Michigan Law Review

Volume 90 | Issue 6

1992

Whose World and How?

Milner S. Ball
University of Georgia

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*Milner S. Ball**

RETHINKING THE AMERICAN RACE PROBLEM. By *Roy L. Brooks.* Berkeley: University of California Press. 1990. Pp. xiv, 256. Cloth, $24.95; paper, $13.

I. THE RACE PROBLEM IN AMERICA

The 1893 World's Columbian Exposition in Chicago marked the four-hundredth anniversary of Columbus' "discovery" of America. Its designers intended the Exposition to provide instruction in human evolutionary advancement; the pedagogical exhibits along the midway were arranged chronologically, from grass huts and half-naked savages to the beginnings of modern civilization in a Teutonic village. Then came, across a bridge, the triumphant White City. The progression formed, as William McFeely recently observed, "an all-too-powerful metaphor of the dominance of white people over those of color."[1]

Frederick Douglass accepted appointment as commissioner of Haiti's pavilion at the Exposition. He and Ida Wells distributed to visitors a pamphlet describing the fair as a "whited sepulcher."[2] They sought to counter the white racial triumphalism by drawing attention to black Americans' accomplishments and to their continuing oppression. To advance the cause, Douglass planned a grand occasion in August — Colored People's Day at the fair. He would give a speech on the subject of "The Race Problem in America," to be followed by brilliant young performers including the poet Paul Laurence Dunbar, and the musicians Will Marion Cook and Joseph Douglass, Frederick's grandson.[3]

When the day arrived, however, Exposition vendors mockingly offered watermelons for sale, and, as Douglass began his address, white hecklers at the rear of the crowd interrupted him. The aged campaigner faltered. His hand shook. But then he summoned strength, cast aside his papers, stood down the catcalls, and took command of the audience with his great voice:

> "Men talk of the Negro problem," Douglass roared. "There is no Negro problem. The problem is whether the American people have loy-

* Caldwell Professor of Constitutional Law, University of Georgia. A.B. 1958, Princeton; S.T.B. 1961, Harvard; J.D. 1971, University of Georgia. — Ed.

1. WILLIAM S. MCFEELY, FREDERICK DOUGLASS 368 (1991). I have followed McFeely's account of the Chicago fair.

2. *Id.* at 369.

3. *Id.* at 371.

> alty enough, honor enough, patriotism enough, to live up to their own Constitution." On he went for an hour: "We Negroes love our country. We fought for it. We ask only that we be treated as well as those who fought against it."[4]

The speech cleared a space for the young performers. They and he redeemed the day. The rich accomplishments of black Americans were celebrated.

But the plight of black Americans in a nation plagued by lynchings remained unchanged. "The land in which Douglass now spoke his mind was not the one he had worked so hard to achieve. . . . The Chicago fair was a world gone sour."[5]

II. A Way of Thinking About the Race Problem

One hundred years later, the five-hundredth anniversary of Columbus' "discovery" is upon us, and America is different. Lynchings have ceased (Justice Clarence Thomas' description of his confirmation hearings to the contrary notwithstanding). Troops have returned from another war in which African Americans not only fought but also commanded. Instead of touting a supposed evolution toward white supremacy, "discovery" celebrations this time around have been forced to acknowledge both the minority status of whites in the world and the remarkable contributions of people of color, including those who discovered this continent and welcomed Europeans when they came.

Even so, the nation has not yet proved able finally to shake off white supremacy in either its blatant or its subtle, scarcely conscious forms. "The Race Problem in America" endures. Professor Roy Brooks[6] has sought "to bring some creative energy" to rethinking it (p. 171). Abundant creative energy is as necessary for a twentieth-century liberal like Brooks as it was for a nineteenth-century liberal like Douglass. There is as much tension now as then, for, with accomplishment by African Americans rising, oppression of them does not correspondingly recede.

On the Chicago occasion, Douglass spoke of Americans' failure to live up to *"their"* Constitution and of Negroes' loving *"our"* country. In another speech delivered much earlier in his career, the famous "What to the Slave is the Fourth of July?" Douglass had noted to his white audience: "This Fourth [of] July is *yours,* not *mine.*"[7] Douglass

4. *Id.*

5. *Id.* at 371-72.

6. Professor of Law, University of Minnesota.

7. Frederick Douglass, Oration Delivered in Corinthian Hall, Rochester, July 5th, 1852, *reprinted in* 2 The Frederick Douglass Papers 359, 368 (John W. Blassingame ed., 1982). Douglass had a keen sense for discrepancy. He agreed to give the speech only when it was moved from July 4 to July 5. His participation in the Chicago Exposition may have been rendered symbolically more tolerable for him because it was held in 1893 instead of 1892.

did as much as any individual to make "your" freedom encompass "our" freedom and to make "their" Constitution embrace the originally omitted right of equal protection,[8] but to the end of Douglass' long life "their" Constitution, country, and freedom remained unequally separated from "ours" — loved, fought for, and enriched though "ours" had been by "us."

The discrepancies and tensions continue. Professor Brooks' response to them follows the Douglass pattern. On "their" side, he would have the majority live up to their Constitution; on "our" side, he would highlight black accomplishment and put it to use within the black community. He makes fresh entries on both sides. On the one, he calls for constitutional and statutory law more responsive to the diverse needs of different African-American classes. On the other, he advocates self-help: African-American middle-class families should help African-American families in the working and poverty classes.

III. "THEIR" LAW: THE MIDDLE AND WORKING CLASSES

Current civil rights policies, says Brooks, are conceptually sound but so operationally flawed that they do not produce equal opportunity for the races and in fact "accommodate, prolong, and intensify intra-class racial disparity" (p. 5). He proposes that policy and law be reformed to take into account the economic status of the purported beneficiaries.

Brooks divides African Americans into three economically determined classes: middle class, working class, and poverty class. He includes the upper class (over $75,000 annual income) within the middle class ($25,000 to $75,000) because there are so few African Americans in the former category. The working class is above and the poverty class below the $10,000 divide. The three classes contain roughly equal percentages of the total African-American population (p. 38).

Within each of the classes, African Americans confront race-based obstacles that whites within the same class do not face. Brooks sees this as the configuration of the race problem, and he argues that solutions of it must be class-responsive. What works in one class may be inappropriate or even inimical to another: while integration is appropriate in the middle and working classes, only a careful form of limited separatism can help poor African-American families. Brooks recommends revised civil rights law at the upper end of the class scale and economic reform at the lower.

For example, application of the strict scrutiny test in equal protection litigation works against middle-class African Americans because it commands race neutrality "at the *wrong time.* Except in a very lim-

8. *See* Milner S. Ball, *Stories of Origin and Constitutional Possibilities,* 87 MICH. L. REV. 2280, 2282-85, 2293-94 (1989).

ited situation, it enjoins the public sector's use of race-conscious employment policies or practices that would promote racial inclusion" and makes "it extremely difficult for a public employer to voluntarily use racial classifications for the purposes of assisting qualified African Americans in catching up with their white counterparts" (p. 53). Suits brought under Title VII of the Civil Rights Act of 1964 are difficult to pursue and more difficult to win because of judicial interpretation that "may even encourage would-be discriminators."[9]

Although African Americans in the working class suffer no less employment discrimination than those in the middle class (so that beneficial changes in employment discrimination law would aid them as well), Brooks focuses instead on their need for housing and education. For example, claims of constitutionally impermissible exclusion of minorities from housing and educational possibilities have been rendered nugatory by the requirement that the actions be shown to be racially discriminatory in intent.[10] Moreover, the Fair Housing Act "for years conveyed to would-be discriminators and segregationists in words and deeds that the federal government was not terribly interested in opposing housing discrimination or segregation."[11]

Because the American race problem in the middle and working classes is exacerbated in these instances by the way civil rights law is implemented, Brooks advocates operational reform: "[F]ederal decision makers and policy makers [should] give greater attention and weight to the societal objective of formal equal opportunity — racial inclusion" (p. 152). The government's conceptual end is fine; the means must be more appropriately tailored to it.

Accordingly, to promote the interest of the African-American middle class, "[t]he government must simply cure certain defects in Title VII antidiscrimination law and in racial preference, or affirmative action, law."[12] For the working class, the government must un-

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9. P. 64. Brooks explains:

> Required only to produce evidence probative of a legitimate, nondiscriminatory reason for disparate treatment and protected by the but-for or substantial-factor standard, as well as by the unitary litigation model and the preponderance of evidence standard in mixed-motive cases, an employer has a real opportunity to discriminate — whether the motivation is racism or some perceived economic benefit — and to get away with lying about it.

P. 64. It remains to be seen to what degree or whether the Civil Rights Act of 1991, enacted after Brooks wrote, will have rendered Title VII more effective for civil rights plaintiffs.

10. *See, e.g.*, p. 96 (citing Milliken v. Bradley, 418 U.S. 717 (1974) (education)); p. 84 (citing, inter alia, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (land use)).

11. P. 92. *See* pp. 90-92 (criticizing poor structure and administration of Act, exemptions for certain discriminators, and impotent sanctions).

12. P. 153. *See* pp. 153-57 (proposing five changes: (1) shifting the burden of persuasion to the defendant; (2) replacing the substantial-factor standard with the taint standard in disparate treatment cases; (3) adopting the bifurcated litigation model (separating liability and remedy) over the unitary model in mixed-motive cases; (4) employing the clear and convincing evidence standard rather than preponderance of evidence standard in mixed-motive cases; and (5) applying antidiscrimination requirements to high-level enforcement).

dertake more detailed changes. For example, Title VII remedies must be made more accessible to working class laborers through the creation of a new agency empowered to sue on behalf of individuals (p. 157). Another new agency should be created to enforce antidiscrimination housing law (p. 159). Equal protection litigation in housing and education should be rendered more viable by replacing the discriminatory intent test with an effects test (pp. 158, 160-61). And "a frontal assault on the strict scrutiny test" should be mounted with a view to having the Supreme Court adopt in its place the test employed in Title VII litigation, which allows "voluntary racial preference programs as long as the programs are designed to promote racial inclusion and do not 'unnecessarily trammel the interests' of the group disadvantaged by the racial classification."[13]

IV. "OUR" COMMUNITY: THE POVERTY CLASS

African Americans in the poverty class, like those in the other classes, suffer from discrimination in employment, housing, and education. But they must bear additional burdens peculiar to the class. As middle- and working-class African Americans have been drawn out of previously segregated communities, the poor have been left behind. Racial integration thus "helps to open a cultural and economic abyss in communities already suffering from the lingering effects of slavery and Jim Crow, creating an underworld of dysfunction and self-destruction into which millions of African Americans have fallen" (p. 14).

For these millions, adjustments of civil rights law will have little moment. Brooks therefore proposes two additional, massive responses: an employment opportunities program, and a program of household support of poverty-class African-American families by middle-class African-American families.

The employment program would be initiated by the government. It would not guarantee jobs but would offer job training and transitional income support. Tax incentives would help create private sector jobs. "Employers would be involved in job training and perhaps in transportation to workplaces. Child care services could involve local schools, churches, employers, parents, or governmental assistance" (p. 21).

Because the government is unlikely to undertake such measures, and because he believes "that racial separation can be helpful" to the African-American poverty class (p. 125), Brooks concludes that the African-American community will have to help itself through middle-class involvement with the poverty class. "[W]hite Americans can and must continue to offer assistance to African American households and

13. P. 163 (quoting United Steelworkers v. Weber, 443 U.S. 193, 208 (1979)).

institutions in whatever way feasible," but "members of the African American middle class are likely to be the most effective and the most desirable guides for working-class and poor African American households" because they "possess certain unique skills and knowledge from how to deal with a racist boss or co-worker to how to tap into the African American ethos for strength and perseverance" (p. 20). Brooks believes

> [m]iddle-class African Americans must attempt to redirect the dysfunctional and self-defeating mores afflicting those who form the underclass subculture. They must do so by teaching not only mainstream American behaviors, values, and attitudes (including the work ethic) but also survival techniques for African Americans coping with a racist society. . . . [T]hese skills can be taught only on a long-term, one-to-one, "adopt a family" basis. [p. 21]

The teachable skills would include successful living in American society, finding and using available community resources, and coping with racist colleagues and institutions (p. 133). Teaching and student families could be matched formally through traditional institutions like churches or informally through extended family connections (pp. 134-35). The tutoring would impart a central psychological lesson: "You have the right to be angry about centuries of racial exploitation as well as present-day racism and racial discrimination. But you do not have the right to dwell on that anger, to feel guilty about these matters, to suffer low self-esteem, or to react in other self-destructive ways" (pp. 143-44). The chief outcome to be hoped for would be a new sense among poverty-class African Americans "that sacrifice, perseverance, the church, and an understanding of 'the system' connect in a way that informs a unique worldview — a distinct African American perspective" which "acknowledges that life is especially hard and unfair for African Americans," but also "asserts that they always find the strength to pull through. African American culture thus becomes a point of racial pride and a rallying cry all in one" (p. 146).

V. Expectation

Professor Brooks writes with verve. He is winsomely, affectingly committed to strategic resolution of the race problem and to specific, immediate reforms that can make life better now for individuals desperately pinched by racism and poverty. That is reason enough to read his book. His proposals are marked by hope and readiness for action. His two points of primary focus — that economic circumstances of African Americans must be contextually reckoned with, and that African-American self-help is communally necessary and possible — are well taken. The book should also help provoke whites to reassess their own role in the past and future of the race problem.

Rethinking the American Race Problem has been accurately described as an "example of thoughtful liberal analysis" familiar to read-

ers of law reviews.[14] It exhibits characteristics that have brought liberalism under attack by African-American scholars from both the right and the left.

For example, Brooks accepts the existing civil rights apparatus and proposes reforming it to serve rather than frustrate the interests of middle-class African Americans. But are not the institutions of civil rights, as he also points out, an important source of the problem? Would not his civil reform efforts constitute further entrenchment of the system? Who would benefit from new civil rights agencies? Would not adjusted standards of judicial review be additional litter along the winding trail of interpretive delay and disappointment? Would not a frontal assault on strict scrutiny, like most other frontal assaults, produce carnage but no real gains? Whom is Brooks addressing, with what prospects and provisions at hand, when he says "the federal courts must reallocate the burden of persuasion . . . and change the substantive standard of causation" in certain Title VII cases; "must adopt a different litigation model" in other cases; "and must end their reluctance to apply antidiscrimination law to high-level positions" (p. 18)?

Similarly, Brooks accepts "the existing direction of our society" and so proposes that economic remedies for the plight of working-class African Americans "must not attempt to effect a fundamental social transformation" and "must recognize the limited role that government plays . . ." (p. 15). But does not the existing direction of our society lead in a circle around the race problem? Who will most benefit from training for jobs that it is hoped can be cajoled from industries? And what is entailed when Brooks says "government must . . . create a special support system for African Americans . . ." (p. 14)? Compare his own earlier advice that

> serious thought must be given to the possibility that all the government's clatter about civil rights and equal rights and racial equality is nothing more than a bill of goods — a running promise of forty acres and a mule — sold to our anxiously hopeful and unsuspecting kith and kin and that what the government ultimately means by "civil rights" is that African Americans must fend for themselves. [pp. 2-3]

Brooks is of two minds. He realizes how little the civil rights apparatus is designed to do for black Americans in comparison to how

14. Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race*, 91 COLUM. L. REV. 1547, 1547 n.1 (1991) (book review). Professor Delgado notes that such classic-liberal writing,

> highly normative and rights-based in nature but cautiously incremental in scope and ambition, criticizes Supreme Court opinions, decries our recent inattention to the plight of women and persons of color, and urges a renewed commitment to racial justice. It accepts the dominant paradigm of civil rights scholarship and activism, and urges that we work harder — litigate more furiously, press for new legislation, exhort each other more fervently than ever before — within that paradigm.

Id. at 1547-48 (footnotes omitted).

much it yields for white Americans' self-estimation of their own good intentions. Nevertheless he counsels that "African Americans must continue to knock on the door; they must continue to demand legal and economic assistance from the government" (p. 2).

Continuing to play the game has its attractions, primary among them the scarcity of real alternatives. What are the other possibilities? The suggestion from the right — from Stephen Carter[15] and Shelby Steele,[16] for example — is individual achievement: forget the condescending aid and beat them at their own game. The suggestion from the left — from Derrick Bell[17] and Patricia Williams,[18] for example — is community transfiguration of the universe of possibilities: bring in a new game.[19] The first alternative is fine for the modern Chicago prodigy Michael Jordan and the few others who will grow deservedly rich, but little else is likely to trickle down from it. The second alternative holds promise, but the conditions for its realization are not yet generally or immediately present. So Professor Richard Delgado comes to the bleak conclusion that "in the short run liberalism will continue to decline, and nothing coherent will replace it, while conditions for blacks and other people of color will worsen. Race, our most enduring problem, is likely to remain, for now, as intractable as ever."[20]

African Americans of the middle, the right, and the left must still contend with the Douglass dilemma: how to be "me" and "us," given "them" and "their" city. Brooks regards his book's most important message to be "that a new form of self-help offers the best hope for improving socio-economic conditions among African Americans" (p. xiv). Distinctive African-American culture "as a point of racial pride and a rallying cry" (p. 146) may indeed be the best hope for solution of the race problem, so long as its celebration does more than equip people for accommodation to the White City. Certainly there is a remarkable, substantial tradition of creative as well as resistant mutual help within the African-American community.

In Brooks' estimation, however, self-help must work together with governmental remedies. Is the appropriate complement to African-American self-help an adjusted civil rights policy dependent upon the benevolence of the established powers? Or might the just complement be some new departure in the white community, something unsenti-

15. *See* STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991).

16. *See* SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1990).

17. *See* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

18. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR (1991) (reviewed in this issue by Professor Robin L. West — Ed.).

19. *See* Milner S. Ball, *The Legal Academy and Minority Scholars,* 103 HARV. L. REV. 1855 (1990).

20. Delgado, *supra* note 14, at 1560.

mental and unromantic like obedience to righteousness together with a capacity for listening and understanding? The reality of miracle has been established in the recent politics of other nations. Miracle is not foreclosed from the future of relations between races in this one. We may choose to act as though, by the six-hundredth anniversary of Columbus' transatlantic voyage, "our" freedom will have been created together with, rather than over or against, "theirs."