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W G HART LEGAL WORKSHOP 1990

DISCRIMINATION AND LAW

The Civil Rights Model of Anti-Discrimination Law: An Allegorical Critique

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Tuesday 3 July 1990

W.G. Hart Legal Workshop
Institute of Advanced Legal Studies
University of London
July 3-5 1990

The Civil Rights Model of Anti-Discrimination Law: An Allegorical Critique

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I. The Allegory:

The Racial Preference Licensing Act of 1996

The final years of the Twentieth Century found much of the United States as racially segregated as it had been a century earlier when the Supreme Court's "separate but equal" decision in Plessy v. Ferguson[1] gave Constitutional status to a wave of Jim Crow statutes. That Court had distorted the necessary meaning of the Fourteenth Amendment's guarantee of equal protection of the laws in response to a society weary of racial remedies and ready to sacrifice black rights to political expediency. By 1990, the nation had again concluded that it had done enough for its racial minorities. The never vigorous enforcement of civil rights laws slowed to an ineffective pace that encouraged open violations and discouraged the filing of complaints that victims knew would only add futility to their misery.

In 1994, three decades after enactment of the Civil Rights Act of 1964, landmark legislation that imposed penalties for proved instances of racial discrimination over a wide range of activities, the Court held that the Act was so irrelevant to contemporary racial problems that it no longer contained that essence of rationality essential to constitutional validity. In 1964, the Supreme Court had little difficulty finding the various provisions of the then new law constitutional.[2] But with its protective function seriously undermined by federal administrations that offered little more than lip service to enforcing its provisions, and more recent Supreme Court decisions that construed its provisions narrowly, there was much consternation but little surprise in civil rights circles when the 1964 Act itself was declared unconstitutional in 1994.

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In reversing its earlier approval of the Act, the Court found that the measure created categories based on race that failed to meet the strict scrutiny standard the Court held in 1989 applied to remedial as well as invidious racial classifications.[3] Rather surprisingly, the Court found the 1964 Act inconsistent with what it viewed as the essential principle in the landmark decision in Brown v. Board of Education,[4] that found state-sponsored segregation in the public schools a violation of the Fourteenth Amendment. Unlike the 1964 Act, the Court said, the Brown decision did not seek to identify and punish wrongdoers. The implementation order in Brown II, moreover, did not require immediate enforcement.[5] Rather, it recognized that delay was required, not only to permit time for the major changes required in Southern school policies, but also to enable accommodation to school integration which ran counter to the views and strong emotions of most Southern whites.

The Court referred with approval to the views of the late Yale law professor, Alexander Bickel, who contended that any effort to enforce Brown as a criminal law, normally enforced, "forthwith and without recourse," would have failed as have prohibition, antigambling, most sex laws, and other laws policing morals. Bickel said, "It follows that in achieving integration, the task of the law . . . was not to punish law breakers but to diminish their number."[6]

Professor Bickel's argument, the Court found, was instructive. It reveals that Brown was basically a call for a higher morality rather than a judicial authorization for Congress to seek to coerce behavior allegedly unjust because it recognized generally acknowledged differences in racial groups and based public policies on those differences. This characterization, the Court felt, explains why Brown was as ineffective as an enforcement tool as have other "morals-policing" laws such as prohibition, gambling and sex laws, all of which are hard to enforce precisely because they seek to protect the citizen's health and welfare against what a legislature deems self-abuse."

Based on this reasoning, the Court concluded that "laws aimed at requiring cessation of white conduct deemed harmful to blacks are hard to enforce because they seek to police morality." The Court conceded that both the states and the federal government had broad powers to protect the health, safety, and welfare of its citizens. But it could find nothing in the Constitution authorizing regulation of what government at any particular time would deem appropriate "moral" behavior. Such recognition, the Court reasoned, would seek to control the perceptions of what some whites believe about the humanity

of some blacks. "Whatever the good intentions of such an undertaking, it clearly mandated a morality that might be urged by a religion but was beyond the reach of government coercion."

In closing, the Court urged support for educational efforts designed to gain voluntary adherence to the worthy goals of the Brown decision. It urged black leaders "to emulate the life and adhere to the teachings of Booker T. Washington, your greatest leader." Blacks, the Court admonished, must "work harder to the end that more of "your people will prove themselves worthy of the many opportunities available to those prepared to enter the competitive race without special subsidies or unfair advantages. Racial remedies sponsored by government must adhere to the free enterprise principles that are the heart of our system."

The Court's decision was unanimous, widely hailed across the nation, and motivated Congress to pass and the president to sign a new civil rights law incorporating what many whites but few blacks welcomed as the Court's new philosophy of "moral materialism" in racial matters. At the signing ceremony, held in the Rose Garden and witnessed by representatives of the many right-wing organizations that had worked for its passage, the President assured the nation that the new Racial Preference Licensing Act represented a realistic advance in race relations. "It is," he insisted, "certainly not a return to the segregation policies granted Constitutional protection under the "separate but equal" standard of Plessy v. Ferguson. "And," he added, "it is no more than an inopportune coincidence that the Act was passed exactly a century after the Court announced that decision. Rather, the new law is a bold, new approach to the nation's oldest problem, one that is in harmony with our commitment to allowing the market place rather than governmental regulation to determine public policy."

In fact, the new Act ratified discriminatory practices that in the early 1990s, had become the de facto norm. Under the new Act, all employers, proprietors of public facilities, and owners and managers of dwelling places, homes and apartments, on application to the federal government, could obtain a license authorizing the holders and their agents to exclude or separate persons on the basis of race and color. The license required payment to a government commission of a tax of twelve percent of the income derived from whites employed, served, or sold to during each quarter in which a policy of "racial preference" was in effect.

License fees were placed in an "equality fund" used to underwrite black businesses, offer no-interest mortgage loans for black home buyers, and provide scholarships for black students seeking college and vocational education. Opponents of the Act had charged that black people, as under Plessy, would be segregated and would never gain any significant benefit from the equality fund. The President though committed himself and his administration to the just administration of the new, Racial Licensing Act.

Within a year, the Supreme Court heard and dismissed challenges to the new Act. Rejecting charges that the Act encourages racial discrimination, the Court held the law a reasonable balance between equal protection and freedom of association rights. "Moreover," the Court said, quoting its decision in Plessy v. Ferguson:

> A statute which implies merely a legal distinction between the white and colored races -- a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color -- has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude. . . .[7]

"Blacks as well as whites," the Court pointed out, "are entitled to obtain racial preference licenses. If anything," the Court noted, "the law benefits blacks by making available the equality fund that had already issued millions of dollars to aid blacks in businesses, home mortgages, and scholarships. This fund recognizes and serves as reparations for past and continuing anti-black practices that traditional civil rights laws have proven unable to eliminate.

In conclusion, the Court found that the Congress could reasonably adopt the views of those Law and Economics experts who contend that practitioners of bias will voluntarily cease to discriminate when the cost exceeds economic and psychic the benefits they now receive from excluding people of color. Both studies and general experience indicate that efficient black businesses, black home buyers with advantageous financing, and blacks generally who are well-educated and highly skilled, get ahead despite barriers based on race. As the numbers of truly qualified blacks increase, the perceived need to discriminate against them will decrease, a decline that the racial preference licensing tax will help to bring about."

II. Discussion:

The Deficits of Traditional Anti-Discrimination Statutes

Serious contemplation of a license to discriminate seems bizarre until we review the origins and inherent infirmities of more traditional civil rights laws. Dr. Kenneth Clark, the eminent sociologist whose findings on the adverse affects of racism on black children were cited in the U.S. Supreme Court's school segregation decisions,[8] observed that the usual response to racial unrest in America is the creation of a commission to study the situation and, in due course, to issue a report that after an initial flurry, is filed away, its recommendations unimplemented and forgotten.[9]

Experience enables us to supplement Dr. Clark's observation. When the racial unrest is serious and sustained, it may prompt passage of civil rights laws intended to recognize and protect rights of discrimination victims.[10] When enacted, the effectiveness of these measures varies, but it is clear that in majoritarian societies, the scope of laws intended to protect minority rights is limited. Yale Law School Professor Owen Fiss explained this limitation almost two decades ago in a manner amply supported by subsequent events.[11] Fiss views antidiscrimination prohibitions as applied to employment decisions as a limited strategy intended to confer benefits on a racial class -- blacks. He explains:

> The limited nature of this legal strategy is not just a function of the circumstances of politics but rather reflects a deep commitment to the values of economic efficiency and individual fairness. The most troublesome question is whether the historical legacy of the class, will or should, moderate that commitment so as to yield, through enactment or construction, a more robust strategy for the law. The legacy supplies an ethical basis for the desire to improve the relative economic position of blacks, and yet it also explains why a law that does no more than prohibit discrimination on the basis of race will leave that desire, in large part, unfulfilled.[12]

Fiss provides us with a perspective based on theory but steeped in pragmatism covering much of the resistance to meaningful implementation of anti-discrimination laws that, even before they become law, are usually

compromised during the legislative process. Currently, for example, there are bills in the U.S. Congress designed to undo the limiting interpretations of a series of 1989 Supreme Court decisions.[13] Proponents of these civil rights measures are making an enormous expenditure of energy and resources.[14] Even if their efforts are successful, both history and common sense tell us the new law will do no more than return civil rights law to the status of modest viability it held before the Court's series of damaging decisions.

Were this a period of social calm, we might now move to a familiar and unthreatening consideration of the relative merits of current civil rights legislative as compared to that enacted a few decades ago. The American experience might provide useful analogies for critiquing the civil rights legislation enacted in England, Canada, Ireland, and elsewhere, but for my country -- and likely others -- I think it is time for reflections that go beyond a comparative discussion of mainly ineffectual prohibitions.

The very visible social and economic progress made by some African Americans and other people of color in the United States can no longer obscure the increasingly dismal demographics reflecting the status of most of those whose forebears were slaves. The basic measures of poverty,[15] unemployment,[16] and income,[17] suggest that the slow racial advances of the 1960s and 1970s have ended and retrogression is well under way. Statistics, however, cannot begin to detail the havoc caused by joblessness and poverty: broken homes, anarchy in communities, futility in the public schools. All are the unhappy harvest of race-related joblessness in a society where work provides sustenance, status, and the all-important sense of self-worth.

For the most part, American whites are sanguine about the massive unemployment levels among blacks and the concomitant poverty, broken homes, and devastated lives that come with joblessness in a society where work is equated with worth. But white America is not at all passive about the high levels of violent street crime committed by the young, black, male products of these communities where discrimination-bred discouragement has given way to alcohol and drug-related despair. Despite the best efforts of some schools and as a result of the de facto surrender of many others, whole hosts of young, black people are convinced that rejection is their lot in life. The response -- not in all cases, but in enough -- is personal rebellion in any of several anti-social forms. Employers, government agencies, and the police, react to the rebellious in retaliatory measures that do not reassure us about our safety and

make the rebellious worse. Because the repressive measures do not distinguish between rebellious and non-rebellious blacks, some of the those trying to play by the established rules, join those already convinced that there is no hope. The result is an accelerating cycle of crime and poverty that climbs despite the deployment of more police and the imposition of heavier prison sentences. The effects of this rebellion cycle are not limited to the black community.

The election of blacks to public office, many to positions never before held by black persons, while worthwhile, will not have much effect on the problems of unemployment and poverty. Incidents of random and organized racial violence are on the rise and the hostility to black progress translated into political and judicial enmity constitute a clear and present threat to gains made over the last four decades. These multiple manifestations of the end of an era of civil rights progress provide notice that it is time to discuss seriously whether African Americans -- and since civil rights affect all racial minorities, all people of color -- will ever gain real racial equality through the workings of traditional civil rights laws and judicial decisions.

This last decade of the twentieth century is an appropriate time to make an assessment and to fashion plans for the future by reviewing experiences of the past. At the end of the eighteenth Century, Thomas Jefferson's view that blacks should be free, but that "the two races, equally free, cannot live in the same government,"[18] was widely shared by those who drafted our Constitution. Staughton Lynd, summarizing how the Framers came to include recognition and protection of human slavery in a document committed to the protection of individual liberties, wrote: "Even the most liberal of the Founding Fathers were unable to imagine a society in which whites and negroes would live together as fellow-citizens. Honor and intellectual consistency drove them to favor abolition; personal distaste, to fear it."[19]

That ambivalence, founded in white supremacy and matured in the belief that the two races should not co-exist in this new land, subverted the enthusiasm of even those who championed abolition and the post-Civil War Amendments that granted citizenship rights to the former slaves. By the end of the nineteenth century, it was abundantly clear that the citizenship promises contained in law had been broken in fact by the terms of the 1877 Hayes-Tilden Compromise.[20] The Supreme Court's Plessy v. Ferguson[21] decision in 1896, gave legal substance to segregation policies that had been in effect for years. The Court's finding that the equal protection guarantee was met by the

provision of "separate but equal" accommodations represented a denial of social reality, self-deceit given credence because it conformed both to the nation's needs and its beliefs.

In our era, the premier civil rights precedent, Brown v. Board of Education,[22] promised to be the twentieth century's Emancipation Proclamation. Both the Brown decision and the Emancipation Proclamation, however, served to advance the nation's foreign policy interests more than they provided actual aid to blacks.[23] Black people ignored the self-interest motivations and inspired by the rhetoric of freedom they contained, initiated self-help efforts to gain long-denied rights.

The freedom efforts have fallen short in the twentieth century as they did in the nineteenth. It appears that as much as civil rights proponents criticized him at the time, the late Yale Law Professor, Alexander Bickel's dire prediction has proven correct. He warned that the Brown decision would not be reversed but would become, dread word, irrelevant.[24] Irrelevant is the seeming fate of this once proud decision as we survey the Supreme Court's civil rights decisions of the last Term. Third-year law student, Radhika Rao, assessed their anti-civil rights thrust in a decision finding a Richmond, Virginia set-aside ordinance unconstitutional.[25] Ms. Rao writes:

> In City of Richmond v. Croson, a majority of the Supreme Court chose for the first time to subject an affirmative action plan enacted by the former capital of the Confederacy to the stringent review it applies to the most repugnant forms of racism. The Court's decision to treat all racial classifications identically possesses the same superficial symmetry of the "separate but equal" analysis in Plessy v. Ferguson, and it suffers from the same flaw. The Court denies the reality of racism when it isolates race-conscious actions from their context and concludes that benign racial classifications warrant the same standard of review as invidious acts.[26]

It is difficult to imagine a more apt comparison of the Court's approach in an end-of-the nineteenth century decision, Plessy, and an end-of-the twentieth century decision, Croson. In both, modest anti-discrimination efforts were countered with hypocritical responses that contorted racial reality beyond recognition. The distortions when repeated over time take on a disturbingly

predictable pattern that makes it difficult to maintain long-held views about the causes of racial discrimination and the chances for its eradication.

Long before he published his findings, American blacks and their liberal, white supporters, accepted the philosophy incorporated in Gunnar Myrdal's study, The American Dilemma.[27] Racism was simply an anomaly in a society committed to equality, the repairable failure of liberal democratic practices (regarding black rights) to coincide with liberal democratic theory. Our optimism relied on two assumptions that ignored a contrary history:

1. that the standard practices of American policy making were adequate to the task of abolishing racism; and

2. that white America did, in fact, want to abolish racism.

In The New American Dilemma,[28] Professor Jennifer Hochschild examines what she calls Myrdal's "anomaly thesis."[29] Reviewing the modest progress in school desegregation over almost four decades, Hochschild concludes that the anomaly thesis simply cannot explain the persistence of racial discrimination.[30] Rather, she finds, the continued viability of racism supports arguments "that racism is not simply an excrescence on a fundamentally healthy liberal democratic body but is part of what shapes and energizes the body."[31] Under this view, "liberal democracy and racism in the United States are historically, even inherently, reinforcing; American society as we know it exists only because of its foundation in racially based slavery, and it thrives only because racial discrimination continues. The apparent anomaly is an actual symbiosis."[32]

Hochschild looks at writings supporting the symbiosis thesis including Historian Edmond Morgan's relationship between slavery and the development of a republican ideology of freedom -- and to contemporary Marxist accounts of the functional utility of racism within a capitalist economy. History, she points out, reveal several occasions in which blacks have served as bargaining chips in facilitating the settlement of differences between segments of the white society. Even traditional liberal views regarding the need of symmetry in legal principles serve to protect and perpetuate racist policies and practices.

If Jennifer Hochschild is correct, then her second dilemma explains the intractable nature of the one Myrdal (and most of us) saw as the barrier to full equality for blacks. She suggests that rather than being understood as the

tension between liberal democratic theory and liberal democratic practice, the American dilemma must be understood as the more fundamental problem of reconciling liberalism with democracy. If most white citizens choose not to grant the citizens of color their full rights, then perhaps democracy must give way to liberalism.

But how do you invoke the equality policy choice in a majoritarian, democratic state where racial equality is the oft-heralded ideal but power-based majoritarianism is the on-going societal stabilizing fact? More crucially, how do you convince white Americans that the nation's most pressing social problems will never be addressed meaningfully as long as opponents of the needed reforms can stigmatize them as aid for unworthy black folks?

Economist Robert Heilbroner confirms that "there is no parallel to the corrosive and pervasive role played by race in the problem of social neglect in the United States."[33] He observes that the:

> merging of the racial issue with that of neglect serves as a rationalization for the policies of inaction that have characterized so much of the American response to need. Programs to improve slums are seen by many as programs to 'subsidize' Negroes; proposals to improve conditions of prisons are seen as measures to coddle black criminals; and so on. In such cases, the fear and resentment of the Negro takes precedence over the social problem itself. The result, unfortunately, is that the entire society suffers from the results of a failure to correct the social evils whose ill effects refuse to obey the rules of segregation.[34]

How can we explain the willingness of so many white Americans to sacrifice their interests in social reform to insure that blacks deemed "undeserving" by reform opponents do not gain from government benefits needed by both? What precisely are they trying to protect in this land where equality is a concept while ownership of property is a basic measure of worth.

Over time, beliefs in white dominance, reinforced by policies that subordinate black interests to those of whites, have led to an explicitly unrecognized but no less viable property right in whiteness. In challenging the legality of racial segregation in the late nineteenth century, the plaintiff in Plessy v. Ferguson,[35] recognized and the Court acknowledged -- at least for the purposes of the case -- that there was a property right in being white, an

entitlement to those advantages gained over blacks by virtue of a white identity.[36] Although there is no such overt recognition in contemporary racial decisions, the application to affirmative action policies of strict scrutiny standards of review once reserved for the most invidious forms of racism reflects a concern for "innocent whites" and recognizes in fact what the current Court's predecessors were willing to acknowledge openly.[37]

On close analysis, it becomes clear that past gains in the courts and in Congress came during periods when policy makers recognized that the interests of whites would be advanced or at least would not be harmed by recognizing the claims of African Americans for racial justice. I have been suggesting for years that civil rights progress in general, and the historic decision in Brown v. Board of Education, in particular, did not happen solely because of either the earnest efforts of blacks or the sudden realization by white policy makers that the racial injustices about which blacks had complained for so long were intolerable. Rather, progress requires a coincidence with some fairly pressing issue or situation that is aided by granting -- or as with Brown -- seeming to grant a remedy for long-suffered racial wrongs. In the case of Brown, there was a convergence of self-interest factors that -- consciously or not -- helped convince the Court and then slowly the society that racial segregation was an accommodation to the general belief in white superiority that the country could no longer afford. There is impressive evidence that the anti-Communist atmosphere during the post-World War II era contributed substantially to the end of official segregation.[38]

This is a concept rather hard to grasp for those who remember all too clearly the rabid resistance to Brown and to the desegregation that followed. Those memories are not flawed. The rage with which so many whites screamed "never" grew out of what was them a threatened loss of status as white people. Segregationists were neither impressed nor amused by contentions that it was in America's interest to drop the "separate but equal" charade. Keep in mind though that from the beginning of slavery, the masses of whites have supported programs that were contrary to their economic interest as long as those policies provided them with a status superior to that of blacks.

Why don't whites wake up? Professor Kimberle Crenshaw suggests that:

> To bring a fundamental challenge to the way things are, whites would have to question not just their own subordinate status, but also both the economic and the racial myths that justify the status quo. Racism, combined with equal opportunity mythology, provides a rationalization for racial oppression, making it difficult for whites to see the Black situation as illegitimate or unnecessary. If whites believe that Blacks, because they are unambitious or inferior, get what they deserve, it becomes that much harder to convince whites that something is wrong with the entire system. Similarly, a challenge to the legitimacy of continued racial inequality would force whites to confront myths about equality of opportunity that justify for them whatever measure of economic success they may have attained.
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> . . . .
>
> race consciousness makes it difficult -- at least for whites -- to imagine the world differently. It also creates the desire for identification with privileged elites. By focusing on a distinct, subordinate "other," whites include themselves in the dominant circle -- an arena in which most hold no real power, but only their privileged racial identity. Consider the case of a dirt-poor, southern white, shown participating in a Ku Klux Klan rally in the movie Resurgence, who declared: "Every morning, I wake up and thank God I'm white." For this person, and for others like him, race consciousness -- manifested by his refusal even to associate with Blacks -- provides a powerful explanation of why he fails to challenge the current social order.[39]

Novelist Toni Morrison provides a more earthy but hardly less accurate assessment of how the presence of blacks enables a bonding by whites that occurs across vast socio-economic divides. Thus, when in a recent Time Magazine interview Ms. Morrison was asked why blacks and whites can't bridge the abyss in race relations, she replied:

> I feel personally sorrowful about black-white relations a lot of the time because black people have always been used as a buffer in this country between powers to prevent class war, to prevent other kinds of real conflagrations.
>
> If there were no black people here in this country, it would have been Balkanized. The immigrants would have torn each other's throats out, as they have done everywhere else. But in becoming an

American, from Europe, what one has in common with that other immigrant is contempt for me -- it's nothing else but color. Wherever they were from, they would stand together. They could all say, "I am not that." So in that sense, becoming an American is based on an attitude: an exclusion of me.

It wasn't negative to them -- it was unifying. When they got off the boat, the second word they learned was "nigger." Ask them -- I grew up with them. I remember in the fifth grade a smart little boy who had just arrived and didn't speak any English. He sat next to me. I read well, and I taught him to read just by doing it. I remember the moment he found out that I was black -- a nigger. It took him six months; he was told. And that's the moment when he belonged, that was his entrance. Every immigrant knew he would not come at the very bottom. He had to come above at least one group -- and that was us.[40]

The significance of the Toni Morrison anecdote is its universality. Indeed, it is difficult to think of another characteristic of societal functioning that has retained its viability and its value to social stability from the very beginning of the American experience down to the present day. Both the nation's history and current events give reason to wonder with Professor Tilden W. LeMelle "whether a society such as the United States is really capable of legislating and enforcing effective public policy to combat racial discrimination in the political process and elsewhere."[41] So, while slavery and segregation are gone, most whites continue to expect the society to recognize an unspoken but no less vested property right in their "whiteness." This right is recognized and upheld by courts and the society like all property rights under a government created and sustained primarily for that purpose.

There is no easy exit from this dilemma. Identifying whiteness as a property right simply calls the problem by its rightful name. One would think that it would not be difficult to identify broad areas of social reform in which the interest of most whites would be much greater than the illusory entitlement to a superior status based on whiteness. The gap between the incomes of the rich and the poor is greater than ever. Whites as well as blacks need more comprehensive health care, better schools, and more affordable housing. But achieving unity on these common interests is so difficult precisely because so many whites who share with blacks a whole range of social needs, are willing

to sacrifice their real interests to satisfy their psychic need to maintain a status superior to that of black people.

III. Conclusion:

One Wonders. Given the limited effectiveness of traditional civil rights laws, what kind of miracle or -- more likely -- how enormous a catastrophe will be required to get whites to realize that their property right in being white has been purchased for too much and has netted them only the opportunity, as historian C. Vann Woodward put it, to hoard sufficient racism in their bosoms to feel superior to blacks while working at a blacks' wages.

Those of us who still hope for equality through unity face two enormous challenges. First, we must broaden the Constitution's protection to encompass the sacrosanct area of economic rights, not simply as was the case at the beginning to secure vested property interests, but to recognize entitlement to basic needs -- jobs, housing, health care, education, security in old age -- as an essential property right of all. We must mount this campaign in the face of the likely resistance from many whites who will be the principal beneficiaries of its success.

Second, to reduce this resistance, we must mount an educational campaign based on the notion that "until whites get smart, blacks can't get free. In his campaign for the Democratic nomination for president, The Rev. Jesse Jackson made an exciting start in this tough educational process. He did not gain the nomination, but he proved that there are substantial numbers of working class whites willing to learn what blacks have long known: that the rhetoric of freedom so freely voiced in this country is no substitute for the economic justice that has been so long denied to whites as well as blacks.

Jackson, of course, did not win and as his campaign began gaining momentum, major elements of power used the media to slow and finally defeat his candidacy. Most black people and a respectable number of whites recognize both the need for social reform and the danger inherent in maintaining the current status quo. It is not right and hardly possible that those long held at the very bottom of this society can both sense the deadly dangers in the nation's present course and continue to give life to the fading belief in racial equality so long espoused and so infrequently practiced. Working from the bottom to gain their rights, African Americans have given substance to the

Constitution's guarantees and a vibrant humanity to a nation that has oscillated between a patronizing posture when its interest dictated a feigned friendship, and cold contempt when it did not.

History shows that when the issue is justice for African-Americans vs. Racism -- racism wins every time. But when the issue is racism vs. perceived self-interest for whites -- the choice (it is said) is justice for blacks. Over the years, we have thus come to know what whites <u>really</u> mean when they express an interest in racial justice. Given this knowledge, civil rights advocates must consider carefully what strategies will achieve that whites will view as in their self-interest. This analysis must consider both the limitations of penalty-oriented civil rights laws and the continuing value of discrimination practices that are not only as old as the country, but that continue to provide a key basis for societal stability and order.

ENDNOTES

1. 163 U.S. 567 (1896).

2. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964),(upholding the public facilities provisions of Title II).

3. Croson v. City of Richmond, 109 S. Ct. 706 (1989).

4. 347 U.S. 483 (1954).

5. 349 U.S. 294 (1955),(mandating an end to discrimination in public schools with "all deliberate speed").

6. A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 247-54 (1962).

7. 163 U.S. 537, 545 (1896).

8. Brown v. Board of Education, 347 U.S. 483, 494 n. 11 (1954).

9. A. Platt, The Politics of Riot Commissions 376-77 (1971),(Dr. Clark's statement is contained in his testimony before the Kerner Commission, established in 1967, in the wake of a series of urban, racial disorders.

10. Of course, racial unrest not deemed either threatening to the majority or politically appropriate for legislative action, need not lead to new civil rights laws. For example, between 1937 and 1946, civil rights advocates introduced more than 150 bills in the U.S. Congress intended to address lynching, the poll tax, and fair hiring practices. No civil rights acts were enacted during this period and the President during most of that period, Franklin D. Roosevelt, despite his considerable power, never pushed for or encouraged the passage of a civil rights bill. E. Carmines, J. Stinson, Issues Evolution: Race and Transformation of American Politics 31 (1989).

11. Fiss, A Theory of Fair Employment Laws, 38 U. Chi. L. Rev. 235 (1971).

12. Id. at 313-314.

13. Following are the 1989 Supreme Court rulings on civil rights that Congress may modify or reverse:

Richmond, Va. v. J.A. Croson Co., 109 S. Ct. 706 (1989), (by a 6-3 vote, struck down an affirmative action plan that set aside 30 percent of city construction contracts for minority-owned businesses).

Patterson v. Mclean Credit Union, 109 S. Ct. 2363 (1989),(ruled 5-4 that an 1866 law forbidding discrimination in contracts applies only to hiring agreements, not on-the-job bias).

Dallas Independent School Dist. v. Jett, 109 S.Ct 363 (1989), (ruled 5-4 that state and local officials cannot be held liable for discrimination unless the alleged violation was part of an official policy).

Wards Cove Packing Co. v. Atonio, 109 S. CT. 2115 (1989),(held 5-4 that in cases brought under Title VII of the 1964 Civil Rights Act, burden is on the plaintiff to prove an employer had no business necessity for a practice with discriminatory effects).

Martin v. Wilks, 109 S. Ct. 2180 (1989),(ruled 5-4 that non-parties to a court-approved consent degree incorporating an affirmative action plan can challenge the plan as reverse discrimination, even years after it was adopted).

Lorance v. A.T.& T. Technologies, Inc., 109 S. Ct. 2261 (1989),(held 5-3 that seniority plans cannot be challenged as discriminatory unless complaints are filed soon after the plans are adopted).

14. S. 2104, Congressional Record, S 1019-21 (Feb. 7, 1990). In Sec. 2(b), the bill lists its purposes:

> (1) to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions, and
>
> (2) to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

15. By 1987, the poverty rate for black Americans was 33.1 percent, an increase of 700,000 people in one year. By contrast, during that year, the white poverty rate fell from 11 percent to 10.5 percent. Center on Budget and Policy Priorities, Still Far From the Dream: Recent Developments in Black Income, Employment and Poverty (Oct. 1988). The report is available from the Center, 236 Mass. Ave., N.E., Suite 305, Washington, D.C. 20002.

16. The black unemployment rate averaged 13 percent in 1987, lower than in any other year in the 1980s, although higher than in most years of the 1970s. The proportion of

the total black adult population that is employed is at the highest level recorded since the date were first collected in 1972. But black unemployment has declined less than white unemployment, and the gap between black and white unemployment has widened to 2.57 times the white rate in 1988 -- the highest black-to-white unemployment differential ever recorded. Id. at ix-x.

17. The 1987 income of the typical black family ($18,098) equalled just 56.1 percent of the typical white family ($31,935), a lower percentage than in any year since 1967 when the data first began to be collected. A factor contributing to the growing income disparity between blacks and whites is the growing income gap between upper and lower income families in the nation as a whole. In 1987, this gap reached its widest point in 40 years. Id. at vii-viii.

18. Lynd, Slavery and the Founding Fathers, in Black History 117 (M. Drimmer, ed., 1968).

19. Id. at 129.

20. In the hotly contested Presidential election of 1876, the Democrat, Samuel J. Tilden, won a plurality of 250,000 votes in the nation, and appeared to have won the electoral count by one vote. The returns of three states were challenged and when recounts did not resolve the dispute, it was submitted to a special electoral commission that awarded the vote to the Republican, Rutherford B. Hayes. Democrats accepted this outcome in return for several concessions including a Republican promise to withdraw the remaining federal troops from the South, an action that removed the last barrier to the already-in-progress subjugation of the black freedmen. See, E. Foner, Reconstruction: America's Unfinished Revolution 1863-1877, 575-587 (1988).

21. 163 U.S. 537 (1896).

22. 347 U.S. 483 (1954).

23. The benefits to the nation, including disruption of the South's economy, raising insuperable political barriers to European nations entering the Civil War on the side of the South, and opening the way to the enlistment of thousands of blacks in the Union Army, are discussed in D. Bell, Race, Racism and American Law 3-7. For the advantages the nation gained as a result of the Brown decision, see, Dudziak, Desegregation as a Cold War Imperative, 42 Stanf. L. Rev. 61 (1988).

24. Bickel, A. The Supreme Court and the Idea of Progress ____ (1970).

25. City of Richmond v. Croson, 109 S. Ct. 706 (1989).

26. Harvard Law School, J.D. 1990.

27. G. Myrdal, An American Dilemma (1944). "The Negro problem in America represents a moral lag in the development of the nation and a study of it must record nearly everything which is bad and wrong in America. . . . However, . . . not since Reconstruction has there been more reason to anticipate fundamental changes in American race relations, changes which will involve a development toward the American ideals." Id. at xix.

28. J. Hochschild, The New American Dilemma (1984).

29. Racial discrimination "is a terrible and inexplicable anomaly stuck in the middle of our liberal democratic ethos." Id. at 3.

30. Id. at 203.

31. Id. at 5.

32. Id. at 5.

33. Heilbroner, The Roots of Social Neglect in the United States, in Is Law Dead? 288, 296 (E. Rostow, ed. 1971).

34. Id.

35. 163 U.S. 537 (1896).

36. Justice Brown wrote:

> It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is property, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man. 163 U.S. 548.

37. See, e.g., Martin v. Wilks, 109 S. Ct. 2180 (1989)(the failure of white firefighters to intervene in earlier employment discrimination proceedings did not preclude them from challenging employment decisions taken pursuant to a consent decree.)

38. Dudziak, Desegregation as a Cold War Imperative, 41 Stanf. L. Rev. 61 (1988).

39. Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in AntiDiscrimination Law, 101 Harv. L. Rev. 1331, 1380-1381 (1988).

40. Morrison, The Pain of Being Black, Time, May 22, 1989, at 120.

41. See, D. Bell, Race, Racism and American Law, Sec. 1.12 (2d ed. 1980).

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W G HART LEGAL WORKSHOP 1990

DISCRIMINATION AND LAW

The Civil Rights Model of Anti-Discrimination Law: An Allegorical Critique

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Tuesday 3 July 1990

W.G. Hart Legal Workshop
Institute of Advanced Legal Studies
University of London
July 3-5 1990

The Civil Rights Model of Anti-Discrimination Law: An Allegorical Critique

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I. The Allegory:

The Racial Preference Licensing Act of 1996

The final years of the Twentieth Century found much of the United States as racially segregated as it had been a century earlier when the Supreme Court's "separate but equal" decision in Plessy v. Ferguson[1] gave Constitutional status to a wave of Jim Crow statutes. That Court had distorted the necessary meaning of the Fourteenth Amendment's guarantee of equal protection of the laws in response to a society weary of racial remedies and ready to sacrifice black rights to political expediency. By 1990, the nation had again concluded that it had done enough for its racial minorities. The never vigorous enforcement of civil rights laws slowed to an ineffective pace that encouraged open violations and discouraged the filing of complaints that victims knew would only add futility to their misery.

In 1994, three decades after enactment of the Civil Rights Act of 1964, landmark legislation that imposed penalties for proved instances of racial discrimination over a wide range of activities, the Court held that the Act was so irrelevant to contemporary racial problems that it no longer contained that essence of rationality essential to constitutional validity. In 1964, the Supreme Court had little difficulty finding the various provisions of the then new law constitutional.[2] But with its protective function seriously undermined by federal administrations that offered little more than lip service to enforcing its provisions, and more recent Supreme Court decisions that construed its provisions narrowly, there was much consternation but little surprise in civil rights circles when the 1964 Act itself was declared unconstitutional in 1994.

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In reversing its earlier approval of the Act, the Court found that the measure created categories based on race that failed to meet the strict scrutiny standard the Court held in 1989 applied to remedial as well as invidious racial classifications.[3] Rather surprisingly, the Court found the 1964 Act inconsistent with what it viewed as the essential principle in the landmark decision in Brown v. Board of Education,[4] that found state-sponsored segregation in the public schools a violation of the Fourteenth Amendment. Unlike the 1964 Act, the Court said, the Brown decision did not seek to identify and punish wrongdoers. The implementation order in Brown II, moreover, did not require immediate enforcement.[5] Rather, it recognized that delay was required, not only to permit time for the major changes required in Southern school policies, but also to enable accommodation to school integration which ran counter to the views and strong emotions of most Southern whites.

The Court referred with approval to the views of the late Yale law professor, Alexander Bickel, who contended that any effort to enforce Brown as a criminal law, normally enforced, "forthwith and without recourse," would have failed as have prohibition, antigambling, most sex laws, and other laws policing morals. Bickel said, "It follows that in achieving integration, the task of the law . . . was not to punish law breakers but to diminish their number."[6]

Professor Bickel's argument, the Court found, was instructive. It reveals that Brown was basically a call for a higher morality rather than a judicial authorization for Congress to seek to coerce behavior allegedly unjust because it recognized generally acknowledged differences in racial groups and based public policies on those differences. This characterization, the Court felt, explains why Brown was as ineffective as an enforcement tool as have other "morals-policing" laws such as prohibition, gambling and sex laws, all of which are hard to enforce precisely because they seek to protect the citizen's health and welfare against what a legislature deems self-abuse."

Based on this reasoning, the Court concluded that "laws aimed at requiring cessation of white conduct deemed harmful to blacks are hard to enforce because they seek to police morality." The Court conceded that both the states and the federal government had broad powers to protect the health, safety, and welfare of its citizens. But it could find nothing in the Constitution authorizing regulation of what government at any particular time would deem appropriate "moral" behavior. Such recognition, the Court reasoned, would seek to control the perceptions of what some whites believe about the humanity

of some blacks. "Whatever the good intentions of such an undertaking, it clearly mandated a morality that might be urged by a religion but was beyond the reach of government coercion."

In closing, the Court urged support for educational efforts designed to gain voluntary adherence to the worthy goals of the Brown decision. It urged black leaders "to emulate the life and adhere to the teachings of Booker T. Washington, your greatest leader." Blacks, the Court admonished, must "work harder to the end that more of "your people will prove themselves worthy of the many opportunities available to those prepared to enter the competitive race without special subsidies or unfair advantages. Racial remedies sponsored by government must adhere to the free enterprise principles that are the heart of our system."

The Court's decision was unanimous, widely hailed across the nation, and motivated Congress to pass and the president to sign a new civil rights law incorporating what many whites but few blacks welcomed as the Court's new philosophy of "moral materialism" in racial matters. At the signing ceremony, held in the Rose Garden and witnessed by representatives of the many right-wing organizations that had worked for its passage, the President assured the nation that the new Racial Preference Licensing Act represented a realistic advance in race relations. "It is," he insisted, "certainly not a return to the segregation policies granted Constitutional protection under the "separate but equal" standard of Plessy v. Ferguson. "And," he added, "it is no more than an inopportune coincidence that the Act was passed exactly a century after the Court announced that decision. Rather, the new law is a bold, new approach to the nation's oldest problem, one that is in harmony with our commitment to allowing the market place rather than governmental regulation to determine public policy."

In fact, the new Act ratified discriminatory practices that in the early 1990s, had become the de facto norm. Under the new Act, all employers, proprietors of public facilities, and owners and managers of dwelling places, homes and apartments, on application to the federal government, could obtain a license authorizing the holders and their agents to exclude or separate persons on the basis of race and color. The license required payment to a government commission of a tax of twelve percent of the income derived from whites employed, served, or sold to during each quarter in which a policy of "racial preference" was in effect.

License fees were placed in an "equality fund" used to underwrite black businesses, offer no-interest mortgage loans for black home buyers, and provide scholarships for black students seeking college and vocational education. Opponents of the Act had charged that black people, as under Plessy, would be segregated and would never gain any significant benefit from the equality fund. The President though committed himself and his administration to the just administration of the new, Racial Licensing Act.

Within a year, the Supreme Court heard and dismissed challenges to the new Act. Rejecting charges that the Act encourages racial discrimination, the Court held the law a reasonable balance between equal protection and freedom of association rights. "Moreover," the Court said, quoting its decision in Plessy v. Ferguson:

> A statute which implies merely a legal distinction between the white and colored races -- a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color -- has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude. . . .[7]

"Blacks as well as whites," the Court pointed out, "are entitled to obtain racial preference licenses. If anything," the Court noted, "the law benefits blacks by making available the equality fund that had already issued millions of dollars to aid blacks in businesses, home mortgages, and scholarships. This fund recognizes and serves as reparations for past and continuing anti-black practices that traditional civil rights laws have proven unable to eliminate.

In conclusion, the Court found that the Congress could reasonably adopt the views of those Law and Economics experts who contend that practitioners of bias will voluntarily cease to discriminate when the cost exceeds economic and psychic the benefits they now receive from excluding people of color. Both studies and general experience indicate that efficient black businesses, black home buyers with advantageous financing, and blacks generally who are well-educated and highly skilled, get ahead despite barriers based on race. As the numbers of truly qualified blacks increase, the perceived need to discriminate against them will decrease, a decline that the racial preference licensing tax will help to bring about."

II. Discussion:

The Deficits of Traditional Anti-Discrimination Statutes

Serious contemplation of a license to discriminate seems bizarre until we review the origins and inherent infirmities of more traditional civil rights laws. Dr. Kenneth Clark, the eminent sociologist whose findings on the adverse affects of racism on black children were cited in the U.S. Supreme Court's school segregation decisions,[8] observed that the usual response to racial unrest in America is the creation of a commission to study the situation and, in due course, to issue a report that after an initial flurry, is filed away, its recommendations unimplemented and forgotten.[9]

Experience enables us to supplement Dr. Clark's observation. When the racial unrest is serious and sustained, it may prompt passage of civil rights laws intended to recognize and protect rights of discrimination victims.[10] When enacted, the effectiveness of these measures varies, but it is clear that in majoritarian societies, the scope of laws intended to protect minority rights is limited. Yale Law School Professor Owen Fiss explained this limitation almost two decades ago in a manner amply supported by subsequent events.[11] Fiss views antidiscrimination prohibitions as applied to employment decisions as a limited strategy intended to confer benefits on a racial class -- blacks. He explains:

> The limited nature of this legal strategy is not just a function of the circumstances of politics but rather reflects a deep commitment to the values of economic efficiency and individual fairness. The most troublesome question is whether the historical legacy of the class, will or should, moderate that commitment so as to yield, through enactment or construction, a more robust strategy for the law. The legacy supplies an ethical basis for the desire to improve the relative economic position of blacks, and yet it also explains why a law that does no more than prohibit discrimination on the basis of race will leave that desire, in large part, unfulfilled.[12]

Fiss provides us with a perspective based on theory but steeped in pragmatism covering much of the resistance to meaningful implementation of anti-discrimination laws that, even before they become law, are usually

compromised during the legislative process. Currently, for example, there are bills in the U.S. Congress designed to undo the limiting interpretations of a series of 1989 Supreme Court decisions.[13] Proponents of these civil rights measures are making an enormous expenditure of energy and resources.[14] Even if their efforts are successful, both history and common sense tell us the new law will do no more than return civil rights law to the status of modest viability it held before the Court's series of damaging decisions.

Were this a period of social calm, we might now move to a familiar and unthreatening consideration of the relative merits of current civil rights legislative as compared to that enacted a few decades ago. The American experience might provide useful analogies for critiquing the civil rights legislation enacted in England, Canada, Ireland, and elsewhere, but for my country -- and likely others -- I think it is time for reflections that go beyond a comparative discussion of mainly ineffectual prohibitions.

The very visible social and economic progress made by some African Americans and other people of color in the United States can no longer obscure the increasingly dismal demographics reflecting the status of most of those whose forebears were slaves. The basic measures of poverty,[15] unemployment,[16] and income,[17] suggest that the slow racial advances of the 1960s and 1970s have ended and retrogression is well under way. Statistics, however, cannot begin to detail the havoc caused by joblessness and poverty: broken homes, anarchy in communities, futility in the public schools. All are the unhappy harvest of race-related joblessness in a society where work provides sustenance, status, and the all-important sense of self-worth.

For the most part, American whites are sanguine about the massive unemployment levels among blacks and the concomitant poverty, broken homes, and devastated lives that come with joblessness in a society where work is equated with worth. But white America is not at all passive about the high levels of violent street crime committed by the young, black, male products of these communities where discrimination-bred discouragement has given way to alcohol and drug-related despair. Despite the best efforts of some schools and as a result of the de facto surrender of many others, whole hosts of young, black people are convinced that rejection is their lot in life. The response -- not in all cases, but in enough -- is personal rebellion in any of several anti-social forms. Employers, government agencies, and the police, react to the rebellious in retaliatory measures that do not reassure us about our safety and

make the rebellious worse. Because the repressive measures do not distinguish between rebellious and non-rebellious blacks, some of the those trying to play by the established rules, join those already convinced that there is no hope. The result is an accelerating cycle of crime and poverty that climbs despite the deployment of more police and the imposition of heavier prison sentences. The effects of this rebellion cycle are not limited to the black community.

The election of blacks to public office, many to positions never before held by black persons, while worthwhile, will not have much effect on the problems of unemployment and poverty. Incidents of random and organized racial violence are on the rise and the hostility to black progress translated into political and judicial enmity constitute a clear and present threat to gains made over the last four decades. These multiple manifestations of the end of an era of civil rights progress provide notice that it is time to discuss seriously whether African Americans -- and since civil rights affect all racial minorities, all people of color -- will ever gain real racial equality through the workings of traditional civil rights laws and judicial decisions.

This last decade of the twentieth century is an appropriate time to make an assessment and to fashion plans for the future by reviewing experiences of the past. At the end of the eighteenth Century, Thomas Jefferson's view that blacks should be free, but that "the two races, equally free, cannot live in the same government,"[18] was widely shared by those who drafted our Constitution. Staughton Lynd, summarizing how the Framers came to include recognition and protection of human slavery in a document committed to the protection of individual liberties, wrote: "Even the most liberal of the Founding Fathers were unable to imagine a society in which whites and negroes would live together as fellow-citizens. Honor and intellectual consistency drove them to favor abolition; personal distaste, to fear it."[19]

That ambivalence, founded in white supremacy and matured in the belief that the two races should not co-exist in this new land, subverted the enthusiasm of even those who championed abolition and the post-Civil War Amendments that granted citizenship rights to the former slaves. By the end of the nineteenth century, it was abundantly clear that the citizenship promises contained in law had been broken in fact by the terms of the 1877 Hayes-Tilden Compromise.[20] The Supreme Court's Plessy v. Ferguson[21] decision in 1896, gave legal substance to segregation policies that had been in effect for years. The Court's finding that the equal protection guarantee was met by the

provision of "separate but equal" accommodations represented a denial of social reality, self-deceit given credence because it conformed both to the nation's needs and its beliefs.

In our era, the premier civil rights precedent, Brown v. Board of Education,[22] promised to be the twentieth century's Emancipation Proclamation. Both the Brown decision and the Emancipation Proclamation, however, served to advance the nation's foreign policy interests more than they provided actual aid to blacks.[23] Black people ignored the self-interest motivations and inspired by the rhetoric of freedom they contained, initiated self-help efforts to gain long-denied rights.

The freedom efforts have fallen short in the twentieth century as they did in the nineteenth. It appears that as much as civil rights proponents criticized him at the time, the late Yale Law Professor, Alexander Bickel's dire prediction has proven correct. He warned that the Brown decision would not be reversed but would become, dread word, irrelevant.[24] Irrelevant is the seeming fate of this once proud decision as we survey the Supreme Court's civil rights decisions of the last Term. Third-year law student, Radhika Rao, assessed their anti-civil rights thrust in a decision finding a Richmond, Virginia set-aside ordinance unconstitutional.[25] Ms. Rao writes:

> In City of Richmond v. Croson, a majority of the Supreme Court chose for the first time to subject an affirmative action plan enacted by the former capital of the Confederacy to the stringent review it applies to the most repugnant forms of racism. The Court's decision to treat all racial classifications identically possesses the same superficial symmetry of the "separate but equal" analysis in Plessy v. Ferguson, and it suffers from the same flaw. The Court denies the reality of racism when it isolates race-conscious actions from their context and concludes that benign racial classifications warrant the same standard of review as invidious acts.[26]

It is difficult to imagine a more apt comparison of the Court's approach in an end-of-the nineteenth century decision, Plessy, and an end-of-the twentieth century decision, Croson. In both, modest anti-discrimination efforts were countered with hypocritical responses that contorted racial reality beyond recognition. The distortions when repeated over time take on a disturbingly

predictable pattern that makes it difficult to maintain long-held views about the causes of racial discrimination and the chances for its eradication.

Long before he published his findings, American blacks and their liberal, white supporters, accepted the philosophy incorporated in Gunnar Myrdal's study, The American Dilemma.[27] Racism was simply an anomaly in a society committed to equality, the repairable failure of liberal democratic practices (regarding black rights) to coincide with liberal democratic theory. Our optimism relied on two assumptions that ignored a contrary history:

1. that the standard practices of American policy making were adequate to the task of abolishing racism; and

2. that white America did, in fact, want to abolish racism.

In The New American Dilemma,[28] Professor Jennifer Hochschild examines what she calls Myrdal's "anomaly thesis."[29] Reviewing the modest progress in school desegregation over almost four decades, Hochschild concludes that the anomaly thesis simply cannot explain the persistence of racial discrimination.[30] Rather, she finds, the continued viability of racism supports arguments "that racism is not simply an excrescence on a fundamentally healthy liberal democratic body but is part of what shapes and energizes the body."[31] Under this view, "liberal democracy and racism in the United States are historically, even inherently, reinforcing; American society as we know it exists only because of its foundation in racially based slavery, and it thrives only because racial discrimination continues. The apparent anomaly is an actual symbiosis."[32]

Hochschild looks at writings supporting the symbiosis thesis including Historian Edmond Morgan's relationship between slavery and the development of a republican ideology of freedom -- and to contemporary Marxist accounts of the functional utility of racism within a capitalist economy. History, she points out, reveal several occasions in which blacks have served as bargaining chips in facilitating the settlement of differences between segments of the white society. Even traditional liberal views regarding the need of symmetry in legal principles serve to protect and perpetuate racist policies and practices.

If Jennifer Hochschild is correct, then her second dilemma explains the intractable nature of the one Myrdal (and most of us) saw as the barrier to full equality for blacks. She suggests that rather than being understood as the

tension between liberal democratic theory and liberal democratic practice, the American dilemma must be understood as the more fundamental problem of reconciling liberalism with democracy. If most white citizens choose not to grant the citizens of color their full rights, then perhaps democracy must give way to liberalism.

But how do you invoke the equality policy choice in a majoritarian, democratic state where racial equality is the oft-heralded ideal but power-based majoritarianism is the on-going societal stabilizing fact? More crucially, how do you convince white Americans that the nation's most pressing social problems will never be addressed meaningfully as long as opponents of the needed reforms can stigmatize them as aid for unworthy black folks?

Economist Robert Heilbroner confirms that "there is no parallel to the corrosive and pervasive role played by race in the problem of social neglect in the United States."[33] He observes that the:

> merging of the racial issue with that of neglect serves as a rationalization for the policies of inaction that have characterized so much of the American response to need. Programs to improve slums are seen by many as programs to 'subsidize' Negroes; proposals to improve conditions of prisons are seen as measures to coddle black criminals; and so on. In such cases, the fear and resentment of the Negro takes precedence over the social problem itself. The result, unfortunately, is that the entire society suffers from the results of a failure to correct the social evils whose ill effects refuse to obey the rules of segregation.[34]

How can we explain the willingness of so many white Americans to sacrifice their interests in social reform to insure that blacks deemed "undeserving" by reform opponents do not gain from government benefits needed by both? What precisely are they trying to protect in this land where equality is a concept while ownership of property is a basic measure of worth.

Over time, beliefs in white dominance, reinforced by policies that subordinate black interests to those of whites, have led to an explicitly unrecognized but no less viable property right in whiteness. In challenging the legality of racial segregation in the late nineteenth century, the plaintiff in Plessy v. Ferguson,[35] recognized and the Court acknowledged -- at least for the purposes of the case -- that there was a property right in being white, an

entitlement to those advantages gained over blacks by virtue of a white identity.[36] Although there is no such overt recognition in contemporary racial decisions, the application to affirmative action policies of strict scrutiny standards of review once reserved for the most invidious forms of racism reflects a concern for "innocent whites" and recognizes in fact what the current Court's predecessors were willing to acknowledge openly.[37]

On close analysis, it becomes clear that past gains in the courts and in Congress came during periods when policy makers recognized that the interests of whites would be advanced or at least would not be harmed by recognizing the claims of African Americans for racial justice. I have been suggesting for years that civil rights progress in general, and the historic decision in Brown v. Board of Education, in particular, did not happen solely because of either the earnest efforts of blacks or the sudden realization by white policy makers that the racial injustices about which blacks had complained for so long were intolerable. Rather, progress requires a coincidence with some fairly pressing issue or situation that is aided by granting -- or as with Brown -- seeming to grant a remedy for long-suffered racial wrongs. In the case of Brown, there was a convergence of self-interest factors that -- consciously or not -- helped convince the Court and then slowly the society that racial segregation was an accommodation to the general belief in white superiority that the country could no longer afford. There is impressive evidence that the anti-Communist atmosphere during the post-World War II era contributed substantially to the end of official segregation.[38]

This is a concept rather hard to grasp for those who remember all too clearly the rabid resistance to Brown and to the desegregation that followed. Those memories are not flawed. The rage with which so many whites screamed "never" grew out of what was them a threatened loss of status as white people. Segregationists were neither impressed nor amused by contentions that it was in America's interest to drop the "separate but equal" charade. Keep in mind though that from the beginning of slavery, the masses of whites have supported programs that were contrary to their economic interest as long as those policies provided them with a status superior to that of blacks.

Why don't whites wake up? Professor Kimberle Crenshaw suggests that:

> To bring a fundamental challenge to the way things are, whites would have to question not just their own subordinate status, but also both the economic and the racial myths that justify the status quo. Racism, combined with equal opportunity mythology, provides a rationalization for racial oppression, making it difficult for whites to see the Black situation as illegitimate or unnecessary. If whites believe that Blacks, because they are unambitious or inferior, get what they deserve, it becomes that much harder to convince whites that something is wrong with the entire system. Similarly, a challenge to the legitimacy of continued racial inequality would force whites to confront myths about equality of opportunity that justify for them whatever measure of economic success they may have attained.
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> . . . .
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> race consciousness makes it difficult -- at least for whites -- to imagine the world differently. It also creates the desire for identification with privileged elites. By focusing on a distinct, subordinate "other," whites include themselves in the dominant circle -- an arena in which most hold no real power, but only their privileged racial identity. Consider the case of a dirt-poor, southern white, shown participating in a Ku Klux Klan rally in the movie Resurgence, who declared: "Every morning, I wake up and thank God I'm white." For this person, and for others like him, race consciousness -- manifested by his refusal even to associate with Blacks -- provides a powerful explanation of why he fails to challenge the current social order.[39]

Novelist Toni Morrison provides a more earthy but hardly less accurate assessment of how the presence of blacks enables a bonding by whites that occurs across vast socio-economic divides. Thus, when in a recent Time Magazine interview Ms. Morrison was asked why blacks and whites can't bridge the abyss in race relations, she replied:

> I feel personally sorrowful about black-white relations a lot of the time because black people have always been used as a buffer in this country between powers to prevent class war, to prevent other kinds of real conflagrations.
>
> If there were no black people here in this country, it would have been Balkanized. The immigrants would have torn each other's throats out, as they have done everywhere else. But in becoming an

American, from Europe, what one has in common with that other immigrant is contempt for me -- it's nothing else but color. Wherever they were from, they would stand together. They could all say, "I am not that." So in that sense, becoming an American is based on an attitude: an exclusion of me.

It wasn't negative to them -- it was unifying. When they got off the boat, the second word they learned was "nigger." Ask them -- I grew up with them. I remember in the fifth grade a smart little boy who had just arrived and didn't speak any English. He sat next to me. I read well, and I taught him to read just by doing it. I remember the moment he found out that I was black -- a nigger. It took him six months; he was told. And that's the moment when he belonged, that was his entrance. Every immigrant knew he would not come at the very bottom. He had to come above at least one group -- and that was us.[40]

The significance of the Toni Morrison anecdote is its universality. Indeed, it is difficult to think of another characteristic of societal functioning that has retained its viability and its value to social stability from the very beginning of the American experience down to the present day. Both the nation's history and current events give reason to wonder with Professor Tilden W. LeMelle "whether a society such as the United States is really capable of legislating and enforcing effective public policy to combat racial discrimination in the political process and elsewhere."[41] So, while slavery and segregation are gone, most whites continue to expect the society to recognize an unspoken but no less vested property right in their "whiteness." This right is recognized and upheld by courts and the society like all property rights under a government created and sustained primarily for that purpose.

There is no easy exit from this dilemma. Identifying whiteness as a property right simply calls the problem by its rightful name. One would think that it would not be difficult to identify broad areas of social reform in which the interest of most whites would be much greater than the illusory entitlement to a superior status based on whiteness. The gap between the incomes of the rich and the poor is greater than ever. Whites as well as blacks need more comprehensive health care, better schools, and more affordable housing. But achieving unity on these common interests is so difficult precisely because so many whites who share with blacks a whole range of social needs, are willing

to sacrifice their real interests to satisfy their psychic need to maintain a status superior to that of black people.

III. Conclusion:

One Wonders. Given the limited effectiveness of traditional civil rights laws, what kind of miracle or -- more likely -- how enormous a catastrophe will be required to get whites to realize that their property right in being white has been purchased for too much and has netted them only the opportunity, as historian C. Vann Woodward put it, to hoard sufficient racism in their bosoms to feel superior to blacks while working at a blacks' wages.

Those of us who still hope for equality through unity face two enormous challenges. First, we must broaden the Constitution's protection to encompass the sacrosanct area of economic rights, not simply as was the case at the beginning to secure vested property interests, but to recognize entitlement to basic needs -- jobs, housing, health care, education, security in old age -- as an essential property right of all. We must mount this campaign in the face of the likely resistance from many whites who will be the principal beneficiaries of its success.

Second, to reduce this resistance, we must mount an educational campaign based on the notion that "until whites get smart, blacks can't get free. In his campaign for the Democratic nomination for president, The Rev. Jesse Jackson made an exciting start in this tough educational process. He did not gain the nomination, but he proved that there are substantial numbers of working class whites willing to learn what blacks have long known: that the rhetoric of freedom so freely voiced in this country is no substitute for the economic justice that has been so long denied to whites as well as blacks.

Jackson, of course, did not win and as his campaign began gaining momentum, major elements of power used the media to slow and finally defeat his candidacy. Most black people and a respectable number of whites recognize both the need for social reform and the danger inherent in maintaining the current status quo. It is not right and hardly possible that those long held at the very bottom of this society can both sense the deadly dangers in the nation's present course and continue to give life to the fading belief in racial equality so long espoused and so infrequently practiced. Working from the bottom to gain their rights, African Americans have given substance to the

Constitution's guarantees and a vibrant humanity to a nation that has oscillated between a patronizing posture when its interest dictated a feigned friendship, and cold contempt when it did not.

History shows that when the issue is justice for African-Americans vs. Racism -- racism wins every time. But when the issue is racism vs. perceived self-interest for whites -- the choice (it is said) is justice for blacks. Over the years, we have thus come to know what whites <u>really</u> mean when they express an interest in racial justice. Given this knowledge, civil rights advocates must consider carefully what strategies will achieve that whites will view as in their self-interest. This analysis must consider both the limitations of penalty-oriented civil rights laws and the continuing value of discrimination practices that are not only as old as the country, but that continue to provide a key basis for societal stability and order.

ENDNOTES

1. 163 U.S. 567 (1896).

2. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964),(upholding the public facilities provisions of Title II).

3. Croson v. City of Richmond, 109 S. Ct. 706 (1989).

4. 347 U.S. 483 (1954).

5. 349 U.S. 294 (1955),(mandating an end to discrimination in public schools with "all deliberate speed").

6. A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 247-54 (1962).

7. 163 U.S. 537, 545 (1896).

8. Brown v. Board of Education, 347 U.S. 483, 494 n. 11 (1954).

9. A. Platt, The Politics of Riot Commissions 376-77 (1971),(Dr. Clark's statement is contained in his testimony before the Kerner Commission, established in 1967, in the wake of a series of urban, racial disorders.

10. Of course, racial unrest not deemed either threatening to the majority or politically appropriate for legislative action, need not lead to new civil rights laws. For example, between 1937 and 1946, civil rights advocates introduced more than 150 bills in the U.S. Congress intended to address lynching, the poll tax, and fair hiring practices. No civil rights acts were enacted during this period and the President during most of that period, Franklin D. Roosevelt, despite his considerable power, never pushed for or encouraged the passage of a civil rights bill. E. Carmines, J. Stinson, Issues Evolution: Race and Transformation of American Politics 31 (1989).

11. Fiss, A Theory of Fair Employment Laws, 38 U. Chi. L. Rev. 235 (1971).

12. Id. at 313-314.

13. Following are the 1989 Supreme Court rulings on civil rights that Congress may modify or reverse:

Richmond, Va. v. J.A. Croson Co., 109 S. Ct. 706 (1989), (by a 6-3 vote, struck down an affirmative action plan that set aside 30 percent of city construction contracts for minority-owned businesses).

Patterson v. Mclean Credit Union, 109 S. Ct. 2363 (1989),(ruled 5-4 that an 1866 law forbidding discrimination in contracts applies only to hiring agreements, not on-the-job bias).

Dallas Independent School Dist. v. Jett, 109 S.Ct 363 (1989), (ruled 5-4 that state and local officials cannot be held liable for discrimination unless the alleged violation was part of an official policy).

Wards Cove Packing Co. v. Atonio, 109 S. CT. 2115 (1989),(held 5-4 that in cases brought under Title VII of the 1964 Civil Rights Act, burden is on the plaintiff to prove an employer had no business necessity for a practice with discriminatory effects).

Martin v. Wilks, 109 S. Ct. 2180 (1989),(ruled 5-4 that non-parties to a court-approved consent degree incorporating an affirmative action plan can challenge the plan as reverse discrimination, even years after it was adopted).

Lorance v. A.T.& T. Technologies, Inc., 109 S. Ct. 2261 (1989),(held 5-3 that seniority plans cannot be challenged as discriminatory unless complaints are filed soon after the plans are adopted).

14. S. 2104, Congressional Record, S 1019-21 (Feb. 7, 1990). In Sec. 2(b), the bill lists its purposes:

> (1) to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions, and
>
> (2) to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

15. By 1987, the poverty rate for black Americans was 33.1 percent, an increase of 700,000 people in one year. By contrast, during that year, the white poverty rate fell from 11 percent to 10.5 percent. Center on Budget and Policy Priorities, Still Far From the Dream: Recent Developments in Black Income, Employment and Poverty (Oct. 1988). The report is available from the Center, 236 Mass. Ave., N.E., Suite 305, Washington, D.C. 20002.

16. The black unemployment rate averaged 13 percent in 1987, lower than in any other year in the 1980s, although higher than in most years of the 1970s. The proportion of

the total black adult population that is employed is at the highest level recorded since the date were first collected in 1972. But black unemployment has declined less than white unemployment, and the gap between black and white unemployment has widened to 2.57 times the white rate in 1988 -- the highest black-to-white unemployment differential ever recorded. Id. at ix-x.

17. The 1987 income of the typical black family ($18,098) equalled just 56.1 percent of the typical white family ($31,935), a lower percentage than in any year since 1967 when the data first began to be collected. A factor contributing to the growing income disparity between blacks and whites is the growing income gap between upper and lower income families in the nation as a whole. In 1987, this gap reached its widest point in 40 years. Id. at vii-viii.

18. Lynd, Slavery and the Founding Fathers, in Black History 117 (M. Drimmer, ed., 1968).

19. Id. at 129.

20. In the hotly contested Presidential election of 1876, the Democrat, Samuel J. Tilden, won a plurality of 250,000 votes in the nation, and appeared to have won the electoral count by one vote. The returns of three states were challenged and when recounts did not resolve the dispute, it was submitted to a special electoral commission that awarded the vote to the Republican, Rutherford B. Hayes. Democrats accepted this outcome in return for several concessions including a Republican promise to withdraw the remaining federal troops from the South, an action that removed the last barrier to the already-in-progress subjugation of the black freedmen. See, E. Foner, Reconstruction: America's Unfinished Revolution 1863-1877, 575-587 (1988).

21. 163 U.S. 537 (1896).

22. 347 U.S. 483 (1954).

23. The benefits to the nation, including disruption of the South's economy, raising insuperable political barriers to European nations entering the Civil War on the side of the South, and opening the way to the enlistment of thousands of blacks in the Union Army, are discussed in D. Bell, Race, Racism and American Law 3-7. For the advantages the nation gained as a result of the Brown decision, see, Dudziak, Desegregation as a Cold War Imperative, 42 Stanf. L. Rev. 61 (1988).

24. Bickel, A. The Supreme Court and the Idea of Progress ____ (1970).

25. City of Richmond v. Croson, 109 S. Ct. 706 (1989).

26. Harvard Law School, J.D. 1990.

27. G. Myrdal, An American Dilemma (1944). "The Negro problem in America represents a moral lag in the development of the nation and a study of it must record nearly everything which is bad and wrong in America. . . . However, . . . not since Reconstruction has there been more reason to anticipate fundamental changes in American race relations, changes which will involve a development toward the American ideals." Id. at xix.

28. J. Hochschild, The New American Dilemma (1984).

29. Racial discrimination "is a terrible and inexplicable anomaly stuck in the middle of our liberal democratic ethos." Id. at 3.

30. Id. at 203.

31. Id. at 5.

32. Id. at 5.

33. Heilbroner, The Roots of Social Neglect in the United States, in Is Law Dead? 288, 296 (E. Rostow, ed. 1971).

34. Id.

35. 163 U.S. 537 (1896).

36. Justice Brown wrote:

> It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is property, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man. 163 U.S. 548.

37. See, e.g., Martin v. Wilks, 109 S. Ct. 2180 (1989)(the failure of white firefighters to intervene in earlier employment discrimination proceedings did not preclude them from challenging employment decisions taken pursuant to a consent decree.)

38. Dudziak, Desegregation as a Cold War Imperative, 41 Stanf. L. Rev. 61 (1988).

39. Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in AntiDiscrimination Law, 101 Harv. L. Rev. 1331, 1380-1381 (1988).

40. Morrison, The Pain of Being Black, Time, May 22, 1989, at 120.

41. See, D. Bell, Race, Racism and American Law, Sec. 1.12 (2d ed. 1980).