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Affirmative Action After Grutter: Reflections on a Tortured Death, Imagining a Humanity-Affirming Reincarnation

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Affirmative Action After *Grutter*: Reflections on a Tortured Death, Imagining a Humanity-Affirming Reincarnation

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> Affirmative action is part of a human dream, one that we venture to call universal. All human beings want good, useful, decent lives for themselves and their children.... There is joy in deciding to take on the whole world as home, treating every path as sacred, treating every person as deserving respect and care, taking less so that all the children are fed, needing less so that your soul can sleep in peace.
>
> Charles R. Lawrence and Mari J. Matsuda[1]

I. INTRODUCTION

Though the moribund state of affirmative action law fueled racial remedies scholarship for the past ten years or more,[2] the Supreme Court's decision in the *Grutter* case this past summer breathed a bit of stale life into the ailing affirmative action movement. Professor Michael Higginbotham's hypothetical closing argument in the *Grutter* and *Gratz* cases provides a succinct and straightforward articulation of what indeed appears to have been the most viable

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1. Charles R. Lawrence & Mari J. Matsuda, We Won't Go Back: Making the Case for Affirmative Action 8 (1997).

2. Indeed, in a previous article, I discussed the waning support for affirmative action and the link between that phenomenon and the rise in calls for reparations. *See* Rhonda V. Magee, Note, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 Va. L. Rev. 863 (1993) (decrying the backlash against affirmative action as indicative of a prevailing, if largely unconscious, white supremacist world view). *See also* Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. Rev. 429, 429–32 (1998) (setting the stage for an argument encouraging the reconsideration of reparations as a "critical legalism" by stating that "[a]ffirmative action for Black Americans as a form of remediation for perpetuation of past injustice is almost dead.").

argument in support of affirmative action.[3] Tightly focused on the diversity rationale which the Supreme Court's opinions ultimately endorsed,[4] Professor Higginbotham's argument seeks to situate the challenged programs comfortably within the cramped spaces left open begrudgingly by prevailing interpretations of the applicable Constitutional law.[5]

But insofar as he succeeds in fitting his argument within the contours of prevailing law, Professor Higginbotham demonstrates beautifully the law's limits, irrationalities, and near fatal lack of transformative potential. Thus, while articulating the pro-affirmative action argument with the greatest appeal to the Court's moderate center, Professor Higginbotham's argument, like the Supreme Court doctrine upon which it depends, sets aside affirmative action's main practical effect and most pressing aboriginal objectives—redressing discrimination and segregation by increasing opportunities for marginalized groups—as tangential.

In the following few pages, I argue that the standard "diversity" rationale for affirmative action, though of obvious appeal, is not a remedial or corrective justice-based rationale, and hence, fails to address the central concerns of traditionally disadvantaged groups. Indeed, the diversity rationale exemplifies the imposition of a largely exogenous—though admittedly often compatible and generally beneficial—objective upon the legal agenda of traditionally

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3. Gratz v. Bollinger, 123 S. Ct. 2411 (2003); Grutter v. Bollinger, 123 S. Ct. 2325 (2003); Michael Higginbotham & Kathleen Bergin, *Why the University of Michigan Should Win in* Grutter *and* Gratz , 63 La. L. Rev. 697 (2003).

4. *See, e.g.*, *Grutter*, 123 S. Ct. at 2339 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19, 98 S. Ct. 2733, 2762–63 (1978):

> Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."

Gratz, 123 S. Ct. at 2415:

> Because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted interest in diversity, the policy violates the Equal Protection Clause. For the reasons set forth in *Grutter* v. *Bollinger*, *aute*, at 123 S. Ct 2338–41, the Court has today rejected petitioners' argument that diversity cannot constitute a compelling state interest. However, the Court finds that the University's current policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve educational diversity.

5. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S. Ct. 2097 (1995) (overruling Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 110 S. Ct. 2997 (1990)); Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706 (1989); Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000).

marginalized groups. To better reflect the insight of those groups, and to better approximate just results, the justifications for affirmative action must be revised and broadened.

In Section II, I argue that the most compelling justifications for affirmative action-remedying the effects of segregation, discrimination, and related past and present forms of systemic subordination which have undermined educational and other opportunities for traditionally oppressed groups—have curiously received little support from the courts.[6] These discarded justifications not only lend much—needed moral force to the arguments in favor of affirmative action but, if employed, would strengthen the claims to legitimacy of a justice system with a history of supporting racial oppression. I then briefly suggest, in Section III, a new way of thinking about what I believe is the larger project at the root of affirmative action—the continuing Reconstruction of post-slavery America. I call upon advocates of reform and Reconstruction to work toward forging a new, deeper commitment to the remedial goals of affirmative action as a preliminary step toward (1) embracing a jurisprudence focused on the essential human dignity interests which make our tradition of racialist thought and policy so repugnant, a legal philosophy based on what I have called "humanity consciousness," and (2) articulating a broad agenda of reformist policies and programs consistent therewith.[7]

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6. *See, e.g.*, Samuel Issacharoff, *Law and Misdirection in the Debate Over Affirmative Action*, 2002 U. Chi. Legal F. 11, 23, 34–35, 41–43 (noting the original remedial justification for affirmative action; arguing that the "miscast reliance on diversity" forecloses proper inquiry into the link between affirmative action and "historic redress or societal obligation for integration;" and arguing for a return to viewing the equal protection clause as embodying "a commitment to the legacies of group-based discrimination"); Charles R. Lawrence, III, Essay, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 Colum. L. Rev. 928, 964–68 (2001) [hereinafter "Two Views"] (arguing for "transformative politics," aimed at raising the consciousness of the "privileged" supporters of affirmative action regarding the need to go beyond arguing in favor of diversity to pursue a "more radical vision of equality"); Charles R. Lawrence, Symposium, *In Honor of Professor Trina Grillo: Legal Education For A Diverse World: Article: Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. Rev. 757, 764–74 (1997) (arguing that the diversity rationale for affirmative action must be grounded in the interest in undermining racism, or else is "substanceless").

7. *See* Rhonda V. Magee Andrews, *infra* note 33, at 489, 544-46 (describing "humanity consciousness" as a normative and cognitive framework that centers awareness on our common humanity and the dignitary imperatives implicit therein with distinct jurisprudential implications). *Compare* Lawrence, Two Views, *supra* note 6 at 965–66 (calling for an approach which aims to raise the consciousness of those privileged by systems of subordination as to the "profound costs associated with inequality" and "requires looking beyond winning or losing the particular legal dispute or political battle and asking how one's actions serve to reinforce people's awareness of our interdependence and mutual responsibility as members of the

II. SETTING ASIDE DIVERSITY: RECLAIMING THE JUSTIFICATIONS FOR AFFIRMATIVE ACTION ROOTED IN TRADITIONAL REMEDIAL THEORY AND NOTIONS OF CORRECTIVE JUSTICE

The rationale most widely embraced for the use of affirmative action in education, and the one upon which Professor Higginbotham's arguments consequently and almost necessarily rest, is the goal of ensuring diverse educational environments.[8] The University of Michigan's affirmative action programs should be validated, the argument runs, because they amount to legitimate efforts to maintain the kind of diverse classrooms which redound to the benefit of all the students, including those entitled to be there based on "merit" alone.[9] This was, of course, the rationale endorsed most strongly in Justice O'Connor's opinion in *Grutter,* upholding the affirmative action program at Michigan Law School.[10]

It is important to keep in mind, however, that the closing thoughts argued by Professor Higginbotham's hypothetical lawyers on Michigan's behalf might have been shaped differently, or rather, quite a bit more radically. For example, instead of essentially conceding their legitimacy as indicia of merit in the admissions process, Michigan's lawyers might have mounted a strong challenge to the criteria upon which the "merit" argument is based—the SAT, LSAT and GPA—pointing out their inherent biases and questionable claims to legitimacy.[11] Or, they might have developed a stronger case for the use of affirmative action to remedy past and present discrimination at the University of Michigan, which could no doubt have been factually established.[12]

Higginbotham's hypothetical lawyers eschew those and other more radically transformative arguments in favor of one with perhaps the most plausible chance of garnering the Supreme Court's backing, one that would not impugn the reputation of the University of

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human family").

8. Higginbotham & Bergin, *supra* note 3, at 698-99.

9. *Id.* at 698.

10. Grutter v. Bollinger, 123 S. Ct. 2325, 2345 (2003).

11. *See, e.g.,* Brief for Respondents Kimberley James, et al at 3–5, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (No. 02–241).

12. *See, e.g.,* Brief for Leadership Conference on Civil Rights as Amici Curiae, *Grutter*, 123 S. Ct. 2325; Brief on Behalf of a committee of concerned Black Graduates of ABA Accredited Law Schools: Vicky L. Beasley, et al. as Amici Curiae at 10–11, *Grutter*, 123 S. Ct. 2325; Brief for American Sociological Association, et al. as Amici Curiae at 288, *Grutter*, 123 S. Ct. 2325; Brief for Black Women's Law Association of Greater Chicago as Amici Curiae at 26–27, Grutter, 123 S. Ct. 2325. Brief for Amherst College, et al. as Amici Curiae at 9, 11, *Grutter*, 123 S. Ct. 2325.

Michigan regarding any past and present race discrimination, and the one least threatening to the status quo.[13] The argument is nearly exclusively focused on the diversity rationale, with only tangential references to the goals of integration, desegregation, and improving educational opportunity for students from disadvantaged groups.[14] Pragmatically, this makes sense; after all, the University of Michigan had itself focused expertly on the diversity rationale in presenting its case for affirmative action.[15] And the most viable precedent—Justice Powell's opinion in *Bakke*—identified the First Amendment interests underlying a University's interest in a diverse class of students as an important and compelling governmental interest, the only such interest among the many proffered in support of the affirmative action programs at issue there.[16] Thus, the framing of the case around the diversity justification naturally illustrates a sound legal strategy.

Nevertheless, resting the argument for affirmative action solely on the First Amendment-based diversity rationale is not without its troubling implications and consequences. Among the most compelling critiques of the diversity rationale from the perspective of a progressive race theorist have been those asserted by Professor Charles Lawrence.[17] Professor Lawrence argues that the courts have endorsed a "shallow" notion of diversity—one which does not explicitly concern itself with the use of diversity to dismantle the legacies of slavery and segregation, namely, internalized and institutionalized racism and the systemic miseducation of Blacks, Mexicans, Native Americans and others traditionally subjected to discrimination and still suffering from its effects.[18] Indeed, Professor Lawrence contends that a shallow notion of diversity serves the interests of the status quo better than those of the traditionally disadvantaged.[19] He insists, as did Justice Marshall in the early days of the Civil Rights movement, that integration and remedying continuing societal discrimination must be among the legitimate

13. *See* Lawrence, Two Views, *supra* note 7, at 940.

14. Higginbotham & Bergin *supra* note 3, at 699-700.

15. *See, e.g., Grutter*, 123 S. Ct. at 2339–40 (summarizing the University of Michigan Law School's argument, and supporting briefs from Michigans amici); Gratz v. Bollinger, 123 S. Ct. 2411, 2420 (2003). *See also* Brief for Respondents University of Michigan at 2329–33, 36, 38, 39, *Grutter,* 123 S. Ct. 2325 (No. 02-241); Brief for Respondents University of Michigan at 2414, 20, 25, 31, 39, *Gratz,* 123 S. Ct. 2411 (No. 02-516); Brief for Respondents Kimberley James, et al. at 19, 28–30, 49, *Grutter,* 123 S. Ct. 2325 (No. 02-241).

16. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312–13, 16, 98 S. Ct. 2733, 2759–62 (1978).

17. *See, e.g.,* Lawrence, Two Views, *supra* note 6.

18. *Id.* at 951–52.

19. *Id.* at 946.

justifications for an affirmative action program.[20] He insists that the courts adopt a view of affirmative action's justification that is not just forward-looking, but backward-looking too.[21] In other words, Professor Lawrence continues to press for a view that justifies affirmative action as a remedial tool.[22]

I agree with Professor Lawrence. For several reasons, it makes sound jurisprudential sense to base the argument for affirmative action on a remedial theory, a theory of corrective justice, rather than on a notion of diversity based on a utilitarian, distributive justice theory of the overall educational good. The plain fact is that affirmative action would be neither necessary nor acceptable were it not for the history and ongoing operation of racism in the United States, for so long explicitly sanctioned by law. As many scholars have pointed out, the courts have wrongly rejected the relevance of this history.[23] Indeed, while the courts have rejected these remedial justifications, many of society's traditional outsiders, and their advocates within the legal academy, have not.[24] Many of the

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20. Indeed, in the *Bakke* opinion, not only Justice Marshall, but three other Justices—Brennan, White and Blackmun—voted to uphold the use of affirmative action, including quota systems, "to remedy disadvantages cast on minorities by past racial prejudice." *Bakke,* 438 U.S. at 325, 98 S. Ct. at 2766 (joint opinion of Brennan, White, Marshall and Blackmun, J.J., concurring in judgment in part and dissenting in part) (cited in Grutter v. Bollinger, 123 S. Ct. 2325, 2328 (2003)). *See also* Issacharoff, *supra* note 6, at 23:

> The early rationale for affirmative action, whether in the initial Philadelphia Plan formulation or in its academic counterparts, was clearly integrationist. Society was taking responsibility for minorities' past subordination .... No one seriously claimed that the prime benefit would come from the improvement of the internal life of the affected institutions .... Diversity, as articulated by Justice Powell in Bakke, poorly captures this integrationist spirit.

21. Lawrence, Two Views, *supra* note 6, at 952–53.

22. *Id.* at 941, 946, 954 (discussing the liberal justification of affirmative action as premised upon acceptance of the policies as tools for the betterment of the privileged (typically white) class); *id.* at 951–52 ("The original vision of affirmative action proceeded from the perspective of the subordinated . . . ." who "sought *redress* for their communities.") (emphasis added).

23. *See, e.g.,* Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 Stan. L. Rev. 1 (1991); Isacharoff, *supra* note 6.

24. *See, e.g.,* "Excerpts from the Affirmative Action Town Hall," 5 A. C. S. News, Summer 2003, at 6–7. (quoting Professor Charles Ogletree as stating, "those who oppose affirmative action are opposing a very modest and conservative remedy for centuries of racial oppression" and "[a]ffirmative action is the most conservative, the most modest, the most minuscule response to a horrific history that we've had. And it hasn't stopped. If you think I'm lying, ask Amadou Diallo. If you think I'm lying, ask Abner Luima . . . ." and, quoting Robin Lenhardt, Georgetown fellow and former clerk to U.S. Supreme Court Justice Stephen Breyer, as stating, "[i]f there is an adverse decision in the Michigan cases, what we will see is the resegregation of institutions of higher education. I don't mean one or two.

staunchest advocates of racial justice have merely "gone along with" the near-exclusive focus on diversity; after all, Constitutionally, they have been left with no other choice. They have acquiesced in the "diversity movement" as the only Constitutionally acceptable means of furthering a remedially-motivated integrationist agenda.

Yet the ability to do so requires that the courts continue to define diversity in a way which, despite its stated utilitarian objectives and denial of the existence of harms in need of legally-supported remedy, permits the tacit pursuit of broadly remedial programs. In *Grutter* the court elected to continue this charade, expressly denying the Constitutional viability of a broadly remedial justification for affirmative action, but endorsing an approach which permits the tacit application of remedial approaches.

There are several good reasons, however, to continue to pressure the courts to straightforwardly adopt a remedial approach to affirmative action. The first is that a remedial justification would better ground these practices within bedrock principles of American law. Put simply, the American legal system is premised upon the notion of providing remedies for harms done. The injuries of centuries of state-sponsored, race-based oppression, from slavery to Jim Crow and beyond, are among the most egregious wrongs this society has ever known; in the view of many, they represent paradigmatic crimes against humanity.[25] Thus, the legitimacy and integrity of a justice system ostensibly focused on providing remedies for harms demands that a harm of this magnitude be systemically addressed. If not, then for what *does* the American justice system ultimately stand?

Secondly, the affirmative action jurisprudence adopted by the courts since *Bakke* has led to the ultimate continuing injury within a system nominally focused on justice: the courts themselves have outright *denied* the existence of the unremedied injuries which result from what we call racism and discrimination. By refusing a broad remedial justification for affirmative action, the courts have *denied the very existence of the harm* against which the remedial justice apparatus of our society should be most vigilantly arrayed.

Finally, the Court's failure to ground affirmative action in a remedial purpose has not merely denied the victims of historical injustice the affirmative redress that is their due; perhaps equally devastating, in the long run, the Court's approach damages the legitimacy and philosophical coherence of our justice system. By

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I don't mean only Michigan or Harvard.").

25. *See, e.g.*, Sanford Cloud, Jr., Lecture, *The Next Bold Step Toward Racial Healing and Reconciliation: Dealing with the Legacy of Slavery*, 45 How. L.J. 157, 163 (2001).

dressing the "best case" for affirmative action in the morally-lightweight garments of "diversity," the courts have shorn the case for affirmative action of its once substantial moral weight. They have fostered a view among the populace of affirmative action programs as policies without principled justification. In doing so, the Courts have not only depleted arguments in favor of affirmative action of their primary doctrinal, philosophical and moral force; they have created something that veers in the minds of many critics perilously close to a remedy without a wrong. Not surprisingly, then, rather than view such policies as reasonable responses to societal inequities, many view them as unjustified gifts to an undifferentiated mass of "minorities." This perpetuates the view that affirmative action programs are undeserved efforts to compensate not for deficiencies of our society, but for some more or less vaguely drawn pathologies more properly located with the beneficiaries themselves.[26] It is no wonder, then, that support for affirmative action among society, generally, has waned.

Of course, rather than return to a remedial approach, the *Grutter* decision further fuses affirmative action jurisprudence with the diversity rationale, enshrining the most non-threatening and (hence the most socially acceptable) justification for affirmative action into Constitutional jurisprudence.[27] In so doing, the Supreme Court continues the tradition born in *Bakke* of preferring to cast these policies as wholly unconnected to a wrong, and hence, morally, if not legally suspect; of forcing the victims of the wrongs and injuries at the root of these programs to deny, ignore, or blame themselves for their unremedied injuries; and, of asking society to undergo the burdens of what many perceive as implicitly and broadly remedial, even though the Courts have acknowledged no corresponding societal wrong.

A more straightforward, ethical and jurisprudentially sound approach would be to adopt the remedial approach proffered by Justice Marshall and supported by scholars such as Professor Lawrence: acknowledge the existence of concrete, substantive legacies of discrimination and segregation within American society, and underscore the severe extent to which such injuries deserve redress under our law. Doing so would recognize victims' injuries, give society the strong moral justification it seeks for these policies, and legitimize the system by underscoring and furthering the corrective justice objectives upon which it ostensibly rests.

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26. *See, e.g.*, Richard J. Hernstein and Charles Murray, The Bell Curve: Intelligence and Class Structure in American Life (1994).

27. *See, e.g.*, Grutter v. Bollinger, 123 S. Ct. 2325, 2329, 2340 (2003).

III. MOVING BEYOND AFFIRMATIVE ACTION: RECKONING WITH THE HUMAN DIGNITY INJURIES AT THE ROOT OF RACIAL INJUSTICE CLAIMS

One additional reason for arguing in favor of a remedial justification of affirmative action is that such a change in focus may lead courts and policymakers to grapple with the precise nature of the injuries which make these programs necessary. Indeed, adopting a remedial justification for affirmative action might have led the courts to think more deeply about the injuries at stake in these cases, and might perhaps have led to a greater understanding of the interests that most compellingly support the broader affirmative action movement.[28]

I believe that at the heart of racism, race-based oppression and the legacies of slavery and Jim Crow in America are injuries to the basic human dignity interests of subordinated races and a thwarting of the inherent desire for mutual recognition that we all share. Thus, in addition to the foregoing, returning to a remedial justification for affirmative action may have the benefit of focusing society on the human dignity interests injured by racialist practices, and would in this sense raise our humanity consciousness.[29] Such a change in focus is a necessary foundation for a broad program of reform aimed at restoring human dignity to all which, in my view, necessarily involves fostering a greater recognition of mutual humanity and essential interconnectedness of all. Without such a reform in vision, the legacies of slavery, segregation, exclusionist policies, gender-based discrimination and a host of similar racialist and dignity-assaulting practices will continue to leave in place their deeply entrenched drivers of race-based, dignity-assaulting hierarchy. And the Reconstruction that is all of society's due will continue to elude us.

Indeed, in a previous article I sought to restate and re-radicalize the project of the ongoing Reconstruction of post-slavery America.[30] There I described the education-related goals of what we might call the Third Reconstruction as central among the humanizing practices a fully reconstructed society would highlight as among its most important objectives.[31] As one of the most crucial elements of a dignified existence, a high-quality, humanity-centered education must be the right of every human being.[32] Affirmative action is and has been one means of ensuring broader access to quality education

28. *See generally* Lawrence and Matsuda, *supra* note 1.
29. Andrews, *infra* note 33, at 489.
30. *See generally* Andrews, *infra* note 33.
31. *Id.* at 552.
32. *Id.*

to traditionally disadvantaged groups. At least until the legacies of slavery, Jim Crow and other racially-subordinating policies are subjected to adequate remedy, such programs are an important part of the present patchwork approach to race-related justice. Affirmative action programs should be reconceived as remedial in their fundamental objectives, and the perspective of humanity consciousness should guide their structure and implementation.

I believe that we must see the battle over affirmative action as symptomatic of a more fundamental challenge facing social reformers, and not just racial reformers, in post-slavery America. The ongoing project of post-slavery Reconstruction has never been envisioned quite broadly enough within mainstream or even critical perspectives on civil rights law and policy.[33] The Reconstruction vision has never gone so far as to embrace the goal of forging a deep reconsideration of what it might mean to be a human being in a fully post-racialized world, and articulating the promises a Constitutional democracy should be required to fulfill in light of that new understanding of what it means to be a post-racialized human, of whatever shade. In the rolling shadows cast by the affirmative action gladiators, we must begin to see the imperative of addressing this new, more fundamental, humanity-conscious agenda, and we must commit to developing law and policy aimed at remaking the world accordingly. Indeed, the imperative of a broader view on the scope of the challenge facing those who would further the reconstruction of post-slavery America was one of King's most brilliant insights:

> The black revolution is much more than a struggle for the rights of Negroes. It is forcing America to face all its interrelated flaws—racism, poverty, and militarism. It is exposing the evils that are rooted deeply in the whole structure of our society. It reveals systemic rather than superficial flaws and suggests that radical reconstruction of society itself is a real issue to be faced.[34]

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33. *See* Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race—Consciousness and Colorblindness in Post-Slavery America*, 54 Ala. L. Rev. 483, 501 *passim* (2003):

> [A] truly transformative approach would, at every turn, seek to restore to a state of dignity every man, woman and child impacted by the dehumanizing effects of slavery, and to see that restored dignity reflected, insofar as possible, in the lives of not only the formerly oppressed but the whole society . . . [and] raise all Americans to a state of dignity impossible to all Americans reared in a society whose core principles remain insufficiently reconstructed from the debilitations of our slave-holding past and our still racialized present.

34. Martin Luther King, Jr., *A Testament of Hope in* A Testament of Hope:

In short, when reconceived, for example, as an idealistic movement towards "inclusion of all people in a loving and non-exploitive human community,"[35] affirmative action has the potential to lead us toward true Reconstruction.

IV. CONCLUSION

Notwithstanding the Supreme Court's decision to validate the University of Michigan Law School's affirmative action admissions policy along the lines of the diversity-based argument suggested by Professor Higginbotham, we must face the reality of the inadequate support for affirmative action that *Grutter*, *Gratz*, and similar challenges to such policies represent. Guided by the Supreme Court, society has largely withdrawn support for remedially-focused, corrective justice arguments in favor of affirmative action. And with no ability to see the continuing legacies of slavery and segregation as legal problems deserving remedy, society is unable to fully support relatively modest affirmative action programs. Much less are we, as a society, able to envision adequately broad social policy reforms, reforms with the potential, literally, to remake the world.

As one step toward reversing this trend away from a deep reckoning with the societal implications of our racialist past and still racialized present, courts and policymakers must return to viewing affirmative action primarily in remedial terms, and should evaluate the constitutionality of such programs through the lens of humantiy-consciousness. Doing so is important because corrective justice must be a continuing concern of the law and public policy concerning race in this country. It is important because America's traditionally disadvantaged have always viewed remedial action as critical to the Reconstruction of America in the post-slavery era, and the incorporation of the political thought of these "outsiders" must be part of that Reconstruction. It is important because viewing affirmative action in terms of remedy would lay a foundation for programs and policies which support an understanding of "race" and its consequences as implicating the denials of human dignity which affirmative action, properly viewed, seeks to repair. And it thus may be the necessary foundation for a societal commitment to reforming society to undertake a much broader program of substantive, dignity- and humanity-focused social policy reform.

The Essential Writings of Martin Luther King, Jr., ed. James M. Washington 315 (1986).

35. Peter Gabel, The Bank Teller and Other Essays on the Politics of Meaning, 128 (2000).

The exact shape of this new dignity-inspired, humanity-conscious law and social policy will arise from a deep reconsideration of law and public policy in light of these objectives.[36] However, as Charles Black so eloquently observed at the end of his esteemed career, "law is reasoning from commitment."[37] The task before us now is to forge new commitments, to a legal philosophy which places post-racial human dignity, interconnectedness and love at the center, and to policies, including reconsidered affirmative action programs, which reflect such a transformation in jurisprudence, and law. In short, we must not only dream of new levels of human community, we must commit to making real those dreams, and get fast to work.

36. In a forthcoming article, I suggest some specific ways that affirmative action programs might be reformed with these goals in mind. *See,* Rhonda V. Magee Andrews, Toward a Foundation for Rebuilding the House: The Birth of "Humanity Conscious" Jurisprudence (work-in-progress, on file with author). In another, I discuss in detail the existential social-psychological obstacles which reinforce racialization and must be dissolved if we are ever to reach these goals. *See* Rhonda V. Magee Andrews, *The Philosophy of Black Existence as a Guide to Interpreting the Fourteenth Amendment,* Temple Pol. & Civ. Rts. L. Rev. (forthcoming 2004).

37. Charles L. Black, Jr., A New Birth of Freedom: Human Rights, Named and Unnamed 5 (1997).