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White Superiority in America: Its Legal Legacy, Its Economic Costs

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WHITE SUPERIORITY IN AMERICA: ITS LEGAL LEGACY, ITS ECONOMIC COSTS

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A FEW years ago, I was presenting a lecture in which I enumerated the myriad ways in which black people have been used to enrich this society and made to serve as its proverbial scapegoat. I was particularly bitter about the country's practice of accepting black contributions and ignoring the contributors. Indeed, I suggested, had black people not existed, America would have invented them.

From the audience, a listener reflecting more insight on my subject than I had shown, shouted out, "Hell man, they did invent us." The audience immediately understood and responded to the comment with a round of applause in which I joined. Whether we are called "colored," "Negroes," "Afro-Americans," or "blacks," we are marked with the caste of color in a society still determinately white. As a consequence, we are shaped, molded, changed, from what we might have been . . . into what we are. Much of what we are—considering the motivations for our "invention," is miraculous. And much of that invention—as you might expect—is far from praiseworthy . . . scarred as it is by all the marks of oppression.

Not the least of my listener's accomplishments was the seeming answer to the question that is the title of this talk. And indeed, racial discrimination has wrought and continues to place a heavy burden on all black people in this country. A major function of racial discrimination is to facilitate the exploitation of black labor, to deny us access to benefits and opportunities that would otherwise be available, and to blame all the manifestations of exclusion-bred despair on the asserted inferiority of the victims.

But the costs and cost-benefits of racial discrimination are not so neatly summarized. There are two other inter-connected political phenomena that emanate from the widely shared belief that whites are superior to blacks, that have served critically im-

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portant stabilizing functions in the society. First, whites of widely varying socio-economic status employ white supremacy as a catalyst to negotiate policy differences, often through compromises that sacrifice the rights of blacks.

Second, even those whites who lack wealth and power are sustained in their sense of racial superiority and thus rendered more willing to accept their lesser share, by an unspoken but no less certain 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.

Let us look first at the compromise-catalyst role of racism in American policy-making. When the Constitution's Framers gathered in Philadelphia, it is clear that their compromises on slavery were the key that enabled Southerners and Northerners to work out their economic and political differences.

The slavery compromises set a precedent under which black rights have been sacrificed throughout the nation's history to further white interests. Those compromises are far more than an embarrassing blot on our national history. Rather, they are the original and still definitive examples of the on-going struggle between individual rights reform and the maintenance of the socio-economic *status quo*.

Why did the Framers do it? Surely, there is little substance in the traditional rationalizations that the slavery provisions in the Constitution were merely unfortunate concessions pressured by the crisis of events and influenced by then prevailing beliefs that: (1) slavery was on the decline and would soon die of its own weight; or that (2) Africans were thought a different and inferior breed of beings and their enslavement carried no moral onus.

The insistence of southern delegates on protection of their slave property was far too vigorous to suggest that the institution would soon be abandoned.[1] And the anti-slavery statements by slaves and white abolitionists alike were too forceful to suggest that the slavery compromises were the product of men who did not know the moral ramifications of what they did.[2]

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1. Even on the unpopular subject of importing slaves, Southern delegates were adamant. John Rutledge from South Carolina warned: "If the Convention thinks that N.C.; S.C. & Georgia will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those States will never be such fools as to give up so important an interest." II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 373 (M. Farrand ed. 1911).

2. The debate over the morality of slavery had raged for years with influen-

The question of what motivated the Framers remains. My recent book, *And We Are Not Saved*,[3] contains several allegorical stories intended to explore various aspects of American racism using the tools of fiction. In one of these stories, or chronicles, the book's heroine, Geneva Crenshaw, a black civil rights lawyer, gifted with extraordinary powers, is transported back to the Constitutional Convention of 1787.

There is, I know, no mention of this visit in Max Farrand's records of the Convention proceedings. James Madison's compulsive notes are silent on the event. But the omission of the debate that followed her sudden appearance in the locked meeting room, and the protection she is provided when the delegates try to eject her is easier to explain than the still embarrassing fact that these men—some of the outstanding figures of their time—could incorporate slavery into a document committed to life, liberty, and the pursuit of happiness to all.

Would they have acted differently had they known the great grief their compromises on slavery would cause? Geneva's mission is to use her knowledge of the next two centuries to convince the Framers that they should not incorporate recognition and protection of slavery in the document they are writing. To put it mildly, her sudden arrival at the podium was sufficiently startling to intimidate even these men. But outrage quickly overcame their shock. Ignoring Geneva's warm greeting and her announcement that she had come from 200 years in the future, some of the more vigorous delegates, outraged at the sudden appearance in their midst of a woman, and a black woman at that, charged towards her. As Geneva described the scene:

> Suddenly, the hall was filled with the sound of martial music, blasting trumpets, and a deafening roll of snare drums. At the same time—and as the delegates were almost upon me—a cylinder composed of thin vertical bars of red, white, and blue light descended swiftly and silently from the high ceiling, nicely encapsulating the podium and me.

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tial Americans denouncing slavery as a corrupt and morally unjustifiable practice. *See, e.g.*, W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA: 1760-1848, at 42-43 (1977). And slaves themselves petitioned governmental officials and legislatures to abolish slavery. *See* I A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 5-12 (H. Aptheker ed. 1968).

3. D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

> To their credit, the self-appointed eviction party neither slowed nor swerved. As each man reached and tried to pass through the transparent light shield, there was a loud hiss, quite like the sound electrified bug zappers make on a warm, summer evening. While not lethal, the shock the shield dealt each attacker was sufficiently strong to literally knock him to the floor, stunned and shaking.

This phenomenon evokes chaos rather than attention in the room, but finally during a lull in the bedlam, Geneva tries for the third time to be heard. "Gentlemen," she begins again, "Delegates,"—then paused and, with a slight smile, added, "fellow citizens. I have come to urge that, in your great work here, you not restrict to white men of property the sweep of Thomas Jefferson's self-evident truths. For all men (and women too) are equal and endowed by the Creator with inalienable rights, including 'Life, Liberty and the pursuit of Happiness.' "

The debate that ensues between Geneva and the Framers is vigorous, but despite the extraordinary powers at her disposal, Geneva is unable to alter the already reached compromises on slavery. She tries to embarrass the Framers by pointing out the contradiction in their commitment to freedom and liberty and their embrace of slavery. They will not buy it:

> "There is no contradiction," replied a delegate. "Governeur Morris of Pennsylvania . . . has admitted that 'Life and liberty were generally said to be of more value, than property, . . . [but] an accurate view of the matter would nevertheless prove that property is the main object of Society.' "[4]
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> "A contradiction," another added, "would occur were we to follow the course you urge. We are not unaware of the moral issues raised by slavery, but we have no response to the [Southern delegate] who has admonished us that 'property in slaves should not be exposed to danger under a Government instituted for the protection of property.' "[5]
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> Government, was instituted principally for the protection of property and was itself . . . supported by prop-

4. *See generally* I THE RECORD OF THE FEDERAL CONVENTION OF 1787, at 533 (M. Farrand ed. 1911).

5. *Id.* at 593-94.

> erty. Property is the great object of government; the great cause of war; the great means of carrying it on.[6] The security the Southerners seek is that their Negroes may not be taken from them. After all, Negroes are their wealth, their only resource.

Where, Geneva wondered, were those delegates from northern states, many of whom abhorred slavery and had already spoken out against it in the Convention? She found her answer in the castigation she received from one of the Framers who told her:

> Woman, we would have you gone from this place. But if a record be made, that record should show that the economic benefits of slavery do not accrue only to the South. Plantation states provide a market for Northern factories, and the New England shipping industry and merchants participate in the slave trade. Northern states, moreover, utilize slaves in the fields, as domestics, and even as soldiers to defend against Indian raids.
>
> Slavery has provided the wealth that made independence possible, another delegate told her. The profits from slavery funded the Revolution. It cannot be denied. At the time of the Revolution, the goods for which the United States demanded freedom were produced in very large measure by slave labor. Desperately needing assistance from other countries, we purchased this aid from France with tobacco produced mainly by slave labor. The nation's economic well-being depended on the institution, and its preservation is essential if the Constitution we are drafting is to be more than a useless document. At least, that is how we view the crisis we face.

At the most dramatic moment of the debate, a somber delegate got to his feet, and walked fearlessly right up to the shimmering light shield. Then he spoke seriously and with obvious anxiety:

> This contradiction is not lost on us. Surely we know, even though we are at pains not to mention it, that we have sacrificed the freedom of your people in the belief that this involuntary forfeiture is necessary to secure the property interests of whites in a society espousing, as

6. *Id.* at 542.

> its basic principle, the liberty of all. Perhaps we, with the responsibility of forming a radically new government in perilous times, see more clearly than is possible for you in hindsight that the unavoidable cost of our labors will be the need to accept and live with what you call a contradiction.

Realizing that she was losing the debate, Geneva intensified her efforts. But the imprisoned delegates' signals for help had been seen and the local militia summoned. Hearing some commotion beyond the window, she turned to see a small cannon being rolled up, and aimed at her. Then, in quick succession, a militiaman lighted the fuse; the delegates dived under their desks; the cannon fired; and, with an ear-splitting roar, the cannonball broke against the light shield and splintered, leaving the shield intact, but terminating both the visit and all memory of it.

The Framers felt—and likely they were right—that a government committed to the protection of property could not have come into being with the race-based, slavery compromises placed in the Constitution. It is surely so that the economic benefits of slavery and the political compromises of black rights played a very major role in the nation's growth and development. In short, without slavery, there would be no Constitution to celebrate. This is true not only because slavery provided the wealth that made independence possible, but also because it afforded an ideological basis to resolve conflict between propertied and unpropertied whites.

According to historians, including Edmund Morgan[7] and David Brion Davis,[8] working class whites did not oppose slavery when it took root in the mid-1660s. They identified on the basis of race with wealthy planters . . . even though they were and would remain economically subordinate to those able to afford slaves. But the creation of a black subclass enabled poor whites to identify with and support the policies of the upper-class. And large landowners, with the safe economic advantage provided by their slaves, were willing to grant poor whites a larger role in the political process.[9] Thus, paradoxically, slavery for blacks led to greater freedom for poor whites, at least when compared with the

7. E. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975).

8. D. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION: 1770-1820 (1975).

9. E. MORGAN, *supra* note 7, at 380-81.

denial of freedom to African slaves. Slavery also provided mainly propertyless whites with a property in their whiteness.

My point is that the slavery compromises continued, rather than set a precedent under which black rights have been sacrificed throughout the nation's history to further white interests. Consider only a few examples:

—The long fight for universal male suffrage was successful in several states when opponents and advocates alike, reached compromises based on their generally held view that blacks should not vote. Historian Leon Litwack reports that "utilizing various political, social, economic, and pseudo-anthropological arguments, white suffragists moved to deny the vote to the Negro. From the admission of Maine in 1819 until the end of the Civil War, every new state restricted the suffrage to whites in its constitution."[10]

—By 1857, the nation's economic development had stretched the initial slavery compromises to the breaking point. The differences between planters and business interests that had been papered over 70 years earlier by greater mutual dangers, could not be settled by a further sacrifice of black rights in the *Dred Scott* case.[11]

Chief Justice Taney's conclusion in *Dred Scott* that blacks had no rights whites were bound to respect, represented a renewed effort to compromise political differences between whites by sacrificing the rights of blacks. The effort failed, less because Taney was willing to place all blacks—free as well as slave—outside the ambit of constitutional protection, than because he rashly committed the Supreme Court to one side of the fiercely contested issues of economic and political power that were propelling the nation toward the Civil War.

When the Civil War ended, the North pushed through constitutional amendments, nominally to grant citizenship rights to former slaves, but actually to protect its victory. But within a decade, when another political crisis threatened a new civil war, black rights were again sacrificed in the Hayes-Tilden Compromise of 1877. Constitutional jurisprudence fell in line with Taney's conclusion regarding the rights of blacks *vis a vis* whites even as his opinion was condemned. The country moved ahead, but blacks

10. L. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES 1790-1860, at 79 (1967).

11. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

were cast into a status that only looked positive when compared with slavery itself.

This audience could add several more examples, but I hope these suffice to make my first point: that throughout our history, whites of widely varying socio-economic status, have employed deeply set beliefs in white supremacy as a catalyst to negotiate and resolve policy differences, often through compromises that sacrifice the rights of blacks.

My second and connected point is that even those whites who lack wealth and power are sustained in their sense of racial superiority and thus rendered more willing to accept their lesser share, by an unspoken but no less certain 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.

In the post-Reconstruction era, the constitutional amendments initially promoted to provide rights for the newly emancipated blacks were transformed into the major legal bulwarks for corporate growth. The legal philosophy of that era espoused liberty of action untrammelled by state authority, but the only logic of the ideology—and its goal—was the exploitation of the working class, whites as well as blacks.

As to whites, consider *Lochner v. New York*,[12] where the Court refused to find that the state's police powers extended to protecting bakery employees against employers who required them to work in physically unhealthy conditions for more than 10 hours per day and 60 hours per week. Such maximum hour legislation, the Court held, would interfere with the bakers' inherent freedom to make their own contracts with the employers on the best terms they could negotiate. In effect, the Court simply assumed in that pre-union era that employees and employers bargained from positions of equal strength. Liberty of that sort simply legitimated the sweat shops in which men, women, and children, were quite literally worked to death.

For blacks, of course, we can compare *Lochner* with the decision in *Plessy v. Ferguson*,[13] decided only eight years earlier. In *Plessy*, the Court upheld the state's police power to segregate

12. 198 U.S. 45 (1905) (overruled by Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("[D]octrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely [is] . . . discarded.")).

13. 163 U.S. 537 (1896) (overruled by Brown v. Board of Educ., 347 U.S. 483 (1954)("separate but equal" doctrine inapplicable to public education)).

blacks in public facilities even though such segregation must, of necessity, interfere with the liberties of facilities' owners to use their property as they saw fit.

Both opinions are quite similar in the Court's use of fourteenth amendment fictions: the assumed economic "liberty" of bakers in *Lochner*, and the assumed political "equality" of blacks in *Plessy*. Those assumptions, of course, required the most blatant form of hypocrisy. Both decisions, though, protected existing property and political arrangements, while ignoring the disadvantages to the powerless caught in those relationships: the exploited whites (in *Lochner*) and the segregated blacks (in *Plessy*).

The effort to form workers' unions to combat the ever-more powerful corporate structure was undermined because of the active antipathy against blacks practiced by all but a few unions.[14] Excluded from jobs and the unions because of their color, blacks were hired as scab labor during strikes, a fact that simply increased the hostility of white workers that should have been directed toward their corporate oppressors.

The Populist Movement in the latter part of the nineteenth century attempted to build a working-class party in the South strong enough to overcome the economic exploitation by the ruling classes. But when neither Populists nor the conservative Democrats were able to control the black vote, they agreed to exclude blacks entirely through state constitutional amendments, thereby leaving whites to fight out elections themselves. With blacks no longer a force at the ballot box, conservatives dropped even the semblance of opposition to "Jim Crow" provisions pushed by lower-class whites as their guarantee that the nation recognized their priority citizenship claim, based on their whiteness.

Southern whites rebelled against the Supreme Court's 1954 decision declaring school segregation unconstitutional precisely because they felt the long-standing priority of their superior status to blacks had been unjustly repealed. This year, we celebrate the thirty-fourth anniversary of the Court's rejection of the "separate but equal" doctrine of *Plessy v. Ferguson*,[15] but in the late twentieth century, the passwords for gaining judicial recognition of the still viable property right in being white include "higher

14. *See, e.g.*, W. GOULD, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES (1977); H. HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM (1977).

15. Brown v. Board of Educ., 347 U.S. 483 (1954).

entrance scores,"[16] "seniority,"[17] and "neighborhood schools."[18] There is as well, the use of impossible to hurdle intent barriers, to deny blacks remedies for racial injustices where the relief sought would either undermine white expectations and advantages gained during years of overt discrimination,[19] or where such relief would expose the deeply imbedded racism in a major institution, such as the criminal justice system.[20]

The continuing resistance to affirmative action plans, set-asides, and other meaningful relief for discrimination-caused harm, is based in substantial part on the perception that black gains threaten the main component of status for many whites: the sense that as whites, they are entitled to priority and preference over blacks. The law has mostly encouraged and upheld what Mr. Plessy argued in *Plessy v. Ferguson* was a property right in whiteness, and those at the top of the society have been benefitted because the masses of whites are too occupied in keeping blacks down to note the large gap between their shaky status and that of whites on top.

Blacks continue to serve the role of buffers between those most advantaged in the society, and those whites seemingly content to live the lives of the rich and famous through the pages of the tabloids and television dramas, like Dallas, Falcon Crest and Dynasty. Caught in the vortex of this national conspiracy that is perhaps more effective because it apparently functions without master plans or even conscious thought, the wonder is, not that so many blacks manifest self-destructive or non-functional behavior patterns, but that there are so many who continue to strive and sometimes succeed, despite all.

The cost to black people of racial discrimination is high, but beyond the bitterness that blacks understandably feel, there is the reality that most whites too, are, as Jesse Jackson puts it, victims of economic injustice. Indeed, allocating the costs is not a worthwhile use of energy when the need now is so clearly a cure.

There are today—even in the midst of outbreaks of anti-black hostility on our campuses and elsewhere—some indications that an increasing number of working class whites are learning what blacks have long known: that the rhetoric of freedom so freely

16. Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).
17. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
18. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974).
19. Washington v. Davis, 426 U.S. 229 (1976).
20. McCleskey v. Kemp, 107 S. Ct. 1756 (1987).

voiced in this country is no substitute for the economic justice that has been so long denied.

True, it may be that the structure of capitalism, supported as was the Framers' intention by the constitution, will never give sufficiently to provide real economic justice for all. But in the beginning, that constitution deemed those who were black as the fit subject of property. The miracle of that document—too little noted during its bicentennial—is that those same blacks and their allies have in their quest for racial justice brought to the Constitution much of its current protection of individual rights.

The challenge is to move the document's protection into the sacrosanct area of economic right this time to insure that opportunity in this sphere is available to all. Progress in this critical area will require continued civil rights efforts, but may depend to a large extent on whites coming to recognize that their property right in being white has been purchased for too much and has netted them only the opportunity, as C. Vann Woodward put it, "to hoard sufficient racism in their bosoms to feel superior to blacks while working at a black's wages."

In this regard, I hope you realize that we are witnessing a historic event as Rev. Jesse Jackson attempts to convince whites of the truth that blacks have long known: that the rhetoric of liberty so freely offered is no substitute for the economic justice that has been so long denied.

True, it may be that the structure of capitalism, supported as was the Framers' intention by the Constitution, will never give sufficiently to provide real economic justice for all. There is more than ample reason to question with Tilden J. LeMelle:

> Whether a society in which racism has been internalized and institutionalized to the point of being an essential and inherently functioning component of that society—a culture from whose inception racial discrimination has been a regulative force for maintaining stability and growth and for maximizing other cultural values—whether such a society *of itself* can even legislate (let alone enforce) public policy to combat racial discrimination is most doubtful.[21]

"A racist culture," LeMelle fears, "can move to eradicate or make racism ineffective only when racism itself becomes a serious

21. T. LeMelle, *Forward* to R. BERKY, RACIAL DISCRIMINATION AND PUBLIC POLICY IN UNITED STATES 38 (1971).

threat to the culture and its bearers."[22] In this regard, the current presidential campaign is both a hope and a discouragement. It is a hope because a surprisingly substantial group of whites—including working class whites—have evidenced an ability to overcome the fatal attraction of the etherial property right in whiteness, and are recognizing the need to rally with blacks—and a black candidate—for economic protection against exploiters who are mainly white.

The discouragement is that so many leaders of the party supposedly committed to social welfare and economic justice for the working classes are so willing to stop at all costs a candidate with the proven potential to unite blacks and whites across the race-as-property colorline. It is said that a black man—and particularly this black man—cannot be elected.

This prediction, voiced by experts, and trumpeted by the media, is accepted as gospel by the powers in the party whose strongly supported candidate in 1984 lost in 49 states. The Democratic party powers are so convinced that American intolerance will bar the election of a black that they are ready to embrace and deem electable America's first ethnic President whose wife is a Jew, and whose economic miracle in Massachusetts will prove—under close scrutiny—to be more the result of good fortune than good government.

I hope you do not miss the paradox of a people who have been the historic victims of American racism, and their candidates, who evidence more faith in the ability of white people to overcome their racism than do the leaders of the party that blacks have supported unstintingly for more than half a century. I do not hope to change the minds of those who oppose Jesse Jackson. He, like the other candidates, has weaknesses as well as strengths. I do urge that you place in context my message regarding the need, by whites as well as blacks, for decolonization of racial-mindsets.

The cost of racial discrimination is levied against us all. Blacks feel the burden and strive to remove it. Too many whites have felt that it was in their interest to resist those freedom efforts. Those pulls, despite the counter-indicators provided by history, logic and simple common sense, remain strong. But the efforts to achieve racial justice have already performed a miracle of transforming the Constitution—a document primarily intended

22. *Id.*

to protect property rights—into a vehicle that provides a measure of protection for those whose rights are not bolstered by wealth, power, and property.