Phraseology can sometimes be striking. In the midst of a powerful announcement that the thirteenth amendment had been resurrected and was to have power over a broad range of social conditions and practices, the Supreme Court fell into the thinnest and most anemic vision of equal stratification as the goal, announcing that its aims were to assure that "a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man" and to protect the freedom of blacks "to buy whatever the white man can buy." Jones v. Alfred Mayer Co., 392 U.S. 409, 443 (1968). In defense of the Court, the *Jones* opinion may simply express the notion that equal "dollarhood" is a *minimal* definition of equality. The words, however, have a nasty ring in today's environment.

212 The occasion was the 1964 Democratic National Convention in Atlantic City. Mrs. Hamer was urging rejection of the two token seats proffered by the Democratic National Committee to the Mississippi Freedom Democratic Party. *See Eyes on the Prize, supra* note 18, Episode 5. For a more detailed discussion of the battle at the convention, see, e.g., T. GITLIN, *supra* note 5; HOWARD ZINN, SNCC: THE NEW ABOLITIONISTS 251-57 (1965).

A second reason that the vision of "equal stratification" has seldom been held up for scrutiny is that even this paltry vision is so far from coming true that it can simply be ignored. The realities of the civil rights struggle, where it is painfully obvious that blacks have NOT been able to achieve even the dubious goal of equal stratification, have prevented people from having to confront the unsatisfactory nature of this implicit goal of a pure race model.[213] The instances of continuing disparity between blacks and whites are glaring enough and infuriating enough to absorb most of our attention, or to make speculations about ultimate goals seem superfluous.

Nevertheless, the fact that so much injustice, oppression and inequality would remain for the vast majority of whites *and* blacks under an equal stratification solution indicates that the race model is inadequate for people motivated by a desire for a radically more humane and egalitarian society. The wisdom of both the race and class models are needed.

IV
"WHERE DO WE GO FROM HERE?"

A. Race and Class

In the real world of civil rights scholarship no pure models exist. The themes of race and class refuse to keep their bounds. They constantly interpenetrate, converge, and reflect on each other. The work of civil rights scholars reflects the fact that it is impossible to ignore realities that are as powerfully operative and intricately intertwined as race and class.[214] Of course, we clearly can and do reach different conclusions about them.[215]

It may be worth juxtaposing a few statements by civil rights scholars to give a flavor of the ways they presently acknowledge and deal with issues of race and class:

> To deal with the roots of American racism [by focusing on the history of racial attitudes and ideas] . . . is not to ignore the crucial

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213 Derrick Bell suggests that the maddening realities of white supremacy may actually obscure for people of color the degree of inequality and constraint that exists among whites. He notes that blacks have long sought "the bias-free opportunity that *seems to them* the birthright of every American who is or can pass for a white person." Bell, *Hurdle*, *supra* note 16, at 2 (Derrick Bell speaking) (emphasis added). One of my students, a black woman who was one of the first students to integrate a local high school, recalls her shock at discovering that some of her white classmates were "dumb" in chemistry, ill-prepared for class, and displayed all the signs of coming from a disadvantaged background.

214 *See* Crenshaw, *supra* note 130. Professor Crenshaw asks us to see the interpenetration and convergence in particular ways, pointing out the "distinct racial nature of class ideology." *Id.* at 1384.

215 Or, perhaps more often, we float in a confusing kind of pluralist sea of no conclusions.

> matters of economic exploitation and social degradation. Without those factors we would have no racism as we know it. But to say, as many have done, that racism is merely the rationalizing ideology of the oppressor, is to advance a grievous error. To rest the analysis there is to close one's eyes to the complexity of human oppression.[216]
>
> 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 understood by itself as a separate problem. However separate its origins and historical practices may be, racism must be confronted today within the context of contemporary American capitalist society.[217]
>
> The error of seeing the plight of the black poor as a consequence of racism alone should not now be transformed into that of viewing their plight as a consequence of classism only.[218]
>
> [We must take account of] the growing significance of the interaction between class and race and American race relations. Although the evidence is persuasive that social class factors are becoming increasingly important, there is little evidence that racial factors are any less important. . . .[219]
>
> There is a big debate over the autonomy of racism. Some argue that it is a reflection of economic forces, a component of the capitalist system. Others contend that it is a force in its own right and not a reflection of the dynamics of capitalism.
>
> Clearly, it has to be dealt with in the capitalist system . . . .[220]
>
> The underlying theoretical question is not whether racism in all of its continuing manifestations is or is not different from class relations generally—because it surely is different—but 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 maintain it.[221]

Reading this discourse, one gets the odd sensation of having come full circle. Is there any disagreement here? What are they *arguing* about? I believe that there are important differences, although they are sometimes muddled ones.[222]

First, partially suppressed issues of distrust animate some of

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216 W. JORDAN, *supra* note 131, at ix.

217 Freeman, *Race and Class, supra* note 146, at 1891.

218 Calmore, *supra* note 15, at 204.

219 Thomas Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 685 (1985).

220 Bell, *Hurdle, supra* note 16, at 29 (Sidney Willhelm speaking).

221 Freeman, *Critical Review, supra* note 14, at 110.

222 Of course, there is a simple question of emphasis. When one person says, "Of course X, but be ever-so-careful not to forget Y!" and the other person says the reverse, we can easily see which factor each thinks has priority and which factor is in danger of

these debates and ought to be brought to the surface. In a parallel vein, Randall Kennedy has recently tried to uncover and explore what he describes as a level of "covert discourse" in affirmative action debate.[223] His remarks deserve quotation at some length:

> [T]here remains a disturbing lacuna in the scholarly debate. Whether racism is partly responsible for the growing opposition to affirmative action is a question that is virtually absent from many of the leading articles on the subject. These articles typically portray the conflict over affirmative action as occurring in the context of an overriding commitment to racial fairness and equality shared by *all* the important participants in the debate .... This portrait, however, of conflict-within-consensus is all too genial .... It ignores those who believe that much of the campaign against affirmative action is merely the latest in a long series of white reactions against efforts to elevate the status of the Negro .... [C]onventional scholarship leaves largely unexamined the possibility that the campaigns against affirmative action now being waged by political, judicial and intellectual elites reflect racially selective indifference, antipathy born of prejudice, or strategies that seek to capitalize on widespread racial resentments.[224]

Like long-time spouses who intimately anticipate each other's moves and become locked in an argument that appears strangely trivial or incoherent on the surface, affirmative action partisans may actually be struggling with deeper issues and apprehensions than is apparent at first glance. Kennedy says they react "in large measure from their fears regarding the ulterior motives of their opponents,"[225] and reports that their "suspicions corrode reasoned discourse."[226]

Professor Kennedy focuses primarily on the affirmative action debate and the suspect motives of those who he believes "have never authentically repudiated the 'old style religion' of white supremacy."[227] Nevertheless, his observations are applicable to the race-class debate as well. Those who emphasize class in analyzing white supremacy are not "old style" supremacists. Still, their insistence on moving "beyond" race and their reiteration of the perennial "yes, but . . . ," can be a cause for serious unease among people of color wary of one more back seat ride. When, as is often the case, the "class" advocate is white and the "race" advocate is a person of

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being lost and needs defending. This tension over choice of emphasis is certainly occurring in this debate, but there is more.

223 Kennedy, *supra* note 23, at 1328.

224 *Id.* at 1337-39.

225 *Id.* at 1345-46.

226 *Id.* at 1345.

227 *Id.* at 1328.

color, the dynamic of distrust can be particularly potent.[228]

One thesis of this Article is that scholars stressing class as a central aspect of white supremacy should devote genuine and sustained attention to people of color and their relationships to whites and to the legal system. It is also crucial that civil rights scholars who focus on race as the key to white supremacy give attention to issues of class.

Given the class situation of most civil rights scholars, it will require special effort and investment to remind ourselves of the life situations and the legal perspectives of those who do not share our privilege. And we will, if we are watching, often catch ourselves displaying selective indifference or worse.[229] The task becomes even more difficult when we try consciously to think about race and class simultaneously. It is all too easy for any of us to make serious and distorting "errors of inclusion and exclusion" in these contexts.[230]

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228 For some sense of the complex dynamics of distrust as they can be played out across racial and doctrinal lines among the wounded and wounding selves of civil rights scholars, see Harlan Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 (1987) (discussing relations between Conference on Critical Legal Studies and minority participants).

229 Though seldom approaching the virulence of racism, our class attitudes are sometimes laden with more than simple selective indifference. As someone who has spent some (but not enough) time working with, for, and beside poor and working-class white Southerners, I felt as though I'd been slapped in the face when I reached the end of Robert Gordon's eloquent reply to Paul Carrington's repugnant attack on CLS, and found him signing off with: "I'm an old admirer of yours . . . . You have too much *class* to be consorting with the *rednecks* of our profession." Robert W. Gordon, *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1, 9 (1985) (emphasis added).

230 Class is not the only axis of difference that we suppress. For example, when we think of race, we may forget gender. Take the following passage, written by a person who has many insightful things to say about race, and ask yourself whether it is acceptable when you force the idea of *women* to the surface of the word "whites":

> *Whites* were trained to aggrandize themselves, to love and respect themselves, to have initiative, narcissism, sense of entitlement, and to master external realities. *Blacks* were trained to surrender and sacrifice themselves, to trust others, to be simple and forthright, to love and respect others, to accept persecution, to devalue themselves, to defeat themselves, and to seek direction from others.

Charles A. Pinderhughes, *Understanding Black Power: Processes and Proposals*, 125 AM. J. PSYCHIATRY 1552, 1554 (1969) (emphasis added). Pinderhughes's vision suppresses the reality of white women and of black men and women by omitting gender. It is simply not true that white women, *in relation* to white men, are taught a sense of mastery and entitlement, or taught to expect that the "other" will surrender, sacrifice, or take direction. Nor does this description of "blacks" provide much help in describing the relations between black women and men. In fact, we can easily imagine this passage as a feminist tract were we simply to substitute "Men" for "Whites" and "Women" for "Blacks."

But this insight, for all its power, backfires and shows the distortion of reality that a pure gender lens can produce when race and class are omitted from vision. Pinderhughes was speaking of *slave* society. As soon as we realize *that*, we suddenly see that gender labels would also fail to capture the truth. That formulation crumbles as

B. Affirmative Action: A Reprise

It is my conviction that civil rights scholarship must take both race and class, both white supremacy and capitalism, as serious and, at least presently, inextricable objects of study and action. Beyond the level of platitude, what might this mean?

I propose to return briefly to the area of doctrine where we began: affirmative action and its new star, the innocent victim. I believe the insights of all three models, the class domination model, the class legitimation model, and the race model, have light to shed on this subject. Together they may help us find our way toward a theory, model, or method that would properly recognize the power of, and the relationship between, race and class.

The class domination model, with its vision of racism as derivative and supportive of class domination,[231] would insist that one trying to understand the twists and turns of race remediation and affirmative action must look to underlying economic realities. I agree with that insistence. The current state of economic regimes and race law around the globe should disabuse us of the notion that any one set of economic relations or conditions necessarily entails one rigidly correspondent set of race relations. Nevertheless, the economic structure and the level of technology clearly limit possibilities, exert pressures, and define sticking points about race that are significant.

The wisdom of the class domination model presses certain questions upon us. Were there changes in United States national and regional economies in the 1950s that made segregation less profitable than before? Were those for whom segregation was most profitable declining in power and influence? Has America's entry into the ranks of declining capitalist economies had important effects on the availability of race remediation to people of color?[232] Is

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soon as we force the race and class aspects of "Black" and "Enslaved" to the surface of the category "Men," and similarly force "White plantation mistress" to the surface of the category "Women."

We must therefore recognize that the characteristics we associate with race or gender or class are complex and relational. The generalizations we often make along one axis (such as white-&-black, male-&-female, owner-&-worker) turn out to be, at best, over-simplified when we force the other axes into view. Bell Hooks has plowed important ground on this subject. *See, e.g.*, BELL HOOKS, FEMINIST THEORY FROM MARGIN TO CENTER (1984). Some white feminists are now also trying to address it. *See, e.g.*, E. SPELMAN, *supra* note 182. For some sense of the difficulties involved, *cf.* Bell Hooks, *The Politics of Radical Black Subjectivity*, Zeta Magazine, Vol. 2, No. 4, 52 at 55 (criticizing the work of "white feminist theoretical elites in the United States" for continuing to marginalize the work of women of color in the very effort to respond to and build upon their work).

231 *See supra* notes 132-44 and accompanying text.

232 Many civil rights scholars of varying stripes appear to believe that the decline of the economy is a factor. *See, e.g.*, Freeman, *Race and Class, supra* note 146, at 1895 (noting

racism profitable to powerful North American economic interests on a *global* (even if not a national) scale, and if so, has that affected the domestic struggle against white supremacy?

Civil rights scholars need to ask themselves these questions, to keep the door open to "non-legal" issues and projects, so that they may move more effectively toward workable answers. The questions remind us that the trend toward privatization in affirmative action cases, the trend toward seeing the heart of white supremacy as a conflict between two workers, leaves out too much of the picture to yield a just result.

The class models suggest that Joe[233] is indeed a victim though not an "innocent" one. They would see him as a victim in two senses. He is victimized first by the inequality and injustice of his relationships to those in power, by his lack of control over social decisions, by his economic dependency, and by his inequitably small share of social resources. He is victimized in a second sense when he is required to bear a disproportionate share (vis-a-vis more privileged whites) of the burdens and dislocations of race remediation.[234]

The class models recognize the victimization of the white worker disappointed by affirmative action. They do not, however, define his victimization in the way that most current affirmative action cases do. The aspiring black is not the real cause of the harm to the white worker, nor is the affirmative action disappointment the main inequity in the white worker's situation. The class model would press for affirmative action that recognized class inequities and that attempted to place more of the remedial burden on those with more of the power and resources to bear them.

The class legitimation model also draws our attention to other issues. It argnes that the security and stability of any legal regime depend largely on the consensus and acquiescence of the majority.

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the problem of a "stagnant or dwindling economy"); Jordan, *Foreword* in W. BEARDSLEE, *supra* note 18, at ix ("Today, the pie is shrinking, and we see an effort to push black people and poor people away from the table again.").

233 *See* party scenario, *supra* text following note 42.

234 Freeman decries the "evasion of remedial burdens by the rich, since American law sees no formal differences based on wealth," and notes that "a regime of formal equality will ensure that the dislocative impact [of race remediation] is disproportionately borne by lower-class whites (not to mention blacks, who are burdened either way)." Freeman, *Critical Review, supra* note 14, at 111. Milliken v. Bradley, 418 U.S. 717 (1974), symbolizes the refusal to visit such dislocation on affluent white suburbs while proceeding "apace" with respect to inner city neighborhoods. *See also* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982).

Freeman elaborates in another article: "American society (or some dominant portion of it) has committed itself (or did) to remedying its historical problem of race, but has made not even the pretense of such a commitment with respect to class. The disappointed white worker is a class victim." Freeman, *Race and Class, supra* note 146, at 1895.

It sees the slow-down in race remediation as a move to fend off destabilization of a deep American consensus around the notion of individual rights and formal equality. This may explain why race remediation moved forward as long as racial progress was linked to a call for formal equality. However, once Jim Crow was defeated and formal equality was achieved, the ideology of equal opportunity became a strait jacket on racial progress. It legitimated, rather than challenged, racial injustice.[235]

This insight suggests that civil rights scholars need to unearth and collectively scrutinize the elements of the deep consensus, to educate ourselves and others about its specific and contingent historical roots,[236] to point out its internal contradictions, to question its appropriateness for the questions and issues now confronting us and to imagine alternatives.

Such a project is not necessarily quixotic. The American consensus on formal equality is wide and deep in some ways, but it is also largely unexamined and fraught with contradictions. After all, many people accommodated the ethic of segregation for years without sensing an intolerable tension with ideals of formal equality. When massive citizen activism disturbed and questioned that ethic, things changed.

Americans share some important core ideas, but few of these ideas are immovable or inherently indissoluble. Together with our strong notions about formal equality, our common sense demands that equality mean something real.[237] More people need to see and

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235 In this instance, the ironies of formal equality for blacks find a striking parallel in the effects of formal equality for women in the "divorce revolution." Women fought for the formal equality so long denied to them in marriage laws, only to find themselves grossly disadvantaged by fanciful presumptions of equality and gender-blindness in a world where the earning power and financial needs of divorcing wives are in most instances grossly disproportionate to those of husbands.

236 Some current revivalist work on "republicanism" in our constitutional history goes far in this direction, recovering some sense of the openness and option that is our past and future. There are different ways to put democracy together with a constitution. We have tried a few of them in our time, have seriously considered many more, and still have only scratched the surface. Sadly, too many of us suffer from the American forgetting disease, so we lose the wisdom some of this experience might afford. *See, e.g.*, Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798 (1987); Paul Brest, *Further Beyond the Republican Revival: Toward a Radical Republicanism*, 97 YALE L.J. 1623 (1988); Frank Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985) (authored by William Michael Treanor). *See also* Bell & Bansal, *supra* note 185.

237 Of course, the idea that formal rights constrain and retard substantive justice predates the civil rights scholarship of our era. Max Weber articulated the tension quite clearly:

> Formal justice guarantees the maximum freedom for the interested parties to represent their formal legal interests. But because of the unequal

appreciate the tension between formal and substantive equality, and legal scholars can and should help them do so.[238]

The class legitimation model teaches that civil rights scholars who try to assimilate and accept formal equality unmodified will founder upon it. To accept or ignore class division and its ideological justifications at this juncture is to forfeit power to deal with race in a meaningful way. The affirmative action cases most painfully demonstrate this reality.

The teaching of the race model also has important bearing on affirmative action. One cannot realistically attempt to understand the "reverse discrimination" backlash without fully acknowledging whites' powerfully internalized and resistant racism. The race model pushes us to admit that many of the expectations of disappointed white "innocent victims" are deeply race-bound expectations. Many white people want and need (whether consciously or not) to feel *superior* to people of color.[239] Superiority is itself an im-

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> distribution of economic power, which the system of formal justice legalizes, this very freedom must time and again produce consequences which are contrary to . . . substantive postulates . . . . [F]ormal justice due to its necessarily abstract character, infringes upon the ideals of substantive justice.

2 MAX WEBER, ECONOMY AND SOCIETY 812, 813 (G. Roth & C. Witticks eds. 1978).

238 I suspect that some effort in this direction by certain scholars associated with Critical Legal Studies prompted the famous attack on "rights" that has been a source of recent controversy. Mark Tushnet described rights as part of "capitalism's culture" that progressive people should reject. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363 (1984). Duncan Kennedy called them "deeply anti-radical." Kennedy, *Antonio Gramsci*, *supra* note 149, at 37.

The promulgators of the critique of rights, however, failed to appreciate the transformed (or partially transformed) meaning of rights in late 20th-century America. They were soon reminded of it by some of those (particularly women and minorities) who had recently struggled to gain recognition of various legal rights. These people objected to the critics' characterization of all rights thinking as pacifying and limiting. They pointed with pride to gains, not simply in legal protections, but also in the sense of empowerment and collective strength, that had resulted for those who invented, fought for, and won new rights. They argued forcefully that those in struggle for rights were often keenly aware that rights were deeply political. *See, e.g.*, Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Williams, *supra* note 41; Williams, *supra* note 42. These widely-noted and often dazzling defenses of rights deserve direct acknowledgment from those who launched the critique, few of whom appear to embrace any longer (if they ever did) the hard one-dimensional position that so disturbed those who struggled over the rights of women and minorities. *See* Duncan Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUS. REL. L.J. 503, 506 (1981) ("We need to work at the slow transformation of rights rhetoric, at dereifying it, ratber than simply junking it."). Some responses have now appeared. *See* Morton Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988), Freeman, *Racism, Rights, supra* note 14.

Civil rights scholars do need to confront the underside of rights, the *Lochner*ian side, the form-over-substance side, the anti-redistributive side, if tbey seek a coherent approach to race and law. *See also* Crenshaw, *supra* note 130.

239 Perhaps analogous to the way that so many men need to feel superior to women as a part of their own internal sense of equilibrium.

portant source of felt well-being, a supportive ingredient in self-concept. The actual entitlement may be less significant than its ranking function.

I believe that many whites harbor and vent deep emotions of fear, revulsion and resentment at the notion of black liberation, of black destabilization of the status quo. I further believe that the force of this sentiment has made itself felt in the courts. White popular backlash alone cannot adequately explain the judicial retreat from race remediation and the shape of affirmative action doctrine, but it clearly tells part of the story. It is recognition of these realities and disgnst at the practical effects of reverse discrimination doctrine that likely prompted one civil rights scholar's call for total rejection of the notion of an "innocent victim."[240] In this view the term is rotten to the core. There is no such thing as an innocent white victim of affirmative action. There is no value in distinguishing among whites affected by affirmative action, nor in trying to determine whether some should bear more responsibility than others.[241]

This position misses the mark. One cannot deny deny the fact that in some ways, some disappointed whites are class victims. More importantly, one cannot deny the differing interests and responsibility of the white worker and the white employer. Nonetheless, race model insights remind us that white victims are likely to be at least partially complicit, rather than purely "innocent," and the victims are almost certainly the beneficiaries of discriminatory patterns, whether consciously so or not.

The race model also reminds us that racial oppression does differ from class oppression, and *does* harm its victims in particular and egregious ways. Blacks, therefore, assert with authority a special race-related, historically-rooted claim upon the American legal system. No affirmative action solution that asks blacks to wait until whites are "convinced," or to rely on the chance of rising passively with the rest of the bread, or to defer to racism in the interests of "class unity," will work. Such a solution would leave a racist substratum unconfronted, and thereby be crippled from the start.

Clearly, then, we must integrate insights of both the class and race models in the thorny area of affirmative action. I want to outline some directions for future work by civil rights scholars, suggested by the problems discussed, that illustrate how we might incorporate both models. I will begin with a brief outline of some

240 *See* Robert Belton, *Reflections on Affirmative Action After* Paradise *and* Johnson, 23 HARV. C.R.-C.L. L. REV. 115, 137 (1988) ("I suggest we . . . drop this notion of 'innocent victim.' It's a red herring.").

241 *Id.* ("I'm not so sure that the employer is any more responsible than individuals for what has happened.").

methodological questions, and then sketch several specific projects I would encourage scholars to pursue.

C. Methodology

Questions of methodology are currently in dispute among civil rights scholars. This dispute is part of the crossroads we currently face.

Traditionally, the bulk of civil rights scholarship has spun itself out in litigation and in the law journals, within the bounds of conventional doctrinal analysis. There is, of course, a virtual juggernaut of material concerning equal protection jurisprudence, "preferential treatment," and the ebb and flow (mostly ebb these days)[242] of evolving doctrine about the scope of actionable civil rights violations and remedies.

A number of scholars voice deep skepticism about continuing this conventional form of scholarship.[243] Their skepticism sometimes arises from a general disillusionment with the ability of law to *do* much for people of color, and sometimes from a sense that scholarship must move beyond the busy surface of doctrinal debate to reveal larger, deeper patterns. Derrick Bell observed:

> Legal analysis is inadequate to address these questions. Even a command of social science principles far beyond my ability would hardly suffice to provide the depth of vision necessary to compare the bleak landscape of America's race relations in 1984 with the expectations of imminent racial equality in 1954. In a setting so removed from that more optimistic time, it now seems appropriate to seek guidance in fiction, particularly that folk fiction so filled with symbolic meaning, the fairy tale.[244]

Bell's recent book bears the fuller fruit of this idea, using a series of

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242 Since this Article was written, the "ebb" has become a rip-tide. *See, e.g.*, Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989); Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989); Lorance v. AT&T, 109 S. Ct. 2261 (1989); Martin v. Wilks, 109 S. Ct. 2180 (1989); Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115 (1989); City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).

243 It is worth noting that the skepticism and experimentation extend not only to scholarship, but to pedagogy as well. *See, e.g.*, DERRICK BELL, 1989-90 MANUAL OF SUPPLEMENTS AND SUGGESTIONS FOR RACE, RACISM & AMERICAN LAW (1989); Gerald Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989); Kimberlé W. Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NATIONAL BLACK L.J. 1 (1989); Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988); *see also* Henry J. Richardson, *Black Law Professors and the Integrity of American Legal Education*, 4 BLACK LAW J. 495 (1974). In these pedagogical stretchings civil rights scholars again show kinship with feminist legal scholars. *See generally* Symposium, *Women in Legal Education: Pedagogy, Law, Theory, and Practice*, 38 J. LEGAL EDUC. Nos. 1 & 2 (1988).

244 Bell, *Fairy Tale*, *supra* note 27, at 334 (footnote omitted).

fantastic "chronicles" to explore the pain and possibility of civil rights law.[245] In his introduction he explains: "In order to appraise the contradictions and inconsistencies that pervade the all too real world of racial oppression, I have chosen in this book the tools not of reason but of unreason . . . . "[246] This methodology resulted in a book remarkably accessible to non-law-trained readers.

Several civil rights scholars associated with Critical Legal Studies also reject traditional forms of legal scholarship. Alan Freeman, for example, takes a stance that is quite disengaged from either litigation or traditional constitutional discourse:

> The purpose of the discussion is descriptive and explanatory, *not* prescriptive or normative. [This law journal] Article is not a doctrinal brief; no attempt will be made to reconcile new arguments with existing case law or find instances for optimism in the interstices of depressing Supreme Court opinions. . . . Those issues are simply irrelevant to an author seeking to observe and report on evolution of legal doctrine rather than to participate in its manipulation.[247]

Karl Klare, another CLS scholar who has written thoughtfully about race, also adopts a distinct perspective at some remove. Although he openly prescribes action for the labor and civil rights *movements*,[248] he distances himself from the immediate contests raging in the Supreme Court, and thus avoids submitting his ideas to the kind of pressure to persuade, even to flatter, that brief writers and law review authors often experience. Klare tries to take a longer view, to "explor[e] a series of parallels, convergences and connections between labor law and civil rights law."[249]

Scholars sometimes present this methodology not as a matter of personal preference, or of temporal tactics, but rather as the only tenable or principled response to the current situation. John Calmore quotes Mark Tushnet as follows: "Despite the cost in claims to influence on public policy, then, the post-nihilist legal scholar must stand apart from the legal system and must attempt to work with legal materials in some other way."[250]

Alan Freeman implies that any "claims to influence" asserted by those engaging in traditional doctrinal discourse are illusory, so there is no real cost in withdrawing from such activity:

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245 D. BELL, *supra* note 3.

246 *Id.* at 5.

247 Freeman, *supra* note 23, at 1050-51.

248 Klare, *supra* note 60, at 158.

249 *Id.* at 157.

250 Calmore, *supra* note 15, at 205 n.17 (citing Mark Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1345 (1979)).

> If I were content to stay within the structure of legal ideology and argument, I would write a brief in favor of the victim perspective as the appropriate form of judicial decision-making in racial-discrimination cases. But surely the law's refusal to incorporate the victim perspective has had little to do with either the logic or effectiveness of legal argument or the subjective wishes of the participants in the legal process.[251]

In some instances, this stepping back for perspective has allowed great leaps forward in understanding. Freeman's own article on antidiscrimination law is a case in point. On the other hand, this detached stance faces increasing criticism. The stratospheric level of some CLS discourse, with its arcane vocabulary, high level of abstraction, cool distance from concrete social or litigational problems, and refusal to suggest solutions, has faced methodological criticism from several sympathetic quarters. Patricia Williams, for example, spins a fable that ends with a haunting image:

> *At the bottom of the Deep Blue Sea, drowning mortals reached silently and desperately for drifting anchors dangling from short chains far, far overhead, which they thought were life-lines meant for them.* . . . CLS . . . has failed to make its words and un-words tangible, *reach*-able and applicable to those in this society who need its powerful assistance most.[252]

What are alternatives, or partners, to scholarship "far, far overhead"? One approach, of course, is business as usual. Plenty of cases and doctrinal arguments are published in reporters and law reviews every day, more than enough to keep scholars busy assimilating and commenting on them. A total renunciation of this system would impose costs. Moreover, thoughtful articles within this system, when informed by a desire to defeat racism, can and have been helpful: they may articulate certain themes running through a line

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251 Freeman, *Critical Review, supra* note 14, at 106. Both here and in *Legitimizing Race Discrimination, supra* note 23, Freeman poses a suggestive dichotomy between the "victim perspective" and the "perpetrator perspective," two radically opposing views of what white-supremacy is and how it should be remedied. Freeman argues that the victim perspective (which longs for results, wants remedies for unequal *conditions*, and for which group remediation seems perfectly natural) is the one the law should adopt, but that civil rights law over the past three decades has been the story of the uneven but eventual triumph of the perpetrator perspective (which wants to restrict remedies to identifiable victims of individually fault-laden acts of discrimination and whose goal is equal *opportunity*, not substantively equal conditions of life).

252 Williams, *supra* note 41, at 402, 403 (emphasis added). Of course, one must ask whether "those in society who need . . . assistance most" find *traditional* civil rights scholarship tangible, reachable and applicable. I doubt it. And I do not think that intelligibility to lay people, or even to the majority of trained readers, is a universal criterion for all scholarly work. It is *one* criterion, however, and an important one in some instances, especially if the work is supposed to be connected in some significant way with the lives of people in need.

of cases,[253] or contribute valuable insights about current debates,[254] or even directly address judges on the perils of judging about race.[255]

Generally, however, bolder steps are required. Life is short. Two recent articles[256] epitomize another approach. They both do things that Alan Freeman repudiated; that is, they stay within the structure of legal ideology and argument, and essentially argue for actual judicial implementation of the victim perspective as the appropriate form of judicial decision-making in race-discrimination cases;[257] they seek to pry open space for women and people of color from "the interstices of depressing Supreme Court opinions."[258] Yet both of these articles do something deep and strong enough to be worth the cost.

In *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*,[259] Charles Lawrence undertakes the task of working within the disastrous rule of *Washington v. Davis*.[260] He proposes to create a new "test" for discriminatory intent in equal protection cases, a test that would recognize *unconscious* racism as the functional equivalent of discriminatory intent. In the course of spinning out how such a test would work, he also presents a helpful short-course on the psychology of racism.

Lawrence takes pains to argue that his approach is in harmony with existing equal protection theories, and attempts a precise demonstration of how his proposed "cultural meaning test" for unconscious racism would work in specific cases. Despite the traditional form of the discussion, however, Lawrence asks the reader to examine material powerfully opposed to the crippled and blindered notion of intentional discrimination that now effectively impedes much meaningful racial remediation. Lawrence's article signifies infusion of racial consciousness-raising into traditional legal scholarly debate.

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253 *See, e.g.*, Sullivan, *supra* note 61, at 78 (tracing talk of fault and innocence in the Supreme Court affirmative active decision of the 1986 term, and suggesting problems with the Court's approach).

254 *See, e.g.*, Paul Brest, *Affirmative Action and the Constitution: Three Theories*, 72 IOWA L. REV. 281 (1987) (pointing out the irony that an originalist interpretation of equal protection doctrine would be fully supportive of affirmative action for blacks).

255 *See, e.g.*, Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) and Frank Michelman, *The Meanings of Legal Equality*, 3 HARV. BLACKLETTER J. 24 (1986).

256 Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Lawrence, *supra* note 36.

257 *See supra* text accompanying note 247.

258 Freeman, *supra* note 23, at 1051.

259 *See* Lawrence, *supra* note 36.

260 426 U.S. 229 (1976). This case holds that practices that have a disparate impact on blacks are nonetheless immune to constitutional challenge on equal protection grounds unless *intentional* discrimination can be proven.

Direct participation in constitutional conversations can be important. The Senate Judiciary Committee hearings on the nomination of Robert Bork to the Supreme Court were only one particularly strong illustration of the notion that when Americans fight out important questions about the good life and about public and private morality, we often do so on the stage of constitutional law.[261]

Alan Freeman himself has noted that "civil rights law serves as much more than 'just law.' It serves also as the evolving statement of dominant moral consciousness . . . ."[262] Lawrence observes that blacks have a special interest in such public conversations, because the "and other historically stigmatized and excluded groups have no small stake in the promotion of an explicitly normative debate."[263] On the other hand, Lawrence is not naive about the likelihood that his argument will sweep today's Supreme Court off its feet: "I do not anticipate that either the Supreme Court or the academic establishment will rush to embrace and incorporate the approach this article proposes . . . . Rather, it is my hope that the preliminary thoughts expressed in the preceding pages will stimulate others to think about racism in a new way . . . ."[264]

I agree with Lawrence that even properly steely-eyed survivors of the civil rights struggle, fully aware of the absorbing, legitimizing and profoundly resistant powers of the law, *should* sometimes contribute actual proposals to the doctrinal conversation, that they should not always "stand aside."[265] Alternative doctrinal formulations can be liberating, can remind us, sometimes groggy from the blows of the Reagan and now post-Reagan eras, that other possibilities exist. However, it takes some daring and imagination to pose a counter-doctrine that does more than nibble at the edges of distress.

Ruth Colker's article is also within the genre of powerful alternatives.[266] Like Professor Lawrence, Professor Colker enters the standard equal protection arena and has her say, even though for feminists as well as for civil rights scholars the ironies and limits of

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261 *See generally* Horwitz, *supra* note 9. *See also* Morton Horwitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 U. PITT. L. REV. 655 (1989).

262 Freeman, *Critical Review*, *supra* note 14, at 96-97.

263 Lawrence, *supra* note 36, at 386.

264 *Id.* at 387.

265 *See supra* note 238 and accompanying text. Of course, when one *defends* oneself or one's client in litigation, the consequences of boycotting the discourse are stiff. Mari Matsuda makes this point by observing that it made good, paradoxical sense for Angela Davis to tell her jury, "your government lies, but *your* law is above such lies." Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, II WOMEN'S RTS. L. REP. 7 (1989) (emphasis in original).

266 *See supra* note 256 and accompanying text.

equality-focused struggle have become too obvious to ignore.[267] She advocates replacing the dominant interpretation of anti-discrimination principle (an interpretation she calls the "anti-differentiation") with a different animating rationale for equal protection activity, the "anti-subordination principle":

> [C]ourts should analyze equal protection cases from an anti-subordination perspective. Under the anti-subordination perspective, it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole. This approach seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities.[268]

Colker's redefinition of the harm to be avoided by equal protection parallels Randall Kennedy's insight. In an article published in the same year as Colker's, Kennedy observed:

> In the forties, fifties and early sixties, against the backdrop of laws that used racial distinctions to exclude Negroes from opportunities available to white citizens, it seemed that racial subjugation could be overcome by mandating the application of race-blind law. In retrospect, however, it appears that the concept of race-blindness was simply a proxy for the fundamental demand that racial *subjugation* be eradicated. This demand, which matured over time in the face of myriad sorts of opposition, focused upon the *condition* of racial subjugation . . . . *Brown* and its progeny do not stand for the abstract principle that governmental distinctions based on race are unconstitutional. Rather, [they] stand for the proposition that the Constitution prohibits any arrangements imposing racial *subjugation*—whether such arrangements are ostensibly race-neutral or even ostensibly race-blind.
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> This interpretation . . . articulates a principle of anti-subjugation rather than anti-discrimination . . . .[269]

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267 For a small sample of the vigorous feminist debate on equality, see, e.g., Lucinda Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Herma Hill Kay, *Models of Equality*, 1985 U. OF ILL. L. REV. 39; Christine Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043 (1987); Christine Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987); Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518 (1986); Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RIGHTS L. REP. 175 (1984); Wendy Williams, *Equality's Riddle*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-85).

268 Colker, *supra* note 256, at 1007 (footnotes omitted).

269 Kennedy, *supra* note 23, at 1335-36 (footnotes omitted) (emphasis added). Colker also echoes MacKinnon's earlier formulation that the proper test should be "whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status." CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 117 (1979). *See also* Roy Brooks, *supra* note 192.

These two articulations are more than word play or whistling Dixie. They offer a welcome and lucid formulation that can radically help to correct the amnesiac world view underlying most notions of "reverse discrimination." They are simple and direct enough to help any woman in the street who finds herself in a yelling match over affirmative action.[270] They attempt to revive and launch the battered "victim perspective" unabashedly into the heart of equal protection discourse. One need not believe that the equal protection clause should remain so dominant in the work of civil rights scholars to believe that dramatic recastings like this are healthy for the public debate.

Having said all this, however, I nonetheless believe it is vital that much civil rights scholarship depart from traditional litigation-bound discourse. This departure might adopt the methodology of CLS's celestial levitation above the realities of recent court decisions. Important work has already been done in that mode and should continue.

This departure might also take the form of burrowing underground. What if legal scholars began, not with the stars, but with the roots? Mari Matsuda suggests several ways to take a productive part in civil rights scholarship by adopting an "expanded method of inquiry, akin to feminist consciousness-raising,"[271] and by consciously looking "to the bottom" for guidance and renewal.[272] In particular, Matsuda proposes the approaches outlined below.

First, civil rights scholars should follow and support the actual organizing struggles of people "on the bottom," discussing and learning from them, and trying to function as "theoretical co-conspirators."[273] Second, civil rights scholars should engage in consciousness-raising about race and class.[274] For Matsuda this would

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270 I would maintain that this is not at all a frivolous litmus for testing the helpfulness of alternative doctrine. To the contrary, it may be the most important one.

271 Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 331 (1987). She explains: "Consciousness-raising in the feminist context is the collective discussion and consideration of the concrete, felt experience of gender in order to identify commonalities and build a theory of the cause, effect and means of eradication of sexist oppression." *Id.* at 359.

272 *Id.* at 332. *See also* Muhammed Kenyatta, *Critical Footnotes to Parker's "Constitutional Theory"*, 2 HARV. BLACKLETTER J. 49, 52 (1985) (calling for civil rights scholars to "recapture our earlier and better humility . . . which sought to learn about participation from the communities of the disenfranchised.").

273 Matsuda, *supra* note 271, at 348.

274 *Id.* at 359-60. Matsuda, unfortunately, did not elaborate on this point. One powerful genius of consciousness-raising as developed by the feminist movement is that it is rooted in each one's own experiences. Matsuda's remarks sound as if she thinks scholars need only look to those (others) on the bottom, and learn about *them*. I doubt it. What consciousness-raising about privilege means for those with relatively more privilege may be a difficult question, but certainly the process cannot be restricted to learning about or empathizing with others. *See* McIntosh, *supra* note 167. For an article that

apparently mean listening to "voices from the bottom" as a source of information, intuition, and normative vision.[275]

Scholars involved in such a project must make strenuous efforts to insure that their theory is informed by contemporary minority writers and by works from the legal and non-legal "alternative intellectual tradition"[276] of people of color. This effort would require "conscious alteration of the typical research path . . ."[277] and recognition that the "choice of sources is political."[278]

Regina Austin suggests another method of "burrowing down" for theory.[279] In a speech to minority female civil rights scholars she urged them to focus on the concrete legal problems of minority women, to enter the world of the particular, to examine closely the material conditions and the economic and political status of real women of color. She gives as examples two projects of her own. These projects focused on industrial insurance ("the rip-off life insurance with the small face amounts that were purchased by my mother and grandmother")[280] and the problem of "excess death" in majority communities.[281] Austin admits that the problems these projects address are difficult because they "do not begin with a case and will not necessarily end with a new rule,"[282] and because they will often require interdisciplinary work in order to ensure a reliable empirical base.[283]

However, Austin is convinced the project is worth the difficulties: "It is imperative that we portray, almost construct for our legal audience, the contemporary reality of the disparate groups of minority women about whom we write."[284] The image is concrete and

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takes a close "consciousness-raising" look at law from the perspective of a person of color, see Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989).

275 Clearly, automatic "Answers" will not be forthcoming, since the voices from the bottom will be many and often in conflict.

276 Matsuda, *supra* note 271, at 331.

277 *Id.* at 343. Matsuda has since elaborated on this theme. Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988).

278 *Id.* at 344.

279 *See* Austin, Sapphire Bound!, *supra* note 40.

280 *Id.* at 7.

281 *Id.*

282 *Id.*

283 Since this Article was written, Professor Austin has followed her own advice in an exemplary article that looks at a concrete set of issues that particularly affect women and people of color in low-income jobs. *See* Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988).

284 Austin, Sapphire Bound!, *supra* note 40, at 7. Austin's statement bears comparison with similar statements by white women scholars seeking to define feminist legal projects. Professor West, for example, urges us to "tell true stories of women's lives," and "flood the market with our own stories until we get one simple point across: Their story is not our story." Robin West, *Masculine Jurisprudence* 69-70. *See also* Peggy Davis & Richard Dudley, *The Black Family in Modern Slavery*, 4 HARV. BLACKLETTER J. 9 (1987).

particular. The lawyer's role is both to serve the people and to find the voices of the silent.[285] I find Austin's challenge powerful. We should embrace this burrowing and digging in the reality of people's lives.[286]

I suggest that there truly is no one project, no one voice, to which civil rights scholars should conform. But despite and because of diverse methodologies, choosing and maintaining our loyalties will be of utmost importance and not always so easy.

D. Projects for Civil Rights Scholars

Civil rights scholars can play a part in helping to "realign the parties" in the affirmative action debate. Their efforts must maintain the kind of attention to race and to class described above. The projects set forth below may provide fruitful avenues for criticizing and overcoming the privatization, misalignments and exclusions of today's affirmative action practice and doctrine.

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285 The voice of the silent might be one's own. Several scholars have made daring contributions by telling their *own* stories, or consciously using their own experiences to judge legal doctrine. Derrick Bell, in AND WE ARE NOT SAVED, *supra* note 3, uses a semi-autobiographical narrator. His article *The Price and Pain of Racial Perspective, supra* note 40, opened to public view an incident he experienced at Stanford Law School. (It appears at present that by taking the risk of self-exposure Bell was able to turn a painful and subjectively degrading experience into an opportunity for Stanford's institutional growth. This particular story, therefore, has a happy ending. *See* Bell, Memorandum, *supra* note 40. Patricia Williams's articles, *supra* note 41, *On Being Invisible*, 4 HARV. BLACKLETTER J. 16 (1987), *On Being the Object of Property*, 14 SIGNS 5 (1988) and *Spirit-Murdering the Messenger*, 42 U. MIAMI L. REV. 127 (1987) gain power through the author's sharing of her own experiences. Lawrence's *Unconscious Racism, supra* note 36, also uses personal narrative in instructive ways. *See also* Freeman, *Racism, Rights, supra* note 146.

Feminist contributions in this mode include Robin West's breathtaking article, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987). Christine Littleton argues, in the context of feminist work:

> [S]ome of the sharing and analysis that occurs within consciousness-raising groups might be carried on in dialogue within the journals. The risk of looking "too different" from traditional legal periodicals may explain much of the absence of the personal voice, but such risks must oftimes be run lest we legitimize the dehumanizing tone of the distance, impersonality and "objectivity" so prized by the male establishment.

Christine Littleton, *In Search of a Feminist Jurisprudence*, 10 HARV. WOMEN'S L. REV. 1, 4 n.15 (1987).

286 Richard Delgado's article, *Words that Wound, supra* note 180, exemplifies scholarship that roots itself in particular experiences endured by people of color and attempts to "surface" those experiences and suggest ways the law could respond to them. In the field of feminist legal scholarship, Frances Olsen does a wonderful job of interjecting and honoring female lives in the midst of fairly traditional constitutional analysis. Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984) (retrieving the experience of the underage rape victim; demanding that she be recognized not only as a target of assault, but also as an autonomous person with sexual desires; urging a statutory scheme aimed at *empowerment* rather than "protection").

1. *Modest and Immodest Proposals for Greater Worker Control of the Work Place*

Proposals designed to increase worker control of the work place should be coupled with thorough critiques of the limited value of the "management-prerogative defense" of voluntary affirmative action programs. They should scrutinize the misuse of affirmative action as a tool to undermine collective worker strength and employee autonomy.[287] It is not racist or sexist for white male workers to observe that affirmative action often serves as an additional weapon in management's arsenal of control over labor. Anyone familiar with Bell's "interest-convergence dilemma"[288] should hardly be surprised to see those in power use whatever pieces wash up on the industrial relations shore to fashion tools to enhance their control.

In *W.R. Grace & Co v. Local Union 759*,[289] the Supreme Court's opinion is laden with hints of how creative management can turn affirmative action to its advantage. The facts recited in the opinion suggest that such a process might go as follows:

** Employer refuses to hire blacks and women for many years. Suit is brought on behalf of the excluded.
** Labor dispute arises and white male workers go out on strike.
** During strike first women are hired—as scabs.
** Company rushes to file conciliation agreement with EEOC that conflicts with labor contract.
** Strike ends, strikers return to work, and now male incumbents and female scabs must fight over job slots and seniority, with the union no doubt seriously weakened as a result.

We need affirmative action schemes that are less susceptible to such abuse by management. We also need jobs and job security for the previously excluded.

2. *Comparisons of Worker Protection and "White Skin Protection"*

There is a startling difference in the way our courts typically treat white/male job security threatened by affirmative action claimants and the way they treat that job security when it is threatened by corporate investment decisions. Scholars need to investigate this difference. The vulnerability of American workers to plant closings is a public scandal.[290] The court's solicitous concern about the

287 For people of color to be put in a position where their welfare depends upon the anti-racist *discretion* and management prerogatives of private corporations deprives them of security. It also exerts a force on the minority person to look to the "bosses" for aid rather than to the strength of those united by common interests.

288 *See supra* notes 25-28 and accompanying text.

289 461 U.S. 757 (1983).

290 For a closely-reasoned account of how our law could be improved in this regard without doing conceptual violence to existing norms, see Joseph Singer, *The Reliance*

workers' "firmly rooted expectation[s]"[291] and action that might "disrupt seriously [their] lives"[292] in the affirmative action context, compared to its apparent lack of concern when the threat is not a racial or sexual one (*e.g.*, veteran's preference, informal admission networks, remediation for unfair labor practices, plant closings and other investment decisions of absentee corporations) has prompted Derrick Bell to remark that courts increasingly recognize a "property interest in whiteness."[293] It appears all too likely that courts will protect certain bundles of rights against *racial* challenge, will preserve the white person's racially privileged environment, even if the very same bundles of rights are entirely vulnerable to almost any other threat.[294]

This differential treatment only highlights and reinforces the fact that corporate policies and practices, not the unemployed person of color, pose the more serious threat to the job security of the American white worker. Perhaps our scholarship could prove this more clearly.

3. *Creative Proposals for Burden Sharing*

In many cases the ultimate choice between an affirmative action claimant and a white and/or male incumbent need not be resolved solely between the two of them, nor must the "winner" take all. Job sharing[295] and enhanced unemployment benefits present alternatives to unfair lay-offs. Also, front pay may be advanced to one who must temporarily forgo promotion in order to allow race and gender integration of previously white/male jobs.[296]

Ensuring proper inclusion of all relevant victims and perpetrators is essential. Excluded minorities need a voice in decisional processes. Employers should be held presumptively responsible for

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Interest in Property, 40 STAN. L. REV. 611 (1988). The developing literature on plant closings is voluminous and interdisciplinary. *See, e.g.*, GILDA HAAS, PLANT CLOSINGS: MYTHS, REALITIES AND RESPONSES (1985) and BUREAU OF NATIONAL AFFAIRS, PLANT CLOSINGS: THE COMPLETE RESOURCE GUIDE (1988).

291 Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 638 (1987). *See supra* text accompanying notes 93-122.

292 United States v. Paradise, 480 U.S. 149, 189 (1987) (Powell, J., concurring).

293 Bell, *supra* note 175, at 12.

294 *See id.*

295 Mothers (who in most cases remain the primary caretakers of children whether or not both parents work) and children (who are drastically affected by the entry of mothers into the paid work place and the failure of most fathers, employers, and "society" to make up for the withdrawal of unpaid motherly labor from the home) have additional reasons for welcoming a non-gender-bound loosening of job boundaries, and a more employee centered ethic at the work place.

296 *See supra* note 91. A recent note explores some possibilities in this realm, without "presum[ing] to resolve the public debate concerning the legitimacy of preferential remedies." Note, *Compensating Victims of Preferential Employment Discrimination Remedies*, 98 YALE L.J. 1479, 1480 (authored by J. Hoult Verkerke) (1989).

all or part of the burden of unequal conditions. Employers' attempts, in a concessionist climate, to force workers to redistribute burdens entirely among themselves are illegitimate without a similar commitment on their own part.

4. *Continued Defense of Affirmative Action*

Without continuing pressure, historically white institutions in America keep sliding back to white. Affirmative action has only the weakest and most ambivalent of blessings from the Supreme Court, whose members have divided along a confusing series of almost inexplicable lines in the past and now appear to be increasingly hostile to any but the most limited forms of individual relief.[297] Justice Scalia was venomous in his first contribution to the dialogue,[298] and continues to be a powerful opponent of affirmative action.[299] Despite the rising hostility of the Court toward group remediation, de-

297 *See supra* note 242.

298 Justice Scalia dissented in Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 657 (1987), making several novel suggestions, among them the proposition that women and minorities are now the "favored groups" in society, *id.* at 674; that those who believe women have been kept out of traditionally male jobs suffer from a thoroughly laughable and delusional fantasy that women are "eager to shoulder pick and shovel," *id.* at 668; that affirmative action is a "powerful engine of racism and sexism" abroad in the land, riding roughshod over a bunch of poor white male victims, *id.* at 677; and that the Court should overrule United Steelworkers v. Weber, 443 U.S. 193 (1979), discussed *supra* notes 125-27 and accompanying text. *Johnson*, 480 U.S. at 670, 673. I have parodied one or two of these suggestions, but only mildly.

The most disturbing thing about this dissent, however, is not the amazing tenor of the propositions just noted, but the fact that it arrives draped in a populist flag. Scalia first makes the unusual assertion that the majority's opinion is defective because it reflects class bias. According to Justice Scalia, the rule in *Johnson* (which allows a desire for gender diversity to be one factor considered by an employer in a promotion decision as long as all candidates under consideration are qualified), does not pose much of a threat to "those in the upper strata of society," because (listen carefully) there are so few female or minority candidates who are even *minimally* qualified for those upper strata jobs! *Id.* at 675. Scalia observes that this (apparently self-evident) dearth of minority and female talent in the higher echelons allows the high and mighty to be cavalier about the burdens others are being asked to shoulder.

Justice Scalia's next move in the populist mode is to identify people like the white male blue collar incumbent, "the Johnsons of the country," as class victims of a hypocritically bleeding heart Court: "The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent." *Id.* at 677.

No one who has long watched the politics of white supremacy will doubt that the Johnsons of this country are vulnerable to such talk, and would be likely to applaud it. Hopefully the work of civil rights scholars will help to make clear for "the Johnsons" that women and blacks seeking access to previously all-male and all-white jobs are not the source of the most significant problems white male workers face. I suspect Justice Scalia will not find it easy, once out of the affirmative action arena, to style himself as an unalloyed friend of the working man.

299 *See, e.g.*, his remarks in City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 735 (1989).

spite affirmative action's other problems, civil rights scholars need to defend affirmative action against opposition.[300]

The most important work on affirmative action may take place in the trenches of each work place and institution. Legal scholars, for instance, must continue to work for greater diversity "at home" on university faculties. But we must be ready to defend affirmative action from attack in other institutions as well.

5. *Increased Attention to Problems of the Non-white Underclass*

Although we must defend affirmative action, we must also recognize the increasingly obvious fact that it is unlikely to help members of the black underclass significantly in the near future. As a legal strategy, affirmative action primarily benefits the relatively privileged sections of the black population, and does little for the poor. Therefore, a civil rights scholar who is "remembering class" will learn from the affirmative action debate that she must avoid being completely consumed in that struggle. She must probe and remember and articulate the problems of the poor as well.

Identifying and addressing the most pressing problems of the black poor are daunting tasks, clearly beyond the scope of this Article. The discussion above has touched on some possible approaches.[301] Of course, many elements of that discussion also apply to the interests and problems of the white poor. These elements should be explored. Also, some investigation of the particular problems of race *as they affect people of color at the bottom of the class structure* is in order. Problems of race affect people differently depending on their class position.

6. *The Problem of Dependence on Authority*

The last scholarly project I propose requires civil rights scholars to examine the tactics, strategies, doctrines, and institutional reforms that make us, our clients, or our constituencies dependent on some form of authority (this authority is usually the state, but in the affirmative action context it may be an employer or union) to administer and defend our welfare after the reform battle is won. Scholars need to investigate the ugly shape of victories that harden into bureaucratic nightmares and the frustrating shapelessness of victories that melt into unmonitored lassitude.[302] Too often mechanisms

300 *See* Kennedy, *supra* note 23; Lawrence, *supra* note 40.

301 *See supra* notes 242-86 and accompanying text. *See also* Austin, *supra* note 283.

302 For example, many War on Poverty programs became "part of the problem," though they were instituted largely in response to popular pressure for reform. The National Labor Relations Board now contains conflict more than it promotes the interests of workers. The present dramatic strike of the United Mine Workers of America against the Pittston Coal Co. has been unfolding like a morality play on the basis and

that people fight to establish will ossify and turn back on them, encouraging or even enforcing passivity and non-disruptive styles of responding to problems.[303]

Of course, as lawyers we are in the thick of this dilemma. A lawsuit is itself a paradigm of conflict management. The institutionalized form, the need for expert assistance, the individualization of claims, the delay and delay and delay, the elaborate ritual, the scalpel of "relevance," the limited remedies, all work to channel our behavior and mold our perceptions of possibilities. We "do what we can," we flow like water down a hill, seeking the path of least resistance, a tiny hole in the rock. Like those Justices on the Supreme Court who wish to preserve affirmative action and who adopt the language of management prerogative as one of the few potentially successful approaches, we often find ourselves pulled along, making arguments we would rather not make. But, after all, we must do something.[304] Furthermore, in pleading a case, or seeking a reform, we quite naturally look to those in power because they seem to be the ones who can act on it.[305]

Outside litigation this relationship with authority is still at work. Legal scholars often direct their articles, perhaps indirectly, toward figures in authority. This stance in turn impresses itself upon the ideas that are then articulated. The posture molds the message.

Affirmative action is a program won largely through popular pressure and then put into the hands of the authorities: the government and private employers. These institutions hire affirmative action officers, create bureaucracies, and explore the possibilities of using the program as a means to other ends. Very soon this "victory" becomes another part of an alienated structure that controls and even exploits the people it was intended to help.[306]

Regina Austin voices the haunting desire to "consider using the law to create and sustain institutions and structures that will belong to minority women long after the movement has become quiescent

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inadequacy of present day labor law. The outcome is still uncertain and may prove of great consequence to the future of organized labor and the meaning of the National Labor Relations Act. *See* UMWA, *Betraying the Trust: The Pittston Company's Drive to Break Appalachia's Coalfield Communities* (newsletter) (1989).

303 *See* Karl E. Klare, *The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978).

304 Lawrence, *supra* note 36, is, in part, a work in this genre.

305 Elizabeth Fox-Genovese grapples with some of these issues, although she reaches no clear conclusion, pointing out that reliance on the state is often necessary, for example, in the case of domestic violence. Elizabeth Fox-Genovese, *Women's Rights, Affirmative Action, and the Myth of Individualism*, 54 GEO. WASH. L. REV. 338 (1986).

306 Mark Tushnet explores another example of victory followed by increased passivity in a discussion of abortion "rights" and the rises and falls of pro-choice activity. Mark Tushnet, Rights: An Essay in Informal Political Theory (unpublished text of three lectures on file at Cornell Law Review).

and the agitation has died."[307] I understand her fears and yearnings, but I think she longs for the impossible. It is *only* the presence of movement that keeps institutions in the hands of the people who create them.

Still, are some institutions more difficult to "lose" than others? Can we incorporate safeguards that will somehow make it easier for us to "keep" them? Could we have a worker-controlled affirmative action program with enough teeth to advance women and minorities without eventually turning the machinery over to the authorities? These are important questions. I hope some people will explore them.

CONCLUSION

This Article is a plea for civil rights scholars to commit themselves to dealing simultaneously and interrelatedly with race and class. After positing two imaginary and no doubt simplistic "models" that might help to explain white supremacy in America, the "race model" and the "class model,"[308] I conclude that neither will suffice. Rather, the inadequacies of each demonstrate the importance of race *and* class to a full understanding of white supremacy and to a viable plan for overcoming it. (I also suggest, rather unevenly, that a third axis must be somehow kept in mind and in work as well, the axis of gender.) The purpose of my effort is to see what light a race-and-class perspective might shed on civil rights law, particularly on contemporary affirmative action doctrine, and to suggest approaches and paths that civil rights scholars might pursue with the aid of this light.)

The investigation began with the observation that we are in a time of pain and distress at our inability to end white supremacy or even to make life significantly better for the masses of black people who still suffer dreadful deprivations and indignities, despite the victories of the civil rights era. The task of the civil rights movement now is to press on, to criticize and attack the class/race system that oppresses the majority of the people in our society, black and white.

The necessity for this progression is plain from the history of the civil rights movement. The frustrations the movement has encountered in its effort to win real improvements for the masses of black people ("we didn't come all this way for no two seats")[309] have

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307 Austin, Sapphire Bound!, *supra* note 40, at 10.

308 I posit these models and also go on to quote current legal scholars partially and loosely as representing what one or the other model might sound like in action. Many of the people quoted would quite likely refuse to embrace either model if actually offered the choice.

309 *See supra* note 212 and accompanying text.

been caused by the limits of our racial and economic system. The need to attack that system is therefore no rhetorical flourish, no leftist flight of fancy, but simply a cold fact.[310]

A number of civil rights scholars have indicated that this is indeed the conclusion they draw from the history of the civil rights movement. One, after despairing that "group-based" remedies for people of color will be able to survive, concludes:

> [T]he future of meaningful equality may depend upon the willingness of the society to voluntarily alter its organization so as to guarantee to all persons the satisfaction of needs deemed basic to a meaningful existence. . . . We must decide whether the costs of equality will be borne by citizens privately or whether these costs will be socialized through increased governmental guarantees of basic needs.[311]

Another says:

> [T]he question I would like to pose is whether it is possible to eliminate racial inequality without attacking general inequality. I submit that the civil rights mentality assumes that you can. I submit further that the assumption is incorrect. . . .
>
> What I am suggesting is that, rather than seeking ways to resuscitate the civil rights agenda, maybe it is time to move beyond civil rights toward a human rights agenda that is far richer and addresses much deeper issues.[312]

An approach that would move "beyond civil rights toward a human rights agenda,"[313] beyond a struggle for minority rights and toward a multiracial struggle for guarantees of basic human needs, faces many obstacles. Two of the greatest obstacles are anti-communism and white racism.

White racism has proved its staying power, its ability to thwart coalitions and to breed distrust. Throughout American history blacks have been repeatedly on the front lines and on the move; very seldom have they rejected white allies. Whites are the ones who have blindly failed to see that common cause was possible, and that racial justice helps them too. Although Jesse Jackson's victories in the North and the South were impressive and heartening, the number of white people voting for him remained disappointing. Devising political and legal strategies that will build unity without pandering to white racism presents a sharp dilemma.

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310 By the same token, efforts to change class hierarchies have repeatedly foundered on the rock of racial division and suffered from the failure to deal successfully with that division on a practical or theoretical level. The need to attack racism is no nationalist flight of fancy, but another cold fact.

311 Greene, *supra* note 197, at 753.

312 Darity, *supra* note 198, at 978, 979.

313 *Id.* at 979.

Anti-communism, too, has survived the test of time. In the United States, this ideology retains tremendous power both on the right and on the left. It constricts our ability to imagine on a broad scale, to dream deep and big (isn't there something about a big deep dream that is totalitarian?), to know or grasp intelligently the history of past efforts for change. Furthermore, it distorts the way we talk together.

Anti-communism particularly affects the civil rights movement. The fear that the movement's program would be vulnerable to attack from the right as somehow communist or communist-inspired, and the frequent efforts to head off any such attacks by preemptive disavowals and self-censorship have seriously inhibited the movement.[314] All progressive movements for social change in the United States have been buffeted and weakened by these winds.

I believe civil rights scholars and civil rights activists alike should try to break out of this pattern. We should refuse to allow the fear of red-baiting to distort our program, our discourse, our sources, or our positions. This process must involve deep and well-informed criticisms of socialism as it exists and must include a concentrated effort to understand the varying dynamics of totalitarianism. Part of the process must also be a public rejection of much of the anti-communist canon and a corresponding insistence that possibilities and policies be looked at afresh, on their own merits, and without the bipolar, us-them, all-left-ideas-are-dangerous, distorting lens of anti-communism. Anti-communism can be destructive, first,

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314 Derrick Bell, with characteristic courage, does not leave this stone unturned. *See* D. BELL, *supra* note 3. The "Curia sisters," who have prodded, educated, challenged and implored the heroine Geneva throughout the narrative, warn her fearfully near the end:

> "[B]eware lest your people's enemies construe your desire to change the structure of government as some form of subversion—a risk that, in the past, civil rights organizations have taken pains to avoid."
>
> "I have not forgotten," Geneva said, and her voice rang out to the farthest corner of the Great Hall, "but this is no time to become conservative or to draw back from controversy. We must commit ourselves to salvation for all through means that are peaceful and ethical. And," she added, "let me warn those critics who would brand us as advocates of revolution. If our efforts fail, we are likely to be replaced by actual, and active, subversives who will earn the apprehensions undeservedly aimed at us."

Id. at 256.

This passage bears the scars of precisely the struggle I am talking about. Who are these "*un*peaceful," "*un*ethical," "actual active subversives"? What is the difference between a "revolution" and a "change [in] the structure of government"? What additional steps might "the critics" encourage you to take in order to prove conclusively your loyalty to maintaining your difference from the subversives? What might such steps cost you? These are not idle questions.

The passage also, however, expresses hope and courage for the future. It announces that it is time to press on, to keep looking with our own eyes and hearts, to stop allowing ourselves to be molded and limited by threats, spoken and unspoken.

as an instrument of repression against progressive movements that are beginning to achieve results, and, second, as an internal fetter that interferes with our own ability to see, understand, and move effectively.

If we can surmount the obstacles I describe, the possibilities are tremendous. Is it silly even to hope? Can anything but phantoms rise from the ashes of our expectations? Can we stir these greying coals to new life? Professor Bell, in the concluding pages of his book, asks us to hope, though in his view it may be more the hope of unreason than of reason. Through an alchemy born of faith and also, mysteriously, of experience, Geneva Crenshaw, the fictional seer and heroine of Bell's book, announces the vision of a "Third Way," a way that will be neither withdrawal through emigration to a separate black state, nor the way of "truly disruptive, even violent, struggle."[315] The Third Way will come through "peaceful and ethical" means, accepting "existing legal and legislative structures" while working to change them.[316]

Almost everything about this proposal is unsettled, including its ultimate outcome, about which the author is profoundly agnostic. One thing is clear, however. The Third Way springs from the notion that the struggle must be one of transcendence and of "justice for all."[317] In this sense, the final chapter of Bell's book is a call for the joining of race and class.

The heroine announces that she will undertake "a systematic campaign of attacking poverty as well as racial discrimination. . . ."[318] Because the book's final passages present such a challenge to all who would try to struggle on in this tradition, I will close with a quotation from Professor Bell's Geneva, describing her vision of the Third Way. I am certain that there are more than three ways, and that many more visions and formulations lie ahead. I find it tremendously hopeful and helpful, however, that Bell is searching for a fusion of race and class, and that he fights his way toward understanding, rededication and hope, rather than toward the cynicism, despair and passivity that I believe to be the great danger of our times. Geneva announces to the assembly:

> "I am now convinced that the goal of a just society for all is morally correct, strategically necessary, and tactically sound. The barriers we face, though high, are not insuperable, and the powers that brought me these Chronicles are no greater than the forces available to you—and within you. Use them to the fullest in the

315 *Id.* at 255.
316 *Id.*
317 *Id.* at 254.
318 *Id.*

difficult times that lie ahead. And be of good cheer . . . . We know that life is to be lived, and not always simply enjoyed; that, in struggle, there is joy as well as pain . . . [W]e find courage in the knowledge that we are not the oppressors and that we have committed our lives to fighting the oppression of ourselves as well as of others . . . .

"Let us, then, rejoice in the memory of the 'many thousands gone,' those men and women before us who have brought us this far along the way. Let us be worthy of their courage and endurance, as of our own hopes, our own efforts. And, finally, let us take up their legacy of faith and carry it forward into the future for the sake not alone of ourselves and our children but of all human beings of whatever race or color or creed."[319]

319 *Id.* at 256-57.