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What's Wrong with Our Talk About Race? On History, Particularity, and Affirmative Action

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WHAT'S WRONG WITH OUR TALK ABOUT RACE? ON HISTORY, PARTICULARITY, AND AFFIRMATIVE ACTION

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One of the striking and original achievements of the *Michigan Law Review* in its first century was the publication in 1989 of a Symposium entitled *Legal Storytelling*.[1] Organized by the remarkable editor-in-chief, Kevin Kennedy — who tragically died not long after his graduation — the Symposium not only brought an important topic to the forefront of legal thinking, it did so in an extraordinarily interesting way. For this was not a mere collection of papers; the authors met in small editorial groups to discuss their work in detail, and as a result the whole project has a remarkable coherence and depth. In this Essay I shall build on the idea of that Symposium, but do so in a rather different way from any of those who wrote for it.

I.

People sometimes talk as though narrative is invariably a liberating or "subversive" mode of thought, when of course this is not so: stories can be as authoritarian, reactionary, closed-minded, and self-satisfied as any other form of discourse.[2] But I think it is also true that the narrative imagination has its own ways of working that can in some ways be inconsistent with more theoretical or abstract forms of speech.[3]

Sometimes you find as you tell a story that it takes on a life of its own, leading you to places you had not imagined and presenting

* L. Hart Wright Collegiate Professor of Law, Professor of English, and Adjunct Professor of Classical Studies, University of Michigan. A.B. 1960, Amherst; A.M. 1961, LL.B. 1964, Harvard. — Ed. I want to thank the following people who have given careful and helpful readings to earlier drafts and helped with bibliographical suggestions too: Milner Ball, Sherman Clark, Alice Fulton, Don Herzog, James Jackson, Richard Lempert, Sabine MacCormack, Bruce Mannheim, Deborah Malamud, Robert Nagel, Jefferson Powell, Rebecca Scott, Joseph Vining, Catherine White, Emma White, Mary White, and Christina Whitman. I have often followed their suggestions, but sometimes not, and in any event none of them is responsible in any way for my errors or misjudgments. Since the University of Michigan is involved in litigation over its affirmative action programs I should also say, what should go without saying, that I speak only for myself and not the University or its Law School.

1. 87 MICH. L. REV. 2073 (1989).

2. For an elaboration, see L. H. LaRue, *Stories versus Theories*, 14 CARDOZO L. REV. 121, 134-36 (1992).

3. *See* J.B. WHITE, THE LEGAL IMAGINATION 858-926 (1973).

problems of which you had been not consciously aware. This often happens, to take an extremely minor example, in the drafting of law school examinations, and I think it happens in larger and more important ways as well. Think, for example, of *Huckleberry Finn*. My sense is that in shifting from the traditional third-person narrator, as used in *Tom Sawyer*, to writing in the voice of an utterly marginal boy called Huckleberry, Twain was mainly thinking of the comic and satiric possibilities of the shift. Huck is a social idiot who perceives everything in a kind of mixed literal and superstitious way: his ignorance of what we all know makes him look foolish, but his fresh perceptions of the sillinesses of our world often make us look foolish too. As I imagine it, under Twain's original plan, the use of the first-person narrator would allow the reader and author alike to feel comfortably superior both to Huck and to the Mississippi River town of Petersburg.

But as the story proceeds it gets out of control: Huck becomes a center of moral life; his friendship with Jim is real — by far the best thing in his life; and Jim himself comes to be seen as a person of extraordinary moral and emotional quality, able to help Huck grow and change. I will not now rehearse the familiar story, but want only to point out that after the famous moment in Chapter 16 at which Huck refuses to turn Jim in to the slave-hunters, the novel comes to a halt. Huck has come to recognize that Jim is his friend, in a real sense the only friend he has ever had, and Twain has no way to imagine the next step in their story. In fact, he stopped writing the book at this point, and when he came back to it three years later he was able to proceed only by separating Huck and Jim and by presenting Huck as though he did not know what he learned in Chapter 16. It turns out that there is no way Twain can imagine the relation between this boy and this man in the social world in which they are placed, the only social world available. I think we could not imagine a life for them in that world either, and that this is a fact full of the deepest social significance.[4]

In one sense, I suppose, this was a real surprise to Twain, a frustration of his comic and satiric intentions. In another sense it was of course no surprise at all, for the story came from within Twain as an expression of a deep and troubling truth at the center of his own experience.

II.

I mean all of this as prelude to an effort of my own to raise a question with which my own imagination, and I think that of the law, cannot adequately deal, namely, the meaning of what we in our world call "race," especially in the context of "affirmative action." Race is of

4. For a fuller statement of what I suggest about *Huckleberry Finn*, see my recent book THE EDGE OF MEANING 28-49 (2001).

course the topic on which *Huckleberry Finn* ran aground, and I think we do too — or at least I do. I believe a large part of the problem is the way we tell the story of race in our culture, so in a small way I shall carry forward the theme of the Symposium to which I referred at the outset, where several of the writers — Patricia Williams, David Luban, Milner Ball, Mari Matsuda, Derrick Bell, Richard Delgado, and Clark Cunningham — spoke specifically to narratives about race in America. At the same time I shall engage in more analytic modes of thought as well, though these turn out to have the property that stories often have, namely, that they bring me in the end to a point I had not imagined at the beginning.

My starting point is my sense that there is something awry in the way we in the law talk both about race in general and about affirmative action in particular, something simply missing, or misrepresented. The legal arguments and judicial opinions I read have in general a smooth and plausible and honorable feel, but I have a nagging sense of something deeply wrong, as deeply wrong perhaps as what Twain discovered in his own way of imagining the world. I cannot prove that I am right, or even say with any clarity why I feel as I do, or what it is that is missing or wrong. This Essay, then, is thus really a tentative exploration of an intuition, and I suppose it will be of interest, if any, only to those who in some way share both that intuition and the sense that it cannot yet be quite articulated.

A word about the genre of this Essay. It will contain some factual assertions, some analytic points, some normative judgments, but it is meant to be something different from the sum of these elements and not reducible to them. You might say it is about the way I — and we — imagine certain things: our history, especially our racial history; the role of race today, especially the racial line between those we call white and black; the point of affirmative action, especially in the university. Since race is not a biological but a cultural fact, I shall be exploring an aspect of our culture, and its history, from the point of view of a participant in it. This kind of work has an ineradicably personal element, for our imaginings are always individual as well as shared. I am trying to say how things really look to me, and this is a function of my own experience and capacity and perception. It is necessarily the case that they will look somewhat different to others, and this is all to the good.[5] As a matter of form, the first half of the Essay will develop

5. What I am trying to say here is difficult to articulate. An analogy might help. If you look at a series of great portraits, say by Rembrandt, or of facial studies that are not formally portraits, say by Vermeer, you naturally find yourself trying to understand the person whose image is before you. This is a matter of reading tiny signs in the face — evidence of tension in the cheek or of quizzicality in a partly raised eyebrow or of petulance or resistance in the curve of a lip. If the painter has done his job well you have a sense of the person as real, with depth and complexity and a character you can begin to grasp. For him to do this, the painter has to master, perhaps without ever being able to make his knowledge explicit, the ways we read faces of real people in the world. This is a capacity we all have; it is one way we decide

the intuition I spoke of above, asking the reader whether or not he or she shares my perceptions; the second half will identify certain consequences that might flow from this intuition if it were shared.

My fundamental point in casting the Essay as I do is to claim that even to ask the question of how we think of race in the law is to draw attention to an act specifically of the imagination; and that thinking about race has some of the features of narrative, including the presentation of characters against a background, engaged in a sequence of events for which a meaning is claimed — and often a meaning that works as something of a surprise.

I am speaking here of the problem of white talk about race, since for these purposes legal talk is white talk.[6] For decades, even centuries, American blacks and Asians and Hispanics and others have tried to tell the story of race as they experience it, often with great eloquence and with considerable effect on particular readers, but with very little effect on the law, or on the way most lawyers and judges think. In a modest way I am trying to say something brief, from my own perspective as a white person, about what I see when I look at the world of race and at the way we in the law talk about it.[7]

III.

As David Luban suggests in his contribution to the Symposium I mentioned[8] — an essay comparing *Walker v. Birmingham*[9] with Martin Luther King's *Letter from Birmingham Jail*[10] — narrative works at the public or political level as well as the local and particular. Indeed, a part of every lawyer's task is to tell the story of the law — including, when appropriate, the history of the nation and its culture — as well as

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whether to trust or mistrust another, or form our expectations about their intelligence or sense of humor. Yet I at least cannot render this knowledge explicit. This is real knowledge, but it lives at the line between the conscious and the subconscious, available as a ground for action but not as the stuff of intellectual analysis.

I think our perceptions of race, and what it means, work in much this way, intuitively, instantaneously, felt not as conclusions reached from evidence but as direct registers of the world. They are simultaneously created by our inarticulate beliefs — expectations, larger understandings — and create such beliefs, all at a level that is only partly available to the conscious mind. This is in a sense where race happens; and in the first part of this Essay I try to say something about what I perceive in myself and others in this dimension of life.

6. Of course there have been crucial contributions made by black lawyers and judges, but these have necessarily been contributions to a discourse largely shaped and maintained by whites.

7. Sometimes I will use the word "we" deliberately to mean "we white people," sometimes more inclusively. I hope the context will make clear which use I intend.

8. David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989).

9. 389 U.S. 894 (1967).

10. M.L. KING, *Letter From Birmingham Jail, in* WHY WE CAN'T WAIT 77 (1963).

the particular story of his or her client, and to do so in a way that both makes sense of the relevant material in each dimension and also produces an essential coherence between the two stories themselves. This means that some of the problems and opportunities of narrative are present whenever the lawyer speaks, including about the law and its history.

Here is one highly reduced and familiar version of our national story about the racial line between white and black: once we had racial slavery; then we had the Civil War; then we had the great Civil War Amendments, prohibiting slavery, protecting the right to vote against racial discrimination, and prohibiting all the states of the Union from denying any person "equal protection of the laws"; then we had Reconstruction, and its abandonment in 1877; then we had *Plessy* and Jim Crow; then we had *Brown*; then we had the Civil Rights Act of 1964, prohibiting discrimination on the grounds of race, not only against blacks but anyone, and finally the Voting Rights Act of 1965. It all makes up a story of gradual amelioration. The large constitutional question still before us, especially with respect to affirmative action, is what the language of "equal protection" is to mean.

The well-known judicial discourse that the Supreme Court has fashioned to give meaning to this language maintains that the central evil against which it is directed is what we call "racial discrimination," and that any state action that distributes benefits or burdens, or otherwise regulates, on the basis of race will be subject to what in the jargon of the day is called "strict scrutiny." This in turn means that a classification based on race will be upheld only if it is "necessary" to the protection of a "compelling" state interest. Where the alleged vice is discrimination on the grounds of something other than race, but still presumptively improper — alienage, gender, perhaps some day sexual orientation — the classification is subject to a less severe but still substantial form of scrutiny. A similar analysis employs similar degrees of scrutiny when a state regulation interferes with a right thought to be more or less "fundamental," such as the right to vote or travel. Where no such suspect classification or fundamental right is involved, the state can do pretty much as it will, so far as the Fourteenth Amendment is concerned, subject only to the requirement that there be a "rational relation" between the regulation in question and a valid state interest. This is a system of thought and law that is meant to be rational, coherent, comprehensive, and neutral.

What of the case where a state uses racial classifications in an effort to *benefit* races that were previously disadvantaged by the law, for example in ensuring that a certain percentage of public contracts go to minority businesses, or in using racial identity as a factor in admitting students to public universities? The courts have for the most part analyzed these cases in the now-traditional way, by asking whether the action in question is "necessary" to advance a "compelling state inter-

est." Both halves of the test are used in turn to attack such programs: opponents argue they serve no compelling state interest and that, even if they do, race-based classifications are not necessary to achieve it. On the other side, proponents deny these propositions, asserting for example a compelling state interest in the educational value of "diversity" and claiming that it can only be attained by affirmative action in admissions. The ensuing arguments are lengthy, passionate, and repetitive.

This way of talking seems to me, as I said above, to be awry, to miss — or miscast — something crucial, and my question is what that is. Where have we gone wrong? My own sense is that a surprisingly large part of the problem lies in the extreme generality and abstractness of the language of analysis summarized above.

A.

At the most basic level, for example, I think there is something profoundly wrong with the use of the generic terms "race" and "minority" in the system of thought described above. For, at least as I perceive it, the situation of African Americans in our country is unique and makes unique claims upon us. I think black people have suffered a qualitatively different kind of discrimination from any other minority or race, and continue to do so. Of course it is also true that, particularly in certain regions of the country, the definition of other groups by what we call their race — including Mexican Americans, Puerto Ricans, Chinese Americans, Japanese Americans, Native Americans — has become foundational for a part of our society, with much of the viciousness that racism entails, including material deprivation, legal disadvantage, social degradation, and psychological oppression.[11] And immigrants to this country frequently find themselves placed in racial boxes they did not know existed, with puzzling and damaging conse-

11. For an account of the relations among blacks, Mexicans, and poor whites in the Texas cotton belt, see NEIL FOLEY, THE WHITE SCOURGE (1997). For an analysis of the role of "whiteness" in our culture, see DAVID ROEDIGER, TOWARDS THE ABOLITION OF WHITENESS (1994). THOMAS HOLT, THE PROBLEM OF RACE IN THE 21ST CENTURY (2000) is very good on tracing the deep continuities in racial attitudes and experiences that are at work beneath evident changes. For further current data, see Harvard Civil Rights Project, *Schools More Separate: Consequences of a Decade of Desegregation*, *quoted in* N.Y. TIMES, July 20, 2000, at A12, and Richard Morris & Michael H. Cottman, *Discrimination's Lingering Sting*, WASH. POST, June 22, 2001, at A1. Three other notes from newspapers I read while preparing this Essay: (1) a study of 300,000 car loans by a Vanderbilt professor, Mark A. Cohen, shows that blacks consistently pay more than whites, regardless of their credit histories, *see Car Study Suggests Dealer Bias*, ST. PETERSBURG TIMES, July 10, 2001, *available at* http://vanderbilt.directtrak.com/fetch/index.cfm?n=35&s=99&o=33&c=143824&t=11&e=5264; (2) John Flesher, *Black Prison Population Out of Proportion*, ANN ARBOR NEWS, Aug. 1, 2001, at B4, reports that blacks make up 14% of the population of Michigan but 50% of the prison population; (3) the Texas Defender Service reports that Texas has never executed a white person for the murder of a black person, *see* Bob Herbert, *Tainted Justice*, N.Y. TIMES, Aug. 6, 2001, at A13.

quences.[12] In what I say here, I do not mean in any way to disregard the experience of such groups or to minimize their claims. But I do think that the maltreatment of African Americans has been distinctive in its duration, its intensity, its legalization, and its ideology, and that honesty requires us to admit that this is so.

This is obviously no accident, for the present condition of African Americans is at least in part a consequence of their experience in our collective past, namely their forced subjection to a legalized form of slavery that was designed to destroy their cultures, their dignity, and their sense of humanity.

This is a moral as well as an historical fact, with unique moral consequences, for American human slavery was one of the greatest crimes ever committed by one people against another.[13] And this is not just my judgment, or ours; it was a national judgment, reached in the most painful possible way. Slavery was, as Lincoln said, "somehow the cause" of our incredibly devastating Civil War — 620,000 dead[14] out of a population of thirty million — and after victory the status of African Americans was the subject of the three great Civil War Amendments. The situation of African Americans is thus distinctive not only sociologically but historically, morally, and — of enormous consequence for legal talk about affirmative action — constitutionally. The use of the words "race" and "minority" as though these terms were universals

12. *See, e.g.*, RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (rev. ed. 1998).

13. Human slavery in our country — unlike Greek and Roman slavery, for example — was not merely a deprivation of liberty, or a system of forced labor, but a totalizing program of dehumanization aimed at destroying the sense that those subject to it were in any full sense human beings. They were denied the right to marry, to maintain families, to read, to meet or talk with people from the larger world, and so on, with the aim of reducing them to a condition that by a hideous tautology would justify the system of slavery itself: since we had made them little more than animals they could be treated as animals. For a collection of relevant materials, see J.B. WHITE, THE LEGAL IMAGINATION, *supra* note 3, at 439-512.

I am speaking here of the object and aim of slavery; the fact that those subject to it were able to maintain their humanity, wit, and wisdom was one of the great achievements of the human spirit. *See* EUGENE GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1976). For a summary of the world of slavery from which the American version derived, see David Brion Davis, *Looking at Slavery from Broader Perspectives*, 105 AM. HIST. REV. 452 (2000), and David Brion Davis, *Slavery — White, Black, Christian, Muslim*, N.Y. REV. OF BOOKS, July 5, 2001, at 51-53. For an account of the practice of "convict leasing," which kept at least part of the population in something very like slavery until 1930, see Douglas A. Blackmon, *From Alabama's Past, Capitalism and Racism in a Cruel Partnership*, WALL ST. J., July 16, 2001, at A1, *reproduced as Alabama's Justice System Holds Tarnished History of Slave Labor*, ANN ARBOR NEWS, July 22, 2001, at A3 to A6.

I can myself remember those who opposed integration talking of blacks in exactly the terms I suggest, as being less than fully human, with whom association on equal terms was unthinkable, intermarriage an abomination. It was in part to resist this conception of who they were that so many escaped slaves thought it important to tell their story — to show, that is, that despite the ideology and the attempts of the slave-owning South to create facts consistent with it, they were fully human, capable of thought and speech and feeling and imagination and moral sense, and able to write.

14. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 854 (1988).

with the same significance the same in every instance simply erases the special sociological, historical, moral, and constitutional status of African Americans.

B.

So does the word "discrimination" (or the phrase "invidious classification"), for as I suggest above I think the nature and character of the discrimination experienced by African Americans is different from any other in our national experience. In fact, although of course I cannot prove this, I believe that for most white Americans "race" really refers to the line between white and black. I am limited by my own experience, but I have never heard anyone express towards any other racial group the intense fear, fascination, loathing, and contempt that at various stages in my lifetime I have perceived to be frequently, though of course not universally, directed by whites at African Americans. While the explicit expression of these feelings is much rarer than it was forty years ago, at least in the circles in which I move, there is something in my world that takes its place, namely meaningful silences, pauses, shifts in tones of voice, all expressive of a sense of an ontological difference, more than difference, between white and black. I have never observed this behavior with respect to other "races."

I do not mean to say that members of other racial groups do not have horrible experiences, even to the point of torture and death, for I know they do. But I myself do not see the same widespread emotional charge, the same intensity of feeling, on the part of white people with respect to the "race" of other groups. For example, no other term of racial abuse so far as I am aware has anything remotely like the force of the N-word.[15]

15. The reason, I think, is that this word does not merely express contempt or hatred; it is an exercise of racist power that recapitulates the experience of slavery itself. Compare what is so evil about the Nazis marching through Skokie: this is not merely an expression of hatred or revulsion, nor just the infliction of psychological or emotional harm in the form of forced recall of trauma, but a way of doing something, claiming the special and odious power of one who has successfully degraded another. For what the Nazis are saying is something like this: "Those with whom we identify — Hitler and his underlings — tortured and destroyed and gassed and killed your families and friends, and we are glad they did. If we had been there we would have done the same. We triumph in your degradation." You can say in response that the speakers are moral monsters, sadists, crazed, evil; but you cannot make a comparable claim of power over them. They are like the child-rapist and murderer who smirks at the parents of his victim, still affirming his pleasure in his crime and his immunity to any moral claims. To it there is no answer. Likewise, the N-word says: "Our people enslaved and degraded and tortured yours, and we are glad they did. We triumph in your degradation." It is a taunt to which there is no possible response. "Honky" does not do it.

To put it more generally: after Hitler's extermination program one cannot engage in antisemitic speech without affirming that crime and identifying with its perpetrators; likewise, one cannot use the N-word without affirming the crime upon which it depends for its force, and identifying with its perpetrators.

I can remember that in the fifties white people opposed to racial equality would commonly ask more liberal-minded whites, as a kind of clincher, how they would like it if their daughter were to "marry one." The idea was of course to show that even the liberal shared the racism of the overt racist and should simply admit the fact and follow its logic, giving up his or her phony claims to moral superiority. Today I never hear anyone ask that question, which would generally be regarded as unacceptable. But I think that if this barrier of manners were overcome, and you did ask how your white friends would feel if their child were to marry a Latino or Latina, an Asian American, a Native American, or an African American, I think that most would in fact have far more problematic emotional responses to the last possibility.

Or think of the phenomenon, known all over the country, called "white flight." This is I think almost invariably, and certainly in its most intense forms, a response specifically to African Americans buying houses in the neighborhood in question — and it is not only whites who move away. Or consider areas of the country where other forms of racism have predominated, like the Southwest or Northwest, but where blacks have more or less recently moved, and ask what the ladder of social hierarchy looks like; I think generally one will find African Americans at the bottom. My own sense is that no one else has to face the same wall of feeling — doubt, hostility, contempt, fear — that black Americans face on a daily basis from their fellow citizens. Faulkner captures what I mean as well as anyone when, in books like *Absalom! Absalom!*, he expresses the kind of psychological torture the white mind inflicts upon itself and others as it tries to deny the full humanity of those it knows are fully human.

In sum, I think the racial line between white and black is far more significant in the lives of white people than any other, and if that is more generally true, honesty requires us to recognize that fact.[16] To

16. I know this is a difficult and somewhat controversial point, and that it does not help that the person who makes it is white. What do I know of the experience of the various racial minorities in this country, after all, and who am I to speak to their circumstances? And suppose that African Americans as a group are worse off, socially and materially: exactly how should that matter to Vincent Chin, say, beaten to death by a pair of thugs for being Asian, or to the Mexican woman living with her children in a trailer on an isolated butte in Colorado, without schooling or medicine or anyone who speaks her language except the boss who employs her family, or the American Indian child, growing up without hope, without an economic future, on a reservation in South Dakota? Indeed, how should it matter to the white family, barely surviving in desperate poverty in a West Virginia village, facing without help the diseases endemic to their condition?

This is a complex set of questions, to put it mildly. I think that no one in a country this rich should suffer the sort of poverty that millions do — and that they do is a national embarrassment and disgrace — but it is also true that all of us, of all races, have a powerful interest in living in a world that is as free as possible from the evils of racial thought and feeling. In this connection, the violent and systematic subordination of blacks seems to me to have a special status in our country's life, past and present, and in our Constitution as well. To say this does not and should not mean blindness to other injustices.

put it bluntly, I think that whites are as a general matter much more racist in their attitudes towards blacks than any other group, and that this shows up in our behavior and in the social structures we fashion and support. To this extent the white racists of the fifties were then — and still would be — right about the rest of us.

All this does not mean that the Fourteenth Amendment does or should speak only to the relations between whites and blacks, or that affirmative action is proper only with respect to that group. Though I recognize that some of the arguments against it have force and validity, my own view is that the highly varied kind of affirmative action practiced at my own and other universities is a right and good thing, and for a range of reasons: to compensate for past deprivation and dis-

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Are the purely material conditions of life in fact worse for blacks as a group than for any other group? This is in one sense an empirical question, and the answer to it would naturally depend to some degree upon the way conditions are measured — in terms of income, housing, safety, schooling, participation in government, and so on. For a sobering set of statistics, see Alan Hutchison, *Indiana Dworkin and Law's Empire*, 96 YALE L.J. 637, 662-64 (1987), *quoted in* Luban, *supra* note 8, at 2160.

But there is a sense in which no conditions are purely material: the question is what they mean in the lives of the people who face them. (Think of the voluntary poverty of a monk or a nun, which is at least sometimes embraced with joy.) And the meaning of the conditions black people face is the work of the history to which I have been referring — the history and its present life in the minds of white people.

For one account of the way in which white racism against blacks takes a physical toll on the body, see Sherman James's fascinating explanation of the severe difference between white and black hypertension. Sherman A. James, *John Henryism and the Health of African Americans*, 18 CULTURE, MED., & PSYCHIATRY 163-82 (1994); *see also* Rodney Clark et al., *Racism as a Stressor for African Americans: A Biopsychosocial Model*, AM. PSYCHOL., Oct. 1999, at 805 and Chalmer E. Thompson & Helen A. Neville, *Racism, Mental Health, and Mental Health Practice*, 27 COUNSELING PSYCHOL. 155 (1999). Especially interesting to one concerned with affirmative action in the university is MARGARET A. GIBSON & JOHN U. OGBU, MINORITY STATUS AND SCHOOLING: A COMPARATIVE STUDY OF IMMIGRANT AND INVOLUNTARY MINORITIES (1991), which, as the subtitle suggests, argues that voluntary minorities — those who choose to come to this or another country — have a radically different experience from indigenous or involuntary minorities. The former have made a decision to move; they can remember the conditions from which they escaped; and they can look forward to better times ahead — all of which are not available to a community that has experienced systematic and longterm oppression, especially by "race," which is a marker one cannot normally leave behind.

The conditions of Native Americans are comparable in important ways to those of blacks. The basic indicators of prosperity in these communities are for the most part extremely low — infant mortality, life expectancy, employment, income, alcoholism and other addictions, income, and political power. Native Americans are classic involuntary minorities, having been conquered by the immensely more powerful whites, made the object of genocide, and later treated shamefully. They are situated differently from blacks, however, in another way, which is that while there was a white war against them, in some sense a national war, there was no war *about* this war, no collective judgment that they had been treated unconscionably, and no constitutional amendments based upon that judgment. They do nonetheless have a special place in our constitutional tradition. As with African Americans, their story is a tragic one, littered with broken promises, and it calls for a response from us. But our constitutional text and tradition treat Native Americans largely through structural arrangements, rather than by denying, and then restoring, individual rights. Any adequate analysis of constitutional questions relating to affirmative action or other programs designed to aid Native Americans must begin with this distinctive and equally unique fact. The articulation of such an approach is beyond the scope of this Essay.

crimination, at both the individual and group level; to improve the quality of education for all students, and teachers too; and to help achieve a deep change in the ways in which we relate to one another across what we conceive of as racial lines. To return to the virtually all-white university of the past would be a dreadful thing. My point is not to put these practices into question, but to say that in the case of African Americans, there is an additional and deeper justification, rooted both in the nature and intensity of white racism against blacks and in our constitutional history.

C.

A second, somewhat different, way in which our language of "discrimination" misleads is this. In some forms, at least, this language assumes that the evil against which it is directed is a kind of stereotyping, that is, a false assumption that a particular individual has a set of social, personal, or physical characteristics in common with the larger group of which he is part — that he or she is good at math or basketball, or has a sense of rhythm or a hot temper. On this view the main vice of discrimination is that people are not judged accurately on their individual merits, but lumped with others with whom they do not belong. As an economist might say, discrimination is bad because it distorts the information flow and leads to defective market judgments in social and commercial relations.

This is indeed a bad thing. But it is not the heart of white racism against blacks, which I think is not so much a matter of cognition or perception as of desire. Think of what we call Jim Crow laws, for example, prohibiting blacks from drinking at white water fountains, or sitting in white waiting rooms, or going to white schools. These laws did not rest on a mistaken lumping of the individual with his or her group, but had among their other aims a totally different reward for white people: the pleasure and satisfaction of treating other people like dirt, as less than you, less than human in fact, secure in the knowledge that as beings without rights they presented no legal, economic, or physical threat.[17] This is as base a desire as exists in human nature,

17. CHARLES S. JOHNSON, GROWING UP IN THE BLACK BELT 277-80 (1941), has a list of interracial taboos in certain southern counties that confirm this assessment, as does the famous account of race relations in GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944), especially at 610-15. Jim Crow was of course a complex phenomenon, trading on and stimulating the feelings I describe, and others too — like the sense that blacks were a source of contamination, with whom any intimacies were degrading for a white person — but also driven by domestic political interests, especially the desire of the established Democratic Party to consolidate its power by excluding the black voter. For this disturbing story, including the complicity of the federal judiciary, see J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974); the classic, C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW, (3d. rev. ed. 1974); and the fine discussion of *Giles v. Harris*, 189 U.S. 475 (1903), and its background, in Richard H. Pildes, *Democracy, Anti-Democracy, and*

but it does exist, potentially in all human beings, and it was present and active in the laws I describe. And I think it is often present and active in white responses to blacks today — including in the affirmative action debates, where it takes the form of superficial lament, but internal satisfaction, when "these people" prove themselves inferior once again.

The feelings I describe have vastly greater consequences than most of our talk recognizes. Think of the way in which issues relating to the "inner city" or welfare or schools or crime or public health are talked about in our media, in political debates, and so on. I believe that just barely beneath the surface of these conversations is a conviction that what we are really talking about is black people, and that they are not fully people, not fully entitled to the kind of equality that is the linchpin of democracy.[18] We know this, for our government and society systematically fail to afford poor blacks the minimal conditions for a decent and healthy life. My own sense is that we would not tolerate on such a scale living conditions like those of many urban blacks if the people subject to those conditions were white, and that we do tolerate terrible conditions for some whites in part because to address them seriously would require us to do the same for blacks, and this we will not do. This is not a matter of stereotyping but of dehumanization, in some sense deliberate dehumanization, to which we — those with power in our country — tend to be blind, but which stands out as a shocking blot on our nation in the eyes of visitors.[19] The ghettoes of the North have taken the place of the slave quarters of the South.

I think that the line we maintain between white and black has the effect of corroding or disabling our democracy in another way, for it divides people where other interests would seem to unite them — interests in good public schools, in sensible penal policies and humane penal institutions, in rules concerning drugs and drug use that focus on education and rehabilitation instead of incarceration, in a decent public health system, in adequate transportation, in sensible controls on spreading suburbs, and so on. In every one of those issues, I believe, one can see at work the cancer of racism, and its effect is to distort

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the Canon, 17 CONST. COMMENT. 295 (2001). For a comparative study of post-slavery regimes, see FREDERICK COOPER ET AL., BEYOND SLAVERY (2000).

18. For a fine account of this phenomenon, see DONALD R. KINDER & LYNN SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS (1996), especially chapter five, *Subtle Prejudice for Modern Times*; *see also* HOLT, *supra* note 11, and the Gallup Poll fortuitously released as I was working on this Essay (July 11, 2001), showing wide disparities in black and white perceptions of our common situation and attitudes towards it.

19. We are so accustomed to our own system of racism that it seems natural, until we are forced to see it with outside eyes, say those of European visitors. Or imagine this: You become friends with a black African while working or studying in England; you suggest that he or she visit America, spending a few weeks traveling then staying with you at your home for a couple of weeks. What would you find yourself obliged to explain to your friend about your country, as he or she set off alone to travel in it?

democracy at the most basic level by preventing the formation of effective political majorities that would otherwise exist. Race may in this way be the cause — or a cause — of our remarkable public heartlessness as a nation, all the more surprising given our private generosity.[20]

D.

A more familiar point is that the language of equal protection is disturbingly abstract also in the terminology of its tests: "strict scrutiny," "compelling interest," "necessity," "suspect classification," etc. One can see some of what underlies this tendency, and it is in its own way good: the desire for neutral, abstract principles that will not commit the Court to the side of any litigant ahead of time. The ideal is to create a kind of elegant intellectual structure that will decide cases in neutral and predictable ways, perhaps with a little adjustment from time to time by the Court, without requiring the Court to take sides in important political debates or struggles. The hope is that this part of constitutional law will be real law, with the prestige and protection of universal categories and universal reason. At stake is the legitimacy of the Court itself, which depends upon its functioning as a legal and not a political agency, or so it is thought.[21]

But all this turns out to be something of a façade. Who, after all, is to decide what is a "suspect classification" or a "fundamental right" or a "compelling state interest," or whether a regulation is "necessary," and how are they to do so? These are not self-applying terms, and there is in the summary I have given, and I think in the opinions I have read, no coherent articulation of general purposes or values to which the Court could sensibly refer to give them definition. To think of this in the context of affirmative action cases, imagine yourself a judge asked to decide whether "racial diversity" offers educational benefits that rise to the level of a "compelling interest." How would you do this?

As is well known, the definition of these terms has fluctuated, with the result that the law at the moment is not very far from the kind of interest-balancing that simply puts control of the essential questions in the hands of the Court and gives up all but the pretense of the kind of control by reason and category that underlay the effort of doctrinal abstraction in the first place.[22] My sense is that in the end the intellec-

20. By this I mean both charitable giving, which of course goes to a wide range of beneficiaries — including blacks, though I doubt to a proportionate degree — and also the far more local habits of neighborliness and helpfulness, which in the nature of things tend to benefit those closest to us.

21. For a classic evocation of the ideals of neutrality and generality, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

22. For an interesting analysis of the tendency of the contemporary Court to frame its decisions in formulas, see ROBERT F. NAGEL, CONSTITUTIONAL CULTURES 121-155 (1989).

tual structure that was meant to control and guide judicial discretion has to a large degree only masked it.

Likewise, the language most often used to justify affirmative action in education, that of "the educational benefits of diversity," seems to me at once too abstract and too anemic. It is not a marginal improvement in the quality of college education that is at stake, but the power of the state to address our gravest and deepest social evil in a sensible way. The proper goal is not simply diversity or variety or pluralism, whether of "race" or perspective or background, but a fundamental change in the ways in which African Americans in particular, but members of other races too, are imagined, indeed are encouraged to imagine themselves, and in the ways in which white Americans imagine themselves and their past too. The goal is not better education but social change at the deepest level; it is not a form of reparation, but a change in the practical and psychological structure of our national life.[23]

E.

Finally, and briefly, a word about an even narrower point, the common assumption that "preferential admissions" necessarily works to the cost of the excluded white applicants who have better credentials. Think about the white high school senior, for example, who complains, in a way sensibly enough, that she has to worry about getting into a good college, while some of her black classmates, with lower grades and scores, have a better chance of making it. How would you respond to her? Perhaps this way: Suppose, against the facts of history, that our fellow citizens of African descent had come here voluntarily and without the burdens of slavery; that they had been welcomed just as the Germans and English and Scots were, for example; and that they thus had had the opportunity to become fully incorporated as equal citizens, with all that entails, from education to property. Is it not possible that admission to college would be even more competitive for you than it is now? The student's complaint, in other words, rests on the assumption that the superiority in wealth, power, and culture that whites have enjoyed is the normal state of affairs, which she sees affirmative action to threaten; not that the normal

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Compare Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

23. For an argument to a similar point, see Elizabeth Anderson, *From Normative to Empirical Sociology in the Affirmative Action Debate: Bowen and Bok's* The Shape of the River, 50 J. LEGAL EDUC. 284, 305 (2000). There is often an element of patronization — or racism, actually — built into the language of "diversity," for it assumes that its beneficiaries will enrich the lives of the rest of us and do so by fulfilling their function, which is to "represent their people." This is not a respectful way to talk about others, and it replicates the fundamental reifying assumptions of racial talk.

state of affairs would be actual equality between the races, which affirmative action is a small effort to attain.[24]

This is just a small instance in which it is plain that, however opposed he or she may be to racial discrimination, every white person is in some sense — in terms of power, self-image, the right to claim no race at all — its beneficiary. This is of course profoundly distasteful, but it is true, and in our efforts to talk about this matter we should try to reflect that truth.[25]

IV.

If I have captured something of the way we talk about race in the law, especially in connection with affirmative action, and something too of what is wrong with it, can we find a way to do better? Is there any other way, in particular, in which we might think about an affirmative action case, say, one involving the use of racial categories by a state university in the admission process to ensure so far as possible the presence of African Americans in the student body? (I shall assume for the moment that the program reaches only African Americans, not members of other races.)

A.

The first step might be to think of the Civil War Amendments less as an effort to create neutral and universal rules of law, to be applied by the work of a universal reason — as is perhaps true of the Bill of Rights — than as an effort to address the greatest single social and political issue the nation has ever faced: human slavery and its conse-

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24. Some people understandably feel resentful of public efforts to redress racial injustice on the grounds that their ancestors came long after slavery was over and that they and their families have not only not practiced racial discrimination, they have been consistently opposed to it. Let the descendants of slaveowners pay, perhaps, but not us, who have done nothing. There are several difficulties with this position, the most obvious perhaps the one made in the next paragraph of the text, that all white people are in fact privileged by our racial system, even if they do not wish to be.

Compare also the person who invests today in a German corporation that used slave labor in the past: some portions of the value he is acquiring is attributed to that labor, whether he likes it or not. Being a white person in America is like buying a house that was built by slaves before the Civil War.

It is also true that slavery was not so long ago. My own great aunt, whom I remember meeting, was born in 1860, and I have myself known people whose parents and grandparents were born into slavery. Equally important, overt and legalized disenfranchisement of black people continued until the Voting Rights Act of 1965, well within the lifetime of many people alive today.

25. Is it in fact possible that the very commitment to abstraction that characterizes legal discourse in this field, its search for neutral categories, its erasure of what is historically and constitutionally special about the situation of black Americans, is partly driven without our knowing it by the hidden desires of racism? *Cf.* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

quences, particularly the denial of full citizenship to the descendants of slaves. It is obvious that the Framers of these amendments saw this as a long process — hence the use of the constitutional amendment as a way to deal with it — and that they anticipated serious and systematic state hostility to the newly freed slaves, for it is against this danger that the amendments were meant to guard. The amendments were in large part aimed at preventing the states from interfering with the process by which newly freed blacks, or those freed earlier, could become integrated into the nation as full citizens — autonomous, capable, independent.[26] This is a way of conceiving of the amendments as designed to achieve something specific in the world, not just as articulations of general political or philosophic principles to be applied to all alike.

From this perspective it would be simply bizarre to use the Fourteenth Amendment to strike down reasonable state efforts to help African Americans achieve full autonomy and integration. The States would be doing just what the amendments wanted them to do — instead of the particularly odious kind of group warfare they had waged against African Americans for centuries, and that many of them were in fact to continue to wage in different guises for another century at least. "Discrimination" — which sounds like a neutral term defining a generalized evil — in fact means something very different indeed when it refers to action by the white majority designed to increase their domination over blacks and when it refers to action by the same majority designed to reduce it.[27]

I am suggesting, that is, that we might think of this set of amendments as being far more "result-oriented" than we usually do, as aimed less at the articulation of a general principle by which to test all state legislation than at the specific result of trying to help black Americans get on their feet and flourish in a world in which they faced constant racial opposition.[28] This view is all the more compelling, to

26. Indeed, the equal protection language could be read to require more: affirmative action, in fact, to protect blacks against lawlessness and violence at the hands of whites. *See* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994), especially her most interesting chapter one, *Toward an Abolitionist Reading of the Fourteenth Amendment.*

27. For an elaboration of this point, see, for example, Richard Lempert, *The Force of Irony: On the Morality of Affirmative Action and* United Steelworkers v. Weber, 95 ETHICS 85 (1984), and my discussion of *Weber* in J.B. WHITE, JUSTICE AS TRANSLATION, 218-22 (1990).

28. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), otherwise so objectionable, could provide a starting point, for the Court there held that the Fourteenth Amendment was to be read not as a general grant of power to review the reasonableness or propriety of state legislation, but as directed to the plight of freed blacks. *See* J.B. White, *Reading Texts, Reading Traditions: African Masks and American Law*, 12 YALE J.L. & HUMAN. 117, 125-26 (2000).

The obvious counter-argument to the position taken in the text is (1) that the Framers of the Fourteenth Amendment did not in fact compose that text in terms of race or slavery, let

me at least, when we consider the disgraceful period of Jim Crow and the Court's shameful complicity in it, during which the conditions that the amendments were designed to address were largely continued under the force of law, including legalized disenfranchisement.[29] Given this history, the Court ought to be extremely deferential to any sincere state effort to achieve, rather than frustrate, the purposes of the amendments.

B.

I also think we should reexamine the "state action" doctrine, the rule that the Constitution reaches discrimination only at the hands of the state, or one of its agents or subdivisions, not of private parties. In affirmative action cases the issue arises this way: the Court has agreed that a state agency, such as a university, may use racial classifications to counter the effects of its own prior unconstitutional racial discrimination (this would, that is, be a "compelling interest"); on the other hand, it may not act in this way to counter the effects of discrimination by other states, or other branches of its own state, and certainly not to counter the effects of what is termed "societal discrimination." There are two arguments at work here: first that private discrimination

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alone identify the specific condition of black Americans, and (2) that it would have been worse, for blacks and everyone else, had they done so, for a group-specific protection in a Constitution otherwise largely part cast in universalist terms would be likely to increase rather than reduce racial hostility.

Of course it is a real question how the Framers' choice of general language is to be read, but I do not think that it precludes the reading I propose. There can be no question that it is the situation of blacks to which the Fourteenth Amendment is mainly directed, especially when it is read in connection with the Thirteenth and Fifteenth. And to say that the paradigm the Framers had in mind should be treated with particular respect and solicitude in no way undermines their wish to articulate a standard that would reach other cases as well — just as in reading the Fourth Amendment it would be right to give scrupulous though not exclusive attention to cases that are especially close to the writs of assistance that were the Framers' paradigm for improper governmental searches. My view is not that the Fourteenth Amendment should reach no other cases, no other people, but only to say that the special case of African Americans ought to be treated as the paradigm it actually was.

The second point in the argument given above I think actually reinforces my reading. Of course one would not want a constitutional amendment framed in terms of one racial group, and for both the reasons suggested. But that very fact is one reason why the Framers might have composed a universalist text not out of universalist impulses, but in response to the dangers and evils of a particular situation. I think it would be much closer to the meaning of the Fourteenth Amendment in its context to read it as especially focused on the circumstances of blacks than to read it, as the Court now seems to, as a wholly neutral prohibition of the use of racial classifications without distinguishing between cases in which those classifications are used to perpetuate the racial domination against which the amendment is directed and those in which they are used to erode it.

29. See especially Giles v. Harris, 189 U.S. 475 (1903), explained and analyzed well in Pildes, *supra* note 17. For a general history, see WOODWARD, *supra* note 17. Like Thomas Holt in his PROBLEM OF RACE IN THE 21ST CENTURY, *supra* note 11, Woodward shows that in race relations as all else there are significant changes over time, some of them dramatic. But the accounts of both writers express a deep theme of persistent white racial hostility, sometimes simmering, sometimes on the boil, but always present.

would have been beyond the reach of the Fourteenth Amendment when it occurred and thus cannot justify ameliorative action today; and second that societal discrimination is in any event too amorphous and uncertain to work as an appropriate standard for legislative action.[30]

The view that the Constitution reaches only state action rests on one great textual pillar, the fact that the Fourteenth Amendment begins with the language, "no state shall . . ." and goes on to specify various things, including "deny any person equal protection of the laws."[31] The state action requirement is supported as well by the nature of the Constitution more generally, which is of course meant to define and limit the powers of government, not to promulgate general rules of law. And it is evident that the purpose of the Fourteenth Amendment at a general level was to subject the state's treatment of the individual person to substantial constitutional control, which before was not the case — indeed it could not have been, if the Framers' original compromise on slavery, permitting but not mentioning it, were to survive. All this amounts to a strong argument for the state action requirement.

But perhaps it is not completely unanswerable, especially where, as here, the question arises at one remove: the question is not whether the societal discrimination the state wishes to redress was itself a violation of the Fourteenth Amendment, but whether its private or societal character disqualifies it as a justification the state may now invoke to support its remedial policies.

Think here of the state action question as it arose in perhaps its purest form, in connection with the series of "sit-in" cases in the early 1960s. The facts were typically something like this: black activists, or black activists and their white supporters together, would enter a restaurant or store or other such establishment to request service against the insistence by the management that they would serve only white customers. The activists would be asked to leave and would refuse. Usually they would be prosecuted under a statute or ordinance that was not cast in racial terms but simply made it a crime to enter property, or to remain on it, against the expressed will of the owner. The question was whether the convictions violated the Fourteenth Amendment; the obvious argument was that they did not, for the state was not the source of the decision to discriminate. Exclusion was a purely private judgment, enforced in a neutral way by the state, which claims that it would have acted equally energetically on behalf of a black restaurateur who wished to exclude white customers. The state

30. *See, e.g.*, Shaw v. Hunt, 517 U.S. 899, 909 (1996).

31. U.S. CONST. amend. XIV, § 1. The seminal articulation of the state action doctrine is in the *Civil Rights Cases*, 109 U.S. 3 (1883).

would in fact have had not the slightest objection, it was said, if an owner of a restaurant wanted his establishment to be open to people of both races, or only to integrated groups. A decision for the protesters, it was argued, would threaten the right of the people to make free choices in the most private aspects of their lives, at parties given in their own homes for example, or in the choice of rooming house boarders.

As is well known, the Court found technical ways to reverse these convictions without directly facing the state action question, in this way putting pressure on Congress to deal with the issue, which it did in the 1964 Civil Rights Act. This statute was premised mainly on the commerce power of the Congress, rather than the Fourteenth Amendment, and therefore no substantial state action question was presented. The new antidiscrimination law was conceptualized, in other words, not as the reversal of a state policy on race but simply as the regulation of a certain part of the economy, which under the expansive readings of the commerce power in the New Deal cases was practically the entire thing.

But suppose that Congress had not acted. Is it obvious that these convictions were beyond the reach of the Fourteenth Amendment? An argument that they were not could begin with the fact that the line between state and private action, especially in connection with racial discrimination, is by no means as clear as the doctrine suggests. First, consider the fact that in any of the Southern states, and some of the Northern ones, every act of so-called private discrimination occurring during the first half of the twentieth century would have had the support of official declarations from every branch of the state government — executive, legislative, and judicial.[32] When a state says that its policy is to segregate the races in every feasible way,[33] in what sense are private acts consistent with this policy merely private acts? It is impossible for me to believe that the governmental policies and declarations did not have substantial reinforcing, perhaps guiding, effect. One task and hope of the law is to shape culture, and that means to reach private action; when the law deliberately reinforces a racist culture it may

32. See, for example, the summary of Louisiana law in *Garner v. Louisiana*, 368 U.S. 157, 178-81 (1961) (Douglas, J., concurring).

33. For one judicial statement of the policy of racial subordination, see Naim v. Naim, 87 S.E.2d 749 (Va. 1955):

> We are unable to read in the Fourteenth Amendment to the Constitution, or in any other provision of that great document, any words or any intendment which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens. We find there no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship.

Id. at 756.

perhaps be held accountable for conduct beyond that which it specifically requires or prohibits. The fact that there is no state policy with respect to lunchrooms, for example, would hardly undo the effect of the state's bold and unrelenting commitment to the principle of black inferiority and the separation of the races.

A more radical way to connect the state with "private" action was suggested by Justice Douglas in the sit-in cases, when he said that custom could be law and hence "state action" for purposes of the Fourteenth Amendment.[34] His idea I think was that when one group, in this case whites motivated by racial animosity towards blacks, have such a practical monopoly of private and public power that they may simply choose whether to achieve their objectives through the arms of the state or through concerted private action, it ought not matter which form of power they elect to use. In other words, when a group is so dominant that it can use the agencies of the state if it chooses, its extragovernmental actions ought not be immune from all constitutional consideration simply because it chose to act "privately."[35]

In support of Justice Douglas's approach, consider the fact that in its origins slavery was to a large degree private, not public. Slavery emerged as a private practice, mainly in the Southern states, presumably with the approval of those with power in the community; only once

34. *See* Jackson v. Metro. Edison, 419 U.S. 345, 365 (1974) (Marshall, J., dissenting); Garner v. Louisiana, 368 U.S. 157, 179-81 (1961). A more familiar argument focused on the character of restaurants, hotels, lunchrooms, and the like, as businesses "affected with a public interest." Under ancient common law they had an obligation to serve all people at fair prices. Of course, the fact that the common law has this principle does not mean that it is automatically a principle of constitutional law, but Douglas used it to provide a language, a set of instances and ideas, by which the Fourteenth Amendment could reach some "private" judgments to discriminate without reaching all — the restaurant but not the social club. When one adds the fact that these facilities are heavily regulated by the state, the argument that they are quasi-public becomes still stronger. On the other hand, this way of thinking would seem to make the restaurants or other businesses "state actors" for all purposes, meaning that other provisions of the Constitution would apply to them — for example the Establishment Clause, which would arguably make it unconstitutional for the restaurant owner to display a religious symbol or text on the wall of his restaurant.

35. Reasoning like this was also at work in *Terry v. Adams*, 345 U.S. 461 (1953), which held that "private" political primaries were subject to constitutional limitations (though that case could presumably be limited to instances where the supposedly private parties were carrying out public functions). One could also invoke here by analogy the arguments against excessive formalism in corporate law made by Nina Mendelson, *A Control-Based Approach to Shareholder Liability*, 102 COLUM. L. REV. 1203 (2002).

Unlike the "affected with a public interest" rationale, Douglas's primary approach to what is involved when a private business acts to maintain white domination over blacks would not make those businesses state actors for all purposes, but only when they are acting to reinforce the evil against which the amendment is directed. In this sense, it is another move away from abstraction to address the particularity of our situation. This is all an argument for the rejection of the now-standard way of thinking about "state action" — by the degree of "entwinement" between the "state" and the "private actor" — whenever the issue is the perpetuation of white domination of blacks. *See* Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) (affirming *Metro. Edison.*, 419 U.S. 345 (1974)).

so established did it become expressly legalized, through legislative and judicial action. Indeed, the most comprehensive and draconian slave codes were not promulgated until the middle years of the nineteenth century, almost 200 years after the beginning. Slavery was a product of the common law, a legalization of social practice, a fact that lends support to the idea that social practices born out of slavery might be within the ambit of the Constitution. A fusion of the private and the public is built into the history of slavery and racial discrimination alike.

This is recognized in the Constitution itself, for the Thirteenth Amendment, prohibiting slavery, has no state action language at all, but simply says:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.[36]

This amendment makes human slavery the proper object of federal concern even if it receives no support whatever from agencies of the state. A federal statute accordingly makes it a crime to treat another person as a slave, without any requirement that the state (or federal) government in any way support or involve itself in that slavery.[37] When one recognizes that the sorts of discrimination and abuse to which the descendants of slaves in this country have been regularly subjected are, as a cultural and factual matter, an effort to maintain the view of the world and of other human beings that underlay slavery, to perpetuate it in another form, it may not be as much of a stretch as it first appears to hold that the Constitution speaks to systematic racism in the private as well as the public sector — or, to use the language of *Plessy v. Ferguson*,[38] that it aims at "social" as well as "political" equality.

This argument has special force wherever agencies of the state have in the past supported racism, and it is even more plausible where — as is true in affirmative action cases — the question is not whether "private conduct" or "societal discrimination" is itself subject to judicial regulation under the Constitution but only whether a state may constitutionally base remedial action upon it, as a legacy of the slavery against which the amendments are specifically directed.[39] In this con-

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36. U.S. CONST. amend. XIII, § 1.

37. 18 U.S.C.A. 77, § 1584 (West Supp. 1994): "Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined under this title or imprisoned not more than 20 years, or both."

38. 163 U.S. 537 (1896).

39. Justice Douglas told the story briefly in *Bell v. Maryland*: "The Black Codes were a substitute for slavery; segregation was a substitute for the Black Codes; the discrimination in these sit-in cases is a relic of slavery." 378 U.S. 226, 247-48 (1964).

text the second argument mentioned above, that societal discrimination is too amorphous to serve as a ground for state action, seems very weak. Insofar as the states are themselves trying in a genuine and rational way to address the problem of racial injustice to which the amendments were themselves directed, their efforts should be applauded and supported, not undermined, by the Court, and the rest of us.[40]

C.

One of the difficulties faced by those who defend affirmative action programs is that of explaining exactly why one racial or ethnic group is included, another excluded. The trial judge in the University of Michigan Law School case said, for example, that the School had no principled way of explaining why it singled out African Americans, Mexican Americans, Native Americans, and Puerto Ricans raised on the U.S. mainland.[41] If the idea is to remedy past discrimination that has resulted in under-representation in the legal profession, as some programs put it,[42] Polish people would certainly seem to have a claim. And why only Latinos and Latinas who are Mexican in origin? Why only mainland-raised Puerto Ricans? And how about Asian Americans, a category that includes an enormous diversity with respect both to prior national and cultural background and to present-day economic and social status? The language of "diversity," as I said above, seems simply too weak to deal with the imperatives presented by the special circumstances of African Americans, and it leads to distinctions that are hard to explain or defend. My own sense is that affirmative action programs, in some sense originally based on special moral and political claims of blacks, have been extended in a way that both makes them harder to explain and justify and ends up diluting and obscuring the claims of blacks themselves.[43] As I say above, "diversity" does not in my view express what is at stake in the state's effort to address the situation of African Americans.

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40. In this field, as in some others, it would in fact be highly desirable to take advantage of our federal system and permit different states to try different programs and methods, with the thought that we all might learn something from the process.

41. "Certainly other groups have also been subjected to discrimination, such as Arabs and southern and eastern Europeans, to name but a few . . . ." Grutter v. Bollinger, 137 F.Supp.2d 821, 852 (E.D. Mich. 2001).

42. See, for example, the University of Colorado Law School program, *quoted* (anonymously) *in* THE LEGAL IMAGINATION, *supra* note 3, at 386-87.

43. See the minority set-aside program at issue in *City of Richmond v. Croson*, 488 U.S. 469 (1989), where "minority group members" included "Blacks, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." *Id.* at 478. Justice O'Connor, writing for the majority, condemned in particular the inclusion of the last two groups, on the grounds that they have had virtually no representation in Richmond's population and therefore cannot legitimately be entitled to remedying of past discrimination. *Id.* at 506.

How, then, should we think about affirmative action? I think a line can be drawn that distinguishes between African Americans and all others, for the reasons I have been setting forth from the beginning of this Essay. Rather than strict scrutiny, a very high degree of judicial deference should be paid to sensible and responsible attempts by the state to address what is in my view at least the most serious of all our social and moral problems: racial oppression of blacks. In the university context, this would include not only the judgment to admit African Americans who would not, on other criteria, be admitted to universities, but also a decision to spend time and money to help them to succeed there.

As for other groups, the rationale of diversity, supported by the desire to redress prior and present patterns of discrimination, does make sense to me. Without the special case of African Americans, such a program could be far less race-dependent than it now is, far more focused on the particular experience and situation of individual applicants. If diversity of background and experience and outlook is the goal, and I think it is a fine one, then a university ought to be interested on these grounds in a bluecollar white man, a fundamentalist Christian woman, a Hasidic Jew, a Sikh or Hindu, a man or woman from the barrio in Los Angeles, a farm worker's child, a person who grew up as the only Asian American in her town in Georgia, a woman who worked during college in a pregnancy clinic in southeast Washington, an Ojibwe man from the White Earth reservation in Minnesota, and so on. The burdens or handicaps faced by any of these people should be relevant to their admission, including those based upon the fact that others regard them as belonging to a "race" different from the "white race." And if a state, or its universities, did conclude that the circumstances of some other race made claims as a group comparable to those of blacks — based on past or present deprivation, discrimination, or oppression — I think the courts should give considerable weight to such a determination too. All of this could be done far more honestly and intelligibly if the special core case of the African Americans were recognized as distinctive and treated accordingly.

Obviously, I support affirmative action on the merits, especially for blacks. But I should stress that the two shifts in doctrine I have suggested — (1) reading the Fourteenth Amendment as focusing especially on protecting blacks against the organized hostility of whites, and (2) proposing a revision of the state action doctrine along the lines suggested by Justice Douglas — would not result in a constitutional *obligation* that the states adopt affirmative action programs in university or other contexts. These programs are on the merits highly controversial and contested, and while I am strongly disposed to favor them, I also recognize that rational — if in my view erroneous — arguments can be made against them. These arguments may be cast in

terms of fairness to white applicants, the importance of neutral standards of intellectual achievement and capacity, the claim of damage done to the intended beneficiaries of the program, or the improper omission of whites who have suffered economic and other forms of deprivation. In my view, the States would be constitutionally entitled to be persuaded by these arguments, disagree with them on the merits though I do. My main point here is very different, having to do with the attitude the Supreme Court — and lower courts, too — should take towards a state agency that has considered these matters, heard arguments both ways, and come to the conclusion that such a program is a wise and good thing. Given the aims of the Fourteenth Amendment and the shameful history of the nation — including state and federal courts — since that time, I think the Court has no business "strictly scrutinizing" reasonable state efforts to advance the purposes of the Civil War Amendments, but should instead be glad that the state has assumed the kind of responsibility it has and defer to its rational judgments.

Race — and by this I mean the socially-defined line between whites and blacks — is the ultimate taken-for-granted of our culture; we maintain it, both in our official and in our unofficial behavior, as I in fact have been doing throughout this article. It is a continuing badge of slavery. So long as it exists, the Court should display, at the very least, a tolerant attitude towards state efforts to end the evils it has produced.

D.

One more point, which brings us back to *Huckleberry Finn* and its implication of the white reader in the racism that is its subject. Built into the argument at every stage so far is the belief that people are in fact of different races. Everyone knows that whites are one thing, blacks another. Intermarriage is of course possible, but again, everyone knows that the child of such a marriage is black, not white. Yet it is perfectly plain that race is not a natural or biological fact.[44] Surely the social rule regarding children of mixed marriages — that they are "black," not "white" — is a demonstration that race is an arbitrary social and legal construct; a system of racism could with equal plausibility hold the opposite, that one drop of the blood of the master race entitled a person to all the privileges of that status. Many of the physical features we associate with "race," such as skin color and facial features are inherited separately, not as a package. And similarity in skin color may in fact not represent a common ancestry, but a parallel adaptation to similar conditions on the part of distant populations. If you turn to

44. For a good introduction to this issue, see STEPHAN MOLNAR, HUMAN VARIATION, RACES, TYPES, AND ETHNIC GROUPS (2d. ed. 1983).

genetic studies of race, you find that Africans have greater genetic variation than other populations — think of the towering and thin Masai compared to the short pygmies, for example, and the enormous variation in head shape and facial features among in habitants of that continent. This makes it exceedingly odd to think of Africans as a single race. But we whites tend not to see these differences, or not to see them clearly, because in our minds they are less significant than the single criterion of skin color. This is what it means to have a mind shaped by the ideology or race: to think that the differences we choose to observe are real and natural.

E.

Finally, I wish to draw attention to another feature of the language of race, and a source of its power, namely, that it creates a connection, a web of identity and responsibility in fact, between people who have not chosen each other and are not related by blood or marriage. Thus, when a black man steals or rapes or kills, white people tend to look to black people, or at least black men, in a demanding or at least questioning way: "What have you to say about that? You people are . . . ." But by what warrant do we whites do that? The person we implicitly address, or hold responsible, has no more real relation with the criminal than we do. Think how differently gender works. I suppose a vast majority of violent crimes are committed by males, but it is not common to see the acts of one male attributed to all. Our culture does not draw among men the kind of connection that it regularly draws among those defined by race, especially African Americans.

The language of race in this context, white against black, works like the language of war. Its logic is the same as that by which a nation at war holds all of the enemy people responsible for what any of them does. In the case of war, this feature of the language has a dreadful but real purpose: it enables us to deny the humanity that unites us with the people on the other side, a denial that is necessary for war to go on at all. It is what enables a person to drop incendiary bombs on Tokyo or Dresden or London or Baghdad. The psychological cost of this denial is enormous, for it is obviously false, but, as I say, it is necessary to the existence of war, to which we must look for any justification.

That our language of race works like a language of war is no accident, since its origins were as a language of war, a language that would justify the war of whites against blacks — their seizure, sale, and total subjugation, by torture and murder if necessary.

This may explain a feeling I have had about *Brown v. Board of Education*,[45] that it was a victory like a martial victory, a triumph over an enemy — and hence that it was entirely beside the point to agonize

45. 347 U.S. 483 (1954)

about whether it treated with appropriate "neutrality" the conflict between the white desire for segregation and the black desire for integration.[46] There is a real sense in which the Civil War did not end at Appomattox, but continued, with African Americans as its continued victims, at least for another century. As a white Northerner in the fifties, I can remember feeling with great self-righteousness that the evil against which *Brown* was directed was specifically and exclusively a Southern one, a remnant of the war in fact. In those days "Yankee" and "Rebel" were still terms of ordinary speech, and I think my own feelings about *Brown*, though I only recognized this recently, were those of victory, victory in a war — one that would require further action, of course, for the war was not yet entirely won, but a decisive victory nonetheless.

It also explains something else, for me at least. I was myself raised to believe that the language of race drew lines among human beings that ought never to be drawn. The inference I drew was that race is a topic on which one should never speak. To refer to another person's race in their presence was an ultimate rudeness; to do so in their absence a kind of dishonesty. When the issue of affirmative action first arose in my life, very early in my teaching years at the University of Colorado, I argued strenuously that it ought to be race-neutral, and that it should speak instead of hardship, deprivation, oppression, on the view that these were ultimately individual matters. I think what I was seeing, without quite knowing it, was that the language of race was the language of war, and I thought it should never be used. But I now think this was and is an impossible principle: race is in fact created by our society, and given meaning, and we cannot deny this. We have to use the language, bad as it is.

The days of *Brown*, and the early days of affirmative action, too, were days of innocence of course. We can now begin to see, even Northerners like me, what Lincoln told us in his Second Inaugural, that this is and was one nation, with one history and one great defining national "offense," to use his and the Bible's word, in which all white people and the state itself are implicated. The true story is that the evil of racial thought is not Southern but national, and the battle of today is not between geographic regions but within our hearts. Yet all this suggests that the nomenclature of the Civil War Amendments has more relevance than is commonly recognized, and not only as a matter of the context in which they were promulgated and adopted. They speak to a civil war that still rages in our society, in our schools, in our selves, and they should be so interpreted.[47] I think it is the right, the

46. *See* Wechsler, *supra* note 21.

47. The fact that racial language is in its origins and nature a language of war helps explain a peculiar feature of its use, namely that the question who is to be included within each group becomes highly problematic in a range of circumstances and is often highly contested.

only thing for the Court to recognize that white racism is the continuation of a war against our fellow citizens, defined by "race," and that as an evil of this kind, it calls for responses that rest on the great purposes of the Civil War itself and the amendments it made possible, certainly to the extent of adopting an attitude of respect and deference, indeed thankfulness, towards every reasonable effort of the state to bring that war to an end.

* * *

This Essay has been my effort to say, in very brief compass, something about the way I see race imagined and acted on in our world, and in the law. For me the abstract and supposedly neutral language of legal analysis is hopelessly inadequate to the facts of our situation, including: our history of over two hundred years of a deliberately degrading racial slavery, the significance of our Civil War and the amendments that gave its achievement shape, the meaning of the next century of state violence and oppression against blacks, and the continuing neglect and contempt to which blacks are subject. Its use of the general categories of "race" and "discrimination" and "diversity" draw attention away from the special claims blacks may properly make on the institutions of this society, and indeed from the special histories of other racial groups as well.

When Mark Twain finds himself imagining more and more fully the relation between Huck and Jim as a relation between human beings — a relation of love and redemption, in fact, for Jim saves Huck not only pragmatically but psychologically — he brings simultaneously into the circle of attention the moral impossibility of racial thought and its unavoidability. We are now in truth situated much as he was then. There is no easy way to imagine ourselves out of the world of deep and violent injustice we have created, and that we recreate every day. But that is our task, and we shall have a much better chance of doing something right and valuable if we can find ways of talking and thinking, ways of telling our national story, that will do justice to its meaning.

For this is a characteristic of the language of war as well: Are you one of "them," that is, one of the enemy whom we regard ourselves as justifiably killing? Or are you too young or too sick or too weak or too old, or too much at odds with government, to count? The consequences are enormous but the line uncertain. So, too, with respect to race: Are you really "black," hence (1) subject to slavery or (2) entitled to make claims based on a history of slavery? Are you really "white," hence in some way responsible for this history, or a beneficiary of it? And so on.