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# Re-Cognizing Inequality: Rebellion, Redemption and the Struggle for Transcendence in the Equal Protection of the Law

Robert L. Hayman

# RE-COGNIZING INEQUALITY: REBELLION, REDEMPTION AND THE STRUGGLE FOR TRANSCENDENCE IN THE EQUAL PROTECTION OF THE LAW

*Robert L. Hayman, Jr.\**

The logic of the rebel is to want to serve justice so as not to add to the injustice of the human condition, to insist on plain language so as not to increase the universal falsehood, and to wager, in spite of human misery, for happiness.

—Albert Camus<sup>1</sup>

## Prologue: An Allegory

We called it “kick-the-can,” but it wasn’t much like the other games that I now know share that name. Our “kick-the-can” was simple: two teams played soccer using crushed cans as “balls” and a couple of sewer grates as the goals—first team to get six cans into the opponents’ sewer grate won. We had no time limits, no periods, no replays, no real rules at all, save one: you could only score by kicking the can. Picking up the can and throwing it was definitely forbidden.

The best kick-the-can player in the neighborhood was Tony. This was no surprise, since Tony was pretty much the best at everything: he was faster, stronger, and a little bit bigger than just about anybody around, and, in what was surely no coincidence, he had learned to cuss about a year before the rest of us. Like quite a few of us, Tony had no dad, at least not one that was much of a presence, and so Tony did the dad-things in his house and

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\* Assistant Professor of Law, Widener University School of Law. Thanks to Jack Balkin, Alice Eakin, Tony Fejfar, Susan Goldberg, Nancy Levit, Bob Lipkin, Jim O’Connor and Ibrahim Wani for their generous dialogue on this effort, to Jack Murphy for his research assistance, and to Michele Kalstein, Richard Pfohl and the staff of the *Harvard Civil Rights-Civil Liberties Law Review* for their insights and editorial assistance.

<sup>1</sup> ALBERT CAMUS, *THE REBEL* 285 (Anthony Bower trans., Alfred A. Knopf, Inc. 1951) [hereinafter *THE REBEL*].

around the neighborhood. Tony was the kind of kid who could have been a neighborhood bully, but for whatever reason, chose not to be. I liked him for that; I figured we all did.

It's not that Tony was a neighborhood icon. He was just a ten-year-old kid, like anybody else, and he took his share of abuse from everybody. I was maybe the best insulter on the block, and I'm pretty sure I cut on Tony as much as I cut on anybody. Other kids physically knocked Tony around, and Tony would sometimes just take it, and sometimes would knock back, and it was always no big deal. And in kick-the-can, Tony got shoved, and tripped, and kicked in the shins accidentally-on-purpose the same as everybody, and it didn't matter; he kept on playing and scoring goals, almost always more than anyone else.

There was nothing remarkable about the last game Tony played. I don't remember the score, or who was playing, or whose side Tony was on; I can't even remember how Tony got knocked down. I just remember him lying on the asphalt, sort of twisted-like, and crying, looking really hurt, really bad. I asked him if he could get up. He said, "Yeah," and so we bent down to help him, the way the Eagles did when their quarterback or somebody got creamed. We half-carried him home, and his mom met us in the alley behind his house. She made him sit down until she was sure that he was okay, and then he walked home with her, with us trailing behind.

We didn't see Tony for a long time after that. Tony lived next door to this kid called "Fig"—I never knew if that was his real name, but we all called him that—and Fig's mom and Tony's mom were best friends. Fig's mom called a bunch of us into her house about a week after Tony was knocked down, and she told us that Tony had fallen down the stairs in his house, and that something was wrong with his back. He was in the hospital and might be there for a long time. She told us we should all say a prayer for Tony, which I'm pretty sure we all did.

I guess our prayers were answered, because Tony came home from the hospital a couple of months later. None of us had been allowed to see him in the hospital, and we weren't allowed to see him when he first got home either, so we all wrote him letters and sent him vital stuff like Sgt. Rock comics and Tasty-kakes and Coca-Cola bottle caps with pictures of his favorite Eagles underneath.

We finally did see Tony early that winter. We had just started a game of kick-the-can on a cold Friday afternoon when Tony came through the alley with his mom a few paces behind. He looked pretty normal, and except for the fact that he was sitting in a wheelchair, he basically seemed like the same old Tony. Most of us ran over to say hi, and Tony's mom walked past and down to the store, and Tony started to thank us for all the various things we had sent. He didn't forget a thing.

Fig asked him why he was in the wheelchair, which was the question everybody wondered about but that only Fig was simple enough to ask, and Tony said he was in the wheelchair because his back was broken, and that he'd probably have to be in it for a long time, but maybe not forever. He said he couldn't move his legs very much, and he showed us the metal braces attached to his feet that I think he said were supposed to keep his toes from curling up. I remember seeing Fig scrunch up his face like he was trying real hard to understand something, and then hearing Fig ask Tony if he could pee okay. We took turns pounding Fig, and Tony chased him with his chair, and basically it became an ordinary Friday afternoon. That, of course, was real good, except that I had kinda hoped to hear the answer to Fig's question.

Somebody yelled, "Let's play," which meant it was time for kick-the-can. We'd already chosen up sides, and one team was a kid short. Fig, who, like me, was on the short team, yelled, "We get Tony."

I looked at Tony. "You wanna play, Tony?" I asked him.

"Yeah, I'll play," he said. "Who's on our side?"

I listed out the sides for him and waited for him to say something, like that he was just kidding, or that maybe he'd better just watch, or maybe be the ref. But Tony just rolled backwards and didn't say a thing. It was starting to get a little bit weird. I got an idea. "So Tony, you gonna be the goalie?" We never played with goalies before, but this seemed like a pretty good time to start.

"No, I don't wanna be a goalie."

Wrong response. I was stumped; I think all of us were. "So what are you gonna do?" I asked him.

"I don't know," he said, "maybe throw the can or something."

We worked it out in a matter of minutes. If the can hit Tony's chair, play would stop and we would pick up the can and hand it to Tony. Tony then could throw it—out of trouble, to a teammate,

or into the sewer for a goal—as long as he skidded it on the asphalt and didn't sail it through the air.

But Eddie, who was on the other team, wasn't going for it. "I ain't playing," he said and grabbed his kid brother Danny and started to walk away. The other kids on Eddie's team started to lemming away too.

It was mostly insults that followed, but eventually we got down to working out the problem. The kids on the other team thought we had an unfair advantage; Michael, who was the captain of the other team, said he didn't even know Tony was playing when he picked the kids for his side. That prompted a little more debate and a lot more insulting before Fig, ever enthusiastic, suggested we just re-choose the sides.

"No way." Eddie wasn't buying it. "Nobody can throw the can; it's against the rules."

"So let's change the rules," Fig offered. It was typical Fig.

"You can't change the rules. That's why they're rules, stupid."

Michael suggested we vote on it, which might have been okay with most everybody, but it really ticked Tony off, and he started yelling sort of generally at everybody. Tony wheeled to leave, and somebody said, "Way to go, Michael," like it was his fault. A bunch of us yelled for Tony to stay, and eventually he did.

"Let's vote," I said.

"You can't." Eddie again. "You can't change the rules just by voting."

The kid was impossible. I don't know where he got his information from—from some Book of Rules, from some International Kick-the-Can Commission, from some Higher Power that hadn't yet been in touch with the rest of us—but wherever it came from he was so damned sure of it that you almost had to believe him. And some kids did; they just shrugged and frowned like, hey, it's a shame, but what can we do?

It was Fig who brought things into focus. Face all scrunched up, trying, earnestly, to understand, Fig asked the impossible question. "Why can't we, Eddie?" Fig asked. "Why can't we change the rules? We'll just say it's what we're going to do."

Eddie sneered and shook his head, which was usually enough to make Fig's questions go away. But this one kind of hung there, and the rest of us were waiting there with it.

"It's not fair," Eddie said, for what seemed like the ten thousandth time. "You can't change the rules just for Tony."

"How else am I gonna play, Eddie?"

"You can be goalie," Eddie said.

"I don't wanna be goalie."

"Well . . . ." Now it was Eddie who was frustrated. "Well, you can't throw the can."

"Eddie," I said, "what if it was Danny who got hurt?" It was my final line of kid reasoning. "If Danny was in a wheelchair, I bet you'd let him throw the can."

"No I wouldn't," Eddie said, which drew a surprised look from Danny. I think Eddie noticed. "Besides," Eddie said, "that would be different. Danny's my brother."

"So?" I asked.

"So, you wouldn't understand. You don't even have a brother."

He was right: I didn't have a brother, and I didn't understand. But he wasn't completely right; after all, I had a sister, and she was four years younger than me, the same age as Danny. I was going to remind him of that, but I wasn't sure he'd see the connection. Heck, I wasn't even sure I saw the connection; I didn't even know any more what connection there was to see.

We argued back and forth for at least an hour, and it got colder and darker, and we basically got nowhere. Eddie's point—and he wasn't alone—was always basically the same: nobody else could throw the can, and letting Tony throw it would give him an unfair advantage. Eddie was sure it was easier to score goals by throwing the can than by kicking it, which may or may not have been true generally (we weren't aware of any studies on it), which probably wasn't true for some kids specifically (some kids couldn't throw a lick), but which definitely was true for Tony (who always had a good arm, and now couldn't kick at all). Change the rules, Eddie figured, and Tony would be able to score more goals than he should have scored.

Maybe Eddie kept track of such things. Maybe he knew how many goals he scored each game, how many in each season, how many in his career. Maybe he figured he'd someday win the International Kick-the-Can Scoring Trophy, or make it into the Record Book, or be elected into the Hall of Fame. Maybe he figured that each goal that Tony scored meant one more goal that he himself

had to score, one extra goal needed to secure his glory. Or maybe he didn't think about any of this stuff at all; maybe he just liked the idea, for whatever reason, that in this one thing at least, he was now somehow better than Tony.

I didn't understand then, and I'm not sure I understand now. All I knew was that we wanted to play the game, and that Tony wanted to play the game, and that we could have played together if, like Fig suggested, we just said it was what we were going to do. After all, the game didn't count so much, it was the playing of it that mattered, and that only mattered on account of the kids. I mean, what's the point of a game if a kid can't play?

### Introduction

The nomination of Judge Clarence Thomas to replace Justice Thurgood Marshall on the Supreme Court instantly raised the inevitable question: was it done to fill a racial quota? The President said no, the Democratic leadership said yes, and the resulting dialogue accomplished little more than to illustrate the vacancy of the debate. What is a "quota?" How is a "quota" different from a "factor?" Is the difference one of kind or degree? Why does anyone care?

The irony, canny observers noted, was that the racial quota was being filled with a black conservative opposed to affirmative action. But what does it mean to be "black?"<sup>2</sup> To be "conservative?" To be "opposed" to "affirmative action?" And what does any of it have to do with equality?

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<sup>2</sup> The choice of terminology—"black," "African-American," "person of color"—is significant, since "race" is, like most differentiating group labels, substantially a political re-creation. See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 80 (1990) (noting that difference "can be understood not as intrinsic but as a function of relationships, as a comparison drawn between an individual and a norm"). For the most part, this work will employ the term "black" to describe the group in "objective" terms, i.e., as objects of perception. The term "African-American" will be used to denote the group in "subjective" terms, i.e., as expressive subjects. Cf. PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 256-57 (1991) (employing "black" in her writings "to accentuate the unshaded monolithism of color itself as a social force," while using "African-American" in personal conversation "because it effectively evokes the specific cultural dimensions of my identity."). This, at times, is an unrealizable distinction, and I have opted, in these situations, to approximate, rather than to utilize a default. I have taken somewhat less care to distinguish the terms "white" and "Euro-American," principally because white Americans have, in a general and relative sense, been able to construct their own signifying terms, if only by exclusion. See *infra* Part II. Finally, I must acknowledge that I was distressed to note, upon completing a draft of this work, how often the term "black" was used relative to "African-American."

The reaction to Judge Thomas' nomination was in many ways typical of the dialogue on "racial equality."<sup>3</sup> More and more, this debate is dominated by the thrust and parry of buzz words, catch phrases, and generic labels. She is for "affirmative action" but against "quotas." He believes in "equal educational opportunity" but is opposed to "outcomes not based on merit." "De jure segregation" is constitutionally infirm, but "de facto" segregation is merely unfortunate, and might only represent the natural consequences of "private decision-making and economics."<sup>4</sup>

Recently the weighty prose of Professor Charles Fried<sup>5</sup> was added to this flurry of words. The debate over equality, Professor Fried advises, is between "liberal individualists," who promote "the common market of the human spirit" by focusing on individual identity, and "collectivists," who promote "racial balkanization" by focusing on group identity.<sup>6</sup>

But Professor Fried's insistence that the oppositions in the dialogue are distinguished by the relative weight assigned to aggregate identities—to racial groups as opposed to individuals—belies a preoccupation with historically contingent conclusions. Professor Fried's assertions miss the deeper points made by supporters of race-conscious relief: that "race" has persistent meanings for the contemporary condition, and that these meanings have been constructed by Professor Fried's "liberal individualist" state. As a result, Professor Fried's explanation ignores the critical differences in the epistemological and metaphysical premises that characterize the oppositions in the dialogue on equality. Those

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<sup>3</sup> The term "race" and its various permutations will frequently appear in quotations in the remainder of this work to signify its artifactual nature. Cf. Henry L. Gates, Jr., *Talkin' That Talk*, in "RACE," *WRITING AND DIFFERENCE* 402, 403 (Henry L. Gates, Jr., ed. 1986) ("Our decision to bracket "race" was designed to call attention to the fact that "races," put simply, do not exist, and that to claim that they do, for whatever misguided reason, is to stand on dangerous ground.").

By focusing on the struggle for "racial" equality, and by focusing within that effort on the struggles of African-Americans, this work does not mean to imply that other differentiated groups have contributed any less to the effort to transform America into a nation of genuine equality. But the truths of white subordination of black Americans provide a paradigm of sorts, and the frequency with which the American legal system has been called upon to confront these truths has resulted in some pervasive juridical paradigms as well.

<sup>4</sup> See *Board of Education of Oklahoma City Schools v. Dowell*, 59 U.S.L.W. 4061, 4065 n.2 (1991) (reviewing a lower court holding, *inter alia*, that present residential segregation in Oklahoma City "was the result of private decisionmaking and economics, and that it was too attenuated to be a vestige of former school segregation.").

<sup>5</sup> Charles Fried, *The Supreme Court, 1989 Term: Comment: Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107 (1990).

<sup>6</sup> *Id.* at 108-10.



differences, this Article suggests, are rooted in opposed philosophical conceptions of personhood, of the state, and of the interactions among them that reflect, at their very heart, a fundamental disagreement over the relative value to be assigned to persons, on the one hand, and to ideology on the other. It is a disagreement, this Article suggests, between "rebels" and "redeemers."<sup>7</sup>

Part I of this Article introduces a jurisprudence of rebellion, a jurisprudence committed to the realization of humane values. Modelled in substantial part on Camus' humanistic philosophy,<sup>8</sup> this jurisprudence of rebellion is at once both anti-ideological and value-affirming. The twin tenets of rebellion are an insistence on the epistemological primacy of human experience and on the metaphysical primacy of human possibility. Rebellion rejects, as a consequence, both falsehood and despair, and proclaims a transcendent value: human worth. Rebellion seeks to vindicate this

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<sup>7</sup> I have used the terms "redeemers" and "redemption" elsewhere to identify a specific approach to human "difference" which fixes the locus of "difference" in the biological individual and which seeks to redeem the social order through the subordination of differentiated persons. See Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1205-11 (1990) (contrasting "redemptive" and "remedial" uses of the "mentally retarded" label).

The terms have a special historical significance in the context of the struggle for "racial" equality. The First Reconstruction was followed by the Redemption, a period of renewal for many aspects of the antebellum southern order. The architects of this effort were the Redeemers, a group whose demographic and political differences were secondary to a common commitment "to dismantling the Reconstruction state, reducing the political power of blacks, and reshaping the South's legal system in the interests of labor control and racial subordination." ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* 588 (1988); see also C. VANN WOODWARD, *REUNION AND REACTION; THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* 246 (1966) (noting that the ascendancy of the Redeemers assured "the dominant whites' political autonomy" and "scotched any tendency of the South to combine forces with the internal enemies of the new economy—laborites, Western agrarians, reformers.").

As the instant work demonstrates, constitutional jurisprudence is, in the first sense of this term, witnessing a marked revival of "redemptive" visions of "race." In the second sense of the term, the Nation is almost certainly in the throes of a Second Redemption, an historical epoch that, this time, knows no geographical bounds.

<sup>8</sup> The approach and ethos purport to be derived from Albert Camus' work. In descending order of importance to this work, the principal sources of Camus' philosophy are the philosophical essays: *THE REBEL*, *supra* note 1; *THE MYTH OF SISYPHUS & OTHER ESSAYS* (Justin O'Brien trans., Alfred A. Knopf, Inc., 1955) (1942), [hereinafter *THE MYTH OF SISYPHUS*] and *RESISTANCE, REBELLION AND DEATH* (Justin O'Brien trans., Modern Library, 1960); and the works of fiction: *THE PLAGUE* (Stuart Gilbert trans., Vintage Books, 1948) (1972) [hereinafter *THE PLAGUE*], *CALIGULA AND THREE OTHER PLAYS* (Stuart Gilbert trans., Vintage Books 1958) (1958), *THE STRANGER* (Stuart Gilbert trans., Alfred A. Knopf, Inc., 1946) (1942), and *THE FALL* (Justin O'Brien trans., Vintage Books 1956) (1956). All are English translations available in the United States. The best work on Camus' life and an invaluable aid to this effort is HERBERT R. LOTTMAN, *ALBERT CAMUS: A BIOGRAPHY* (1979).

value in the constant struggle for reconciliation: of the contradiction between formal construct and human experience, and of the contradiction between the human condition and the possibility of human compassion. In this jurisprudence of rebellion, truths may be contingent, experience incoherent, and moral expression indeterminate, but a unifying guiding principle may still be found in the constant, enduring expression of humanity, that which this Article refers to as human love.<sup>9</sup>

Part I describes rebellion's efforts to realize humane judgment through the promises of constitutional text. Rebellion insists that the founding document be liberated from the base contingencies that constrain comprehension or stifle compassion. In contrast to the redemptive ideologies described in Part I—ideologies which denounce human possibility in their effort to redeem a stable order—a constitutional jurisprudence of rebellion accepts the necessity of interpretive will, and dedicates that will to the transformative struggle to heal.

Part II of this Article describes the epistemological struggle between rebels and redeemers over the meaning of racial equality. It offers an overview of the historical effort to reconcile—or to elude—the contradiction between the truths of subordination and the promise of equal protection. Part II contrasts the redeemers' vision of natural, "private" racism and of absolute, biological "race" differences with the rebels' vision of a coherent state and society, of socially constructed racism, and of politically constructed "difference." It concludes by rejecting the Hobson's choice of the "race"-conscious/"race"-neutral dichotomy. That formal dichotomy, the rebel insists, is built on inauthentic premises; the real choices are between subordination and equality, between indifference and compassion.

Part III of this Article examines the metaphysical premises of the dialogue on equality. It argues that the redeemers' formalistic

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<sup>9</sup> Professor Anthony E. Cook has suggested the possibility of a "reconstructed jurisprudence of love" derived from the works of Dr. Martin Luther King, Jr. Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 1041–42 n.174 (1990). That jurisprudence may prove similar to the jurisprudence of rebellion proposed here. Both proclaim the epistemological primacy of human experience and the metaphysical primacy of a transcendent vision of human worth. Compare *id.* at 1030–33 (emphasizing Dr. King's use of "experiential deconstruction") and at 1034 (noting Dr. King's "reconstructive vision" that favors social consciousness and egalitarianism over the preservation of "a status quo permeated with hierarchy and inequality") with *infra* notes 30–33 and accompanying text.

conception of equality is rooted in an unyielding commitment to natural markets and orders, a commitment that subordinates the possibility of a humane judgment to an absurd faith in the benevolence of the cosmos. It is the rebel, Part III concludes, who serves all of humanity by refusing to treat it as an abstraction, by demanding an equality that is real, and not merely formal.<sup>10</sup> Rules and order remain the rallying cries for the redeemers, but the rebel rejects an ordered world of suffering. The rebel invites chaos,<sup>11</sup> and new arrangements, and new understandings, founded on love.

This Article concludes in Part IV with a modest heuristic intended to promote the transcendent vision of equality inherent in the Equal Protection Clause. Through her relentless reconstructions, this Article concludes, the rebel will make this vision real.

## I. A Jurisprudence of Rebellion

I rebel—therefore we exist.

—Albert Camus<sup>12</sup>

### A. *Rebellion and the Absurd*

A nation that proclaims the equality of its people<sup>13</sup> manifests some striking statistical anomalies. Its white citizens average roughly twice the income of its black citizens;<sup>14</sup> its black citizens are unemployed at over twice the rate.<sup>15</sup> Its white citizens are more than twice as likely as its black citizens to live in a family

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<sup>10</sup> See William J. Brennan, Jr., *Are Citizens Justified in Being Suspicious of the Law and the Legal System?*, 43 U. MIAMI L. REV. 981, 986 (1989) (urging efforts to close the gap "between formal and real equality").

<sup>11</sup> See ANNA A. HEDGEMAN, *THE GIFT OF CHAOS: DECADES OF AMERICAN DISCONTENT* 4 (1977).

<sup>12</sup> THE REBEL, *supra* note 1, at 22.

<sup>13</sup> See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); U.S. CONST. amend. XIV, § 1.

<sup>14</sup> Lynne Duke, *Black Economic Disparity Deepened During 1980's; Report Shows Both Poverty and Affluence Grew*, WASH. POST, Aug. 9, 1991, at A12; see also BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *POPULATION PROFILE OF THE UNITED STATES 1989* 32 (April 1989) [hereinafter *POPULATION PROFILE*].

<sup>15</sup> BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF UNITED STATES* at 38, 377 (109th ed. 1989).

with an annual income in excess of \$50,000;<sup>16</sup> its black citizens are roughly three times more likely than its white citizens to live in poverty.<sup>17</sup> Its white citizens have substantially lower mortality rates than its black citizens;<sup>18</sup> its black citizens are significantly more likely to be murdered as young adults.<sup>19</sup>

The statistical anomalies are themselves artifacts. They represent countless lived truths of subordination, experienced in lives that have been diminished, lives made "different"<sup>20</sup> because of attributions to gender,<sup>21</sup> to physical or mental "ability,"<sup>22</sup> to religion,<sup>23</sup> ethnicity<sup>24</sup> and of course to "race." These lived truths contradict the proclamation of equality. To say otherwise, in the face of human experience, is absurd.<sup>25</sup>

Recognition of the absurd gap between proclaimed truth and truth as it is experienced presents a metaphysical dilemma: the gap must be bridged, or endured. But the dilemma of choice is evaded if the gap is no gap at all: the absurd is rendered tolerable

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<sup>16</sup> According to the Population Reference Bureau, one in seven black families had incomes above \$50,000 in 1989 compared to one in three white families. WASH. POST, *supra* note 14, at A12.

<sup>17</sup> In the mid-1980s the black poverty rate rose to 31.1%, while the white poverty rate declined from 11% to 10.5%. The poverty rate for black children reached 45.6%. The number of blacks who are among the very poorest, those with incomes below half the poverty line, has increased 69% since the late 1970s. Dr. John Jeffries & Randall E. Brock, *African-Americans in a Changing Economy: A Look at the 21st Century*, CRISIS, June/July 1991, at 30; see also POPULATION PROFILE, *supra* note 14, at 34 (noting that in 1987, poverty rates were 10.5% for white Americans and 33.1% for black Americans).

<sup>18</sup> Dr. Christopher J.L. Murray of the Harvard University Center for Population Studies reports that the mortality rate among black females between the ages of 15 and 60 is 79% higher than the mortality rate among white females, and the mortality rate among black males in the same age group is 89% higher than the mortality rate among white males. *Correspondence—Mortality Among Black Men*, 322 NEW ENG. J. MED. 205 (1990).

<sup>19</sup> In 1988 black Americans constituted 12.2% of the total American population, POPULATION PROFILE, *supra* note 14, at 36, but in 1989, black Americans constituted 49.1% of all American murder victims. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 10 (1990). Of the 9225 murder victims aged 15 to 29, 5105 or 55.3% were black, while 3498 or 42.5% were white. *Id.* at 11.

<sup>20</sup> See generally MINOW, *supra* note 2 (examining the ways in which "difference" is manufactured in the process of human interaction).

<sup>21</sup> See, e.g., Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

<sup>22</sup> See, e.g., Hayman, *supra* note 7.

<sup>23</sup> See, e.g., MINOW, *supra* note 2, at 43-47.

<sup>24</sup> See, e.g., Edward W. Said, *An Ideology of Difference*, in "RACE," WRITING AND DIFFERENCE, *supra* note 3, at 38.

<sup>25</sup> "[T]he feeling of absurdity does not spring from the mere scrutiny of a fact or an impression, but . . . it bursts from the comparison between a bare fact and a certain reality, between an action and the world that transcends it." CAMUS, *An Absurd Meaning*, in THE MYTH OF SISYPHUS, *supra* note 8, at 22.

if it is denied, and the status quo redeemed if its contradictions are eluded. These are the tools of redemption: confronted with the disunity of perception and vision, redemption resolves to deny one or the other. Both experience and possibility are insecure when confronted with a redemptive will.

An ordered world threatened by contradicting truths is redeemed by the proclamation of falsehoods. Experience is subjective, and hence unreliable: the subject may have misperceived, misunderstood or misdescribed. Experience is selfish, and hence untrustworthy: the self will not see the truth, or admit what it sees.<sup>26</sup>

Where the truth of human experience is undeniable, redemption denies the vision of the ideal. It denies first that there is any vision at all (there is no promise of "equality"); second, that the vision is cognizable (no one knows what "equality" means: not me, and certainly not you); third, that the vision differs from the perception ("equality" means "legal" equality, not "social" equality); and finally, that the vision is truly realizable ("real equality" is an utterly unrealistic vision). An ordered world threatened by a transcendent vision is thus redeemed by cynicism and despair.

The rebel rejects both of these redemptive approaches.<sup>27</sup> To deny reality is to proclaim a falsehood; to deny the vision is to surrender to despair. The rebel demands instead a confrontation and resolution of the contradiction. She demands a rejection of all conditions that perpetuate falsehood and despair. She insists on bridging the gap between the vision of equality and the truth of human experience, "that divorce between the mind that desires and the world that disappoints,"<sup>28</sup> without denying that the gap exists. She simultaneously accepts the contradiction of the human condition as undeniable and rejects it as impermissible.

"The spirit of rebellion," Camus wrote, "can exist only in a society where a theoretical equality conceals great factual inequalities."<sup>29</sup> Thus rebellion, animated by this contradiction, has two critical components. The first is epistemological: it is an insistence

<sup>26</sup> Groucho Marx, as Dr. Hugo Hackenbush: "Who are you going to believe, me or these crooked X-rays?" *A DAY AT THE RACES* (Metro-Goldwyn-Mayer 1937).

<sup>27</sup> "There can be no question of masking the evidence, of suppressing the absurd by denying one of the terms of its equation." CAMUS, *An Absurd Reasoning*, in *THE MYTH OF SISYPHUS*, *supra* note 8, at 3, 37.

<sup>28</sup> *Id.*

<sup>29</sup> CAMUS, *THE REBEL*, *supra* note 1, at 20.

that knowledge be derived from the sum total of human experience. The second is metaphysical: it is an insistence that the transcendent values of humanity not be compromised. Confronted simultaneously with the fact of human suffering and the possibility of human happiness, rebellion makes two demands: know the suffering and heal it. Confronted simultaneously with the fact of malice and the promise of human compassion, rebellion makes two demands: know the malice and subordinate it to love. Recognize the inequality; struggle for equality.<sup>30</sup>

### *B. Rebellion and the Law*

A jurisprudence of rebellion struggles for transcendence both in and through the law. It recognizes first that positive law is a fact of human experience. Lives are lived according to law; truths are determined according to law. Law is in this sense a cognitive condition: law shapes both reality and awareness.

But the jurisprudence of rebellion insists that law can be, and must be, more than a fact of human experience: it should be an expression of transcendent values as well. As such, law may provide standards for human conduct, including the conduct of juridical inquiry. Rebellion thus maintains the possibility of transcendent law without denying the contradictions that inhere in those terms: laws, like the values they envision, must be relentlessly reconstructed in the effort to transcend the constraining contingencies of the human condition.

At the same time, rebellion recognizes that the contradiction it struggles to resolve is itself artifactual, since neither can reality be "known" nor ideals "transcend" their origin. The struggle to realize transcendence is, in this sense, a struggle based on false premises in pursuit of false hopes.

The rebel's response to this observation is not to deny for the most part its authenticity, but rather to deny its relevance. The epistemological primacy of human experience substantially marginalizes concerns over the indeterminacy and incoherence of the human condition: in human terms, nothing is lost in the dis-

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<sup>30</sup> Cf. Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 20 (1990) (urging recognition of the ways in which legal rhetoric "helps smooth over the apparent inconsistency between our realities and our principles.").

course.<sup>31</sup> The human condition, moreover, may be incomprehensible, but human comprehension transcends its condition in the very recognition of this truth.<sup>32</sup>

Neither does rebellion anguish over the problematic nature of its vision. The metaphysical primacy of human possibility is consistent with, indeed it mandates, the conclusion that human values not transcend their human origins. For the rebel, this is a cause for celebration, not lament.<sup>33</sup>

The rebel, as Camus wrote, acts "in the name of certain values which are still indeterminate but which he feels are common to himself and to all men."<sup>34</sup> Thus rebellion, unwilling to accept the reality of the human condition, but unable to transcend its human origins in the pursuit of the ideal, constructs its world of transcendence in the closed universe of humanity. "In every rebellion is to be found the metaphysical demand for unity, the impossibility of capturing it, and the construction of a substitute universe. Rebellion, from this point of view, is a fabricator of universes."<sup>35</sup>

These fabricated universes are contingent to the extent that they are the products of human creation. But the rebel imbues them with certain values, values addressed to the human condition, but values which transcend the exigencies of an historical moment. They are delicate values, as befits their human origins. As Camus noted, if rebellion could find a philosophy, "it would be a philos-

<sup>31</sup> "This heart within me I can feel, and I judge that it exists. This world I can touch, and I likewise judge that it exists. There ends all my knowledge, and the rest is construction." CAMUS, *An Absurd Reasoning*, in *THE MYTH OF SISYPHUS*, *supra* note 8, at 14.

<sup>32</sup> "He is told that nothing is certain. But this at least is a certainty." *Id.* at 39.

<sup>33</sup> See CAMUS, *The Myth of Sisyphus*, in *THE MYTH OF SISYPHUS*, *supra* note 8, at 88, 91:

At that subtle moment when man glances backward over his life, Sisyphus returning toward his rock, in that slight pivoting he contemplates that series of unrelated actions which becomes his fate, created by him, combined under his memory's eye and soon sealed by his death. Thus, convinced of the wholly human origin of all that is human, a blind man eager to see who knows that the night has no end, he is still on the go. The rock is still rolling.

I leave Sisyphus at the foot of the mountain! One always finds one's burden again. But Sisyphus teaches the higher fidelity that negates the gods and raises rocks. He too concludes that all is well. This universe henceforth without a master seems to him neither sterile nor futile. Each atom of that stone, each mineral flake of that night-filled mountain, in itself forms a world. The struggle itself toward the heights is enough to fill a man's heart. One must imagine Sisyphus happy.

<sup>34</sup> CAMUS, *THE REBEL*, *supra* note 1, at 16.

<sup>35</sup> *Id.* at 255.

ophy of limits, of calculated ignorance and of risk.”<sup>36</sup> Rebellion, in this sense, deliberately forsakes an inquiry into the impenetrable uncertainties of human existence, and risks instead a belief, and it can only be that, in the worth of humanity.

Paradoxically, the delicate and yielding nature of these values ensures their durability. It ensures, most clearly, the affirmation and re-affirmation of its values without reliance on contingent truths or mere supposition. At the point at which values are no longer common to humanity, they lose their claim to transcendence. The limits ensure, too, that the values affirmed by rebellion will never be absolute, and will never justify the subordination of human truths or human possibility.<sup>37</sup> The values, in other words, facilitate perpetual rebellion.

Rebellion in this sense posits an affirmative value: “the identity of man with man.”<sup>38</sup> “When he rebels, a man identifies himself with other men and so surpasses himself, and from this point of view human solidarity is metaphysical.”<sup>39</sup> It is the one metaphysical premise which transcends all contingency, the one enduring human truth: human love.<sup>40</sup> The love proclaimed by rebellion is not an instrumental love, nor is it the love of abstraction and absolutes. The love proclaimed by rebellion is the love born of solidarity: it is human love, expressed for human beings, because of their humanity.

Rebellion’s task, the realization of love in a world of indignity and suffering, necessitates a certain Sisyphean struggle. In a sense, however, it is a modest task: “the affirmation of a limit, a dignity, and a beauty common to all men only entails the necessity of extending this value to embrace everything and everyone and of advancing toward unity without denying the origins of rebellion.”<sup>41</sup> In the end, it is fitting that the task should be at once modest and imposing; it is but a reflection of the “humble yet formidable love”<sup>42</sup> that rebellion seeks to serve.

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<sup>36</sup> *Id.* at 289.

<sup>37</sup> “[Rebellion] supposes a limit at which the community of man is established. Its universe is the universe of relative values.” *Id.* at 290.

<sup>38</sup> *Id.* at 17.

<sup>39</sup> *Id.*

<sup>40</sup> “[M]an’s love for man can be borne of other things than mathematical calculation of the resultant rewards or a theoretical confidence in human nature.” *Id.* at 18.

<sup>41</sup> *Id.* at 251.

<sup>42</sup> CAMUS, *THE PLAGUE*, *supra* note 8, at 280.



Rebellion thus accepts no aprioristic premises except those endemic to its method: the epistemological primacy of human experience and the metaphysical primacy of human possibility. It specifically sanctions no aprioristic proclamations of ideals: no expression has an inherent claim to transcendence, because every expression is in some sense contingent.<sup>43</sup> Save one: rebellion proclaims, unhesitatingly, the absolute and inherent value of human love.

### *C. A Constitutional Jurisprudence of Rebellion*

From the start, the process of constitutional construction has necessitated judgment.<sup>44</sup> As long as humans must construct law to govern humanity, they must invoke human judgment.<sup>45</sup> Rebellion's struggle for transcendence in constitutional text is simply a demand that human judgment be distinctly and universally human: that, in other words, judgment be humane.

Rebellion's struggle to realize humane judgment has been a part of Constitutional jurisprudence since the conception of the Constitution. Each age has offered its own vision of transcendence, has possessed its own forms of expression, and has had to confront the necessity of its own constructions, its own possibilities, its own choice. The goal of rebellion has been to liberate the Constitution from the ideological constraints of a given historical moment, contingencies that shape the construction of the document both originally and upon each reading.<sup>46</sup> In a certain sense, then, rebellion's task has been to derive constitutional meaning

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<sup>43</sup> "Every ideology," Camus observed, "is contrary to human psychology." *THE REBEL*, *supra* note 1, at 116 n.4.

<sup>44</sup> See, e.g., SAMUEL E. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 330 (1965) (describing the conflicting positions of James Madison and Alexander Hamilton on Congressional authority to charter a national bank under the necessary and proper clause).

<sup>45</sup> The abolitionist Samuel J. May observed that Garrisonian abolitionists believed that the Constitution protected slavery, that the radicals insisted that the Constitution was antislavery, and that "it seemed to me that it might be whichever the people pleased to make it." WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* 18-19 (1977).

<sup>46</sup> See J.M. Balkin, *Review Essay: Ideology as Constraint*, 43 *STAN. L. REV.* 1133, 1137-45 (1991) (noting the interdependence of terms in the dialectic of social structure and individual belief); Anthony J. Fejfar, *A Road Less Traveled: Critical Realist Foundational Consciousness in Lawyering and Legal Education*, 26 *GONZAGA L. REV.* 327, 362-63 (1990/91) (noting the mutually constitutive dialectic of social structures and human activity in shaping societal horizons of comprehension).

as much equality as the reader will allow.<sup>51</sup> The Supreme Court's constricted conception of the "state" actor<sup>52</sup> is not mandated by the words of the Fourteenth Amendment,<sup>53</sup> or by its legislative history,<sup>54</sup> and is fundamentally at odds with the understandings of at least some members of the Reconstruction Congress.<sup>55</sup> The

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beginning at least with the Thirteenth Amendment, generally viewed their work as one massive, interrelated effort to reconstruct the Nation. *See* HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW'S CONSTITUTIONAL DEVELOPMENT, 1835-1875* 465-68 (1982).

<sup>51</sup> Quite likely, the ambiguous construction of the Fourteenth Amendment reflects not only the magnitude and complexity of the principles involved, but also the desire of at least some of its framers to permit its organic development. *See* FONER, *supra* note 7, at 257-58; HYMAN & WIECEK, *supra* note 50, at 404-13. The choices available to modern jurists, in other words, are both inevitable and, from the "original" perspective, desirable.

<sup>52</sup> *See infra* notes 97-101 and accompanying text.

<sup>53</sup> It strains neither logic nor linguistic convention to conclude that a state "den(ies) to any person . . . the equal protection of the laws," U.S. CONST. amend. XIV, § 1, when it permits or promotes "private" acts of discrimination, *see infra* notes 89-91 and accompanying text, just as surely as when it formally authorizes those acts of discrimination by its own agents.

<sup>54</sup> The Fourteenth Amendment was modelled in substantial part on the Civil Rights Act of 1866. *See, e.g.,* RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 20 (1977). Significantly, the Amendment worked a radical revision of syntax. Section One of the Civil Rights Act declared that persons "shall have the same right . . . to full and equal benefit of all laws and proceedings" while Section Two of the Act proscribed positive actions by "public" individuals acting "under color of state law" in deprivation of these rights. 14 Stat. 27 (1866). The first section of the Fourteenth Amendment conflates these constructions by mandating that no state shall deprive its citizens of their rights. U.S. CONST. amend. XIV, § 1. Coupled with the critical change from a guarantee of "equal benefits" to a guarantee of "equal protection," *id.*, a change which implies protection against "private" parties from whom the state could not extract "benefits" but against whom it could afford "protection," the syntactic revisions give rise to the plausible if not compelling suggestion that the Amendment fully encompasses and in fact exceeds the reach of the 1866 Act.

Subsequent interpretations by the Reconstruction Congresses certainly support this view; portions of the 1866 Act were re-enacted and extended in reliance on the Fourteenth Amendment, at times in regulation of purely "private" conduct. *See, e.g.,* Section Two of the Ku Klux Klan Act of 1871, 17 Stat. 13 (1873) (prohibiting conspiracy to deprive right to equal protection); Sections One and Two of the Civil Rights Act of 1875 (prohibiting discrimination in inns, theaters, places of public amusement and public conveyances). The record of debates on these subsequent enactments reveals that many legislators believed the Fourteenth Amendment could be fairly construed to prohibit individual acts of discrimination as well as formal state actions. *See, e.g.,* CONG. GLOBE, 42nd Cong., 1st Sess. 334, 375, 459, app. 182, 505, 608 (1871).

<sup>55</sup> *See, e.g.,* CONG. GLOBE, 42nd Cong., 1st Sess. app. 82 (1871) (statement of Rep. John A. Bingham of Ohio, in support of Ku Klux Klan Act of 1871: "These last amendments—thirteen, fourteen, and fifteen—do, in my judgment, vest in Congress a power to protect the rights of citizens against States, and individuals in States, never before granted . . . I had the honor to frame the amendment as reported in February, 1866, and the first section, as it now stands, letter for letter and syllable for syllable, in the fourteenth article of the amendments to the Constitution . . ."); *see also* MICHAEL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* 11 (1987) (noting that "Congress had written the Fourteenth Amendment following hearings at which its Joint Committee on Reconstruction took extensive testimony about the refusal of southern states to punish private wrongs against blacks, carpetbaggers, and unionists.").

“beyond jurisprudence,” through the transformative struggle to realize the promise of humane judgment.

In 1780 abolitionists in Massachusetts failed in their efforts to ban slavery in that state’s constitution, but in 1781 an African-American slave named Quock Walker argued that any construction of that constitution which authorized slavery was contrary to the law of God.<sup>47</sup> In a fashion, Chief Justice William Cushing of the Massachusetts Supreme Court agreed. The institution of slavery was inconsistent with the constitutional proclamation that “all men are born free and equal.” Transcendent natural law “sentiments” led the constitutional framers to include that language, and those “sentiments” were to be realized in Massachusetts from that day forward.<sup>48</sup>

Quock Walker’s argument was not that the Massachusetts constitution was violative of the laws of God, his argument was against an unholy construction. It was a matter of choice. Chief Justice Cushing’s decision was not that the constitution violated natural rights, it was a construction of the document consistent with those rights. It was a matter of choice. Given the choice, Quock Walker and Chief Justice Cushing both chose to serve humanity.

So too did the architects of the Reconstructed Nation. They left an ambiguous legacy, a truth attested to and ensured by the swings and spasms of historiography and jurisprudence alike.<sup>49</sup> But they did leave choices. Certainly this is true of the Reconstruction Congresses: the text of their work, their enactments, and their arguments, spanning six Congresses and over a decade,<sup>50</sup> permit

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<sup>47</sup> A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 92–93 (1978).

<sup>48</sup> *Id.* at 94–95.

<sup>49</sup> Indeed, the historiography of Reconstruction in many ways reflects the same political struggles as the jurisprudence of Equal Protection. *See, e.g.*, FONER, *supra* note 7, at xix–xiv.

<sup>50</sup> The major contributions of the Thirty-Eighth Congress include the passage of the Thirteenth Amendment in 1865; the Thirty-Ninth Congress contributed the Civil Rights Act of 1866, 14 Stat. 27 (1868) (codified, in part, at 42 U.S.C. §§ 1981–1982; 18 U.S.C. §§ 241–242) and the passage of the Fourteenth Amendment; the Fortieth Congress contributed the Fifteenth Amendment; the Forty-First Congress contributed the Enforcement Act of 1870, 18 Stat. 348 (1878) (codified in part at 42 U.S.C. §§ 1981, 1985(c), 1986, 1988; 18 U.S.C. §§ 241–242); the Forty-Second Congress contributed the Ku Klux Klan Act of 1871, 17 Stat. 13 (1873) (codified in part as 42 U.S.C. §§ 1983, 1985(c), 1986); and the Forty-Third Congress contributed the Civil Rights Act of 1875. These tend to be treated in the process of constitutional interpretation as rather discrete exercises of authority; such an ahistorical and acontextual treatment is at odds with the conceptions of the framers themselves, who,

Supreme Court's absolutist conception of biological "races" and objective "racial" "difference"<sup>56</sup> is not mandated by the words of the Amendment.<sup>57</sup> The Supreme Court's deference to free-market order<sup>58</sup> is not mandated by the words of the Amendment;<sup>59</sup> in the Reconstruction Congress, this redemptive metaphysic<sup>60</sup> was rejected in favor of the struggle for humanity.<sup>61</sup> The records of the Reconstruction Congresses are replete with expressions of transcendent purpose;<sup>62</sup> they manifest, as well, the prescient recogni-

<sup>56</sup> While redeemers believe that genetic differences primarily account for differences between the races and permit a "natural" ordering based on race, biology and genetics do not support their assertions. Some racial differences can be explained by biology, but the majority are differences constructed by political ideology. *See infra* note 168.

<sup>57</sup> The term "person" as used in the Amendment arguably refers to a biological being, it is distinguished from "citizens" in the first clause of section one of the Amendment, but there is no mention of "race," "color," or metaphorical equivalent in the Amendment; these latter, then, might be construed as political attributes of the biological "person" without doing violence to the formal text.

<sup>58</sup> *See infra* notes 170–190 and accompanying text.

<sup>59</sup> On the contrary, a sensible construction of the Amendment reveals it to be highly interventionist: it demands state protection initially, U.S. CONST. amend. XIV, § 1, and provides for federal intervention additionally. U.S. CONST. amend. XIV, § 5.

<sup>60</sup> The clearest expression of this redemptive vision may be found in President Johnson's message to Congress in support of his veto of the Civil Rights Act of 1866:

I do not propose to consider the policy of this bill. To me the details of the bill seem fraught with evil. The white race and the black race of the South have hitherto lived together under the relation of master and slave—capital owning labor. Now, suddenly, that relation is changed, and as to the ownership, capital and labor are divorced. They stand now each master of itself. In this new relationship, one being necessary to the other, there will be a new adjustment, which both are deeply interested in making harmonious. Each has equal power in settling the terms, and if left to the laws that regulate capital and labor, it is confidently believed that they will satisfactorily work out the problem. Capital, it is true, has more intelligence; but labor is never so ignorant as not to understand its own interests, not to know its own value, and not to see that capital must pay that value. This bill frustrates this adjustment. It intervenes between capital and labor, and attempts to settle questions of political economy through the agency of numerous officials, whose interest it will be to foment discord between the two races; for as the breach widens their employment will continue, and when it is closed their occupation will terminate.

CONG. GLOBE, 39th Cong., 1st Sess. 1681 (1866).

<sup>61</sup> The Senate overrode the veto by a vote of 33 to 15, *id.* at 1809; the House by a vote of 122 to 41, *id.* at 1861.

<sup>62</sup> *See, e.g., id.* at app. 102 (statement of Sen. Richard Yates of Illinois in support of Freedman's Bureau Bill: "I am for the black man, not as a black man; I am for the white man, not as a white man, but I am for man, irrespective of race; I am for God's humanity, here, elsewhere, and everywhere."); *id.* at 1066 (statement of Rep. Hiram Price of Iowa in support of the Fourteenth Amendment: "gentlemen rise here and talk about the Constitution of our fathers—and I have heard them talk about it here until if I had been a believer in ghosts I would have supposed that our fathers who had been invoked so loudly would have come from the grave to see what was wanted of them . . . And now, while we are in the course of reconstruction, laying anew, as it were, the foundations of this Government, I want to see such a guarantee placed in the Constitution as will protect all citizens . . .");

tion that all of their work could be undone by the exercise of a redemptive interpretive will.<sup>63</sup>

The choices, then, are always available and, relentlessly, the rebels have struggled for, and at times realized, the humane verdict. Even prior to Reconstruction, Frederick Douglass chose to believe in the Constitution; but he simultaneously refused to accept a racist construction. The result, Professor Mari Matsuda observes, is that "[i]n his hands, the document grew to become greater than some of its drafters had intended."<sup>64</sup> Thurgood Marshall made the same choices: the government devised in the 1787 Constitution was, he knew, "defective from the start," but two centuries later, Justice Marshall could "quietly commemorate the suffering, struggle, and sacrifice that has triumphed over much of what was wrong with the original document, and observe [its bicentennial] anniversary with hopes not realized and promises not fulfilled."<sup>65</sup> Of course, Justice Marshall was a part of the struggle, a part of the triumph, and, sadly, he leaves promises unfulfilled.

Each age faces choices. Each offers its own unique forms of expression and its own vision of transcendence. The rebel relentlessly questions these constructions and renders new judgments informed by comprehension and compassion. Rebellion, in this sense, demands a persistent faith in humanity. The rebel insists on knowing the human condition, including its sufferings and frailties, and on working simultaneously to heal its pain, through human struggle, in pursuit of love.<sup>66</sup>

*id.* at 1159 (statement of Rep. William Windom of Minnesota in support of Civil Rights Act of 1866: "This, I believe, is one of the first efforts made since the formation of the Government to give practical effect to the principles of the Declaration of Independence; one of the first attempts to grasp as a vital reality and embody in the forms of law the great truth that all men are created equal . . ."); *id.* at 2459 (statement of Rep. Thaddeus Stevens of Pennsylvania in support of the Fourteenth Amendment: "I will take all I can get in the cause of humanity and leave it to be perfected by better men in better times . . . [M]en in pursuit of justice must never despair.").

<sup>63</sup> "The State courts are already deciding the 'civil rights bill' [Civil Rights Act of 1866] to be unconstitutional. The validity of all laws must depend at last upon human judgment. Judges, even in the highest courts, are but mortals." *Id.* at 3035 (statement of Sen. John B. Henderson of Missouri in support of the Fourteenth Amendment).

<sup>64</sup> Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 334 (1987); see also Miner Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2282-85 (1989).

<sup>65</sup> Thurgood Marshall, *Commentary—Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2-5 (1987).

<sup>66</sup> This Article has not thus far taken up the problem of metatheory: what gives rebellion its legitimacy? The answer must be "rebellion."

The one certain test of legitimacy for all that has been proposed and for all that is to

## II. Epistemological Rebellion and Redemption: State and Personhood

It was not color, but crime, not God, but man, that afforded the true explanation of the existence of slavery; nor was I long in finding out another important truth, viz: what man can make, man can unmake.

—Frederick Douglass<sup>67</sup>

Frederick Douglass stated two truths when he described the institution of slavery, neither of which has gained universal assent. First, slavery was the product of “man:” not of “the state,” not of “society,” not of “private individuals.” It is a simple assertion of the oneness of human endeavor. Second, personal status is indeed the product of human endeavor: the truth of slavery rested not in objective attributes defined by Creation, but in perceived attributes sanctioned by human re-creation. Slavery was, and is, human expression.

But contrary views persist. Slavery, like all property arrangements, is in one view a pre-political institution. Douglass carelessly confused the public and the private, the state and society, in

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follow is an internal measure: the jurisprudence of rebellion must be true to the tenets it postulates. That means, coincidentally, that there can be no external measure, beyond those affirmed by rebellion: human comprehension and human compassion. Beyond this, legitimacy cannot depend on external validation, since rebellion recognizes no other a priori premises to provide a foundation for objective review. Rebellion is, after all, less concerned with legitimacy in this objective sense than with a certain efficacy in a subjective sense.

One alleged weakness of a jurisprudence that denies absolute external criteria, and particularly of a jurisprudence that affirms distinctly human values as its internal criteria, is the leeway it affords for the exercise of interpretive will. Rebellion permits choice; more than that, it mandates it. But choice must be inevitable right from the start, whether that original moment is arbitrarily fixed at the stage of the ideal, the attribute, the standard, or the criteria. Ultimately, the fixed stage dissolves into a process, at every moment a choice to believe or not. That choice shapes the contours of everything that follows.

Rebellion denies that the presence of choice is a “weakness” at all. Rebellion values freedom: it places greater faith in the possibility of humane judgment than the appeal of compelled conclusions or preordained results. To be sure, rebellion accepts the need for some determinacy and it affirms the need for protection from arbitrariness. Rebellion is a philosophy of limits. But these ideals, predictability and consistency, are themselves indeterminate, and they are too easily exalted in situations where they are instrumentally undesirable. Text, in context, is everything. Thus ideals divorced from comprehension and compassion have no inherent claim of value; pressed, on the other hand, into the service of humanity, they count for all. Predictability, rebellion insists, is not necessarily good when it forecloses the possibility of compassionate comprehension; consistency is of supreme worth when it expresses the knowing voice of love.

<sup>67</sup> Quoted in HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 176 (1990).

attributing the institution of slavery to "man." Slavery, in addition, is a response to real differences among humans: man did not assign the distinguishing traits, neither the color which marks the race, nor the more elusive attributes which unhappily consign that race to slavery.

This ongoing debate is at core a debate over epistemological premises, over the possibility and means of knowing, first, the difference between the state and its people, and second, the differences among those people.<sup>68</sup> It is a debate between formal assertions and lived truths, and it is a debate that demonstrates the power that is wielded through imposing an epistemological burden of proof. Ultimately, it is a debate over how, perhaps which, perhaps whether, experiential truths are afforded formal recognition. It is thus a debate about knowing, about re-cognizing the human condition.

### *A. Visions of the State and Society*

"[I]ndividual liberty," Professor Charles Fried writes, "flourishes to the extent that state and society are recognized as distinct entities."<sup>69</sup> Professor Fried thus posits a "liberal truth":<sup>70</sup> the public is not the private, the state is not society.

Critics dispute the authenticity of the state/society dichotomy. Calling the distinction "a liberal truth" does not make it a truth in people's lives. The search for truth does not begin and end with the assertion of formal understandings, rather, it necessitates the comprehensive recognition of human experience.

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<sup>68</sup> While conceptually distinct, it is impossible to overstate the intimate relationship between the "state/society" (or "public/private") dichotomy and the "objective/subjective" dichotomy in the perception of "difference" and other phenomenon. Professor Frank Michelman has suggested that the "public/private" dichotomy may in fact be comprehensible only in conjunction with an acceptance of the dual "subject/object" nature of "persons" and other entities, Frank Michelman, *Universal Resident Suffrage: A Liberal Defense*, 130 U. PA. L. REV. 1581, 1587-88 (1982). Professor Duncan Kennedy has argued that these and other liberal distinctions are "not synonymous" but "are all in a sense, 'the same.'" Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1349 (1982); see also Donald A. Shweder, *Divergent Rationalities*, in METATHEORY IN SOCIAL SCIENCE: PLURALISMS AND SUBJECTIVITIES 163, 177 (Donald W. Fiske & Richard A. Shweder eds. 1986) [hereinafter METATHEORY IN SOCIAL SCIENCE], noting that "the objective versus the subjective" and "public versus private" are part of a "parallel series of oppositions" that, for both positivists and hermeneuticists, deny the place "for a science of subjectivity," that posits the possibility of divergent rationalities.

<sup>69</sup> Fried, *supra* note 5, at 122.

<sup>70</sup> *Id.*

### 1. *The Redemptive Vision*

In 1883 the United States Supreme Court invalidated the first and second sections of the Civil Rights Act of 1875<sup>71</sup> in the *Civil Rights Cases*.<sup>72</sup> The Court's decision was not the first blow against the Reconstruction effort,<sup>73</sup> but it was inordinately significant. The Court, in an opinion by Justice Joseph P. Bradley, defined the protection afforded by the Thirteenth and Fourteenth Amendments in such limited terms as to palsy the federal Reconstruction effort for the next eight decades. A central tenet of Justice Bradley's opinion in the *Civil Rights Cases* was the assertion of a distinction between public life and private life: the affairs of the former were the proper objects of federal legislative action, while the affairs of the latter were not.<sup>74</sup>

This public/private distinction from the *Civil Rights Cases* provided the formal premise for the Court's decision eleven years later in *Plessy v. Ferguson*.<sup>75</sup> *Plessy* sustained the constitutionality of "separate but equal" laws. The separate rail accommodations mandated by Louisiana law, however, were "equal" only by declaration of the state statute. The Supreme Court conducted no empirical inquiry to test the assertion. They were "equal" only as a formal abstraction, but that sufficed: the Constitution guaranteed only "political" equality.<sup>76</sup>

*Plessy* unconditionally affirmed the state/society distinction. The object of the Fourteenth Amendment, Justice Brown wrote:

was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it

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<sup>71</sup> Civil Rights Act, 18 Stat. 335 (1875).

<sup>72</sup> The Civil Rights Cases, 109 U.S. 3 (1883).

<sup>73</sup> The Civil Rights Acts of the Reconstruction Congress had been the objects of presidential veto, see FONER, *supra* note 7, at 247-51. They also had been and would continue to be the objects of judicial invalidation, see, e.g., United States v. Reese, 92 U.S. 214 (1875) (voting rights sections of the 1870 Enforcement Act); United States v. Harris, 106 U.S. 629 (1882) (criminal conspiracy sections of Ku Klux Klan Act of 1871); Hodges v. United States, 203 U.S. 1 (1906) (Civil Rights Act of 1866). As a practical political matter, the Acts had been substantially mooted by the termination of the federal commitment to Reconstruction as a part of the Compromise of 1877. See generally VANN WOODWARD, *supra* note 7.

<sup>74</sup> *Civil Rights Cases*, 109 U.S. 3.

<sup>75</sup> 163 U.S. 537 (1896). As Professor Kenneth Karst notes, Justice Bradley's opinion in the *Civil Rights Cases* is "still the most influential source for the doctrinal model of formal racial neutrality." Kenneth L. Karst, *Private Discrimination and Public Responsibility: Patterson in Context*, 1989 SUP. CT. REV. 1, 15 (1989).

<sup>76</sup> *Plessy*, 163 U.S. at 544.



could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.<sup>77</sup>

The Fourteenth Amendment, “in the nature of things,” “could not have been” aimed at social equality because it was consigned to the world of legal abstraction: to the realm of the formal State and of formal public rights. Social equality, however, was dependent upon the orderings arrived at through pre-political choice: “[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits and a voluntary consent of individuals.”<sup>78</sup> The Constitution, consigned to its insular world of abstract public law, was powerless to disrupt these workings of pre-political society: “[i]f the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution cannot put them upon the same plane.”<sup>79</sup>

In *Plessy*’s formal universe, then, there was no cognizable harm in “separate but equal”; the only “harm,” the “badge of inferiority,” was assigned, and in fact worn,<sup>80</sup> only as an exercise of “private” autonomous choice. The State had abridged no public rights, no political rights, no civil rights, but had merely sanctioned a pre-existing social order.<sup>81</sup>

The *Civil Rights Cases* and *Plessy v. Ferguson* represent the same vision of a constitutional “state”: both consign the Constitution to a universe of formal rights and abstract entities, of a “state” that exists apart from its citizenry, of “civil rights” that

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 551.

<sup>79</sup> *Id.* at 551–52.

<sup>80</sup> *Id.* at 551 (noting that “[i]f the enforced separation of the two races stamps the colored race with a badge of inferiority . . . it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

<sup>81</sup> If anything, the segregationist scheme was protecting rights: the pre-political rights to heed the call of tradition and of natural community. As Justice Brown observed, the only proper test for “social” legislation is that it be “reasonable,” and in “determining the question of reasonableness, [the state] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.” *Id.* at 550. Justice Brown did not specify which “traditions” of which “people” should be referred to, nor did he indicate from whose perspective the “order” should appear “good.” Then again, there was no need to; such “social” concerns were no longer any of the Court’s business.

exist apart from human interactions.<sup>82</sup> These cases acknowledge a social or private world but they do not try to know it. The real world, as they envision it, is none of their business, and the Constitution, as they read it, proclaims their indifference.

*Brown v. Board of Education*<sup>83</sup> announced the end of this indifference, but the Court's ambivalence was apparent almost from the start. The uncertainty manifest in *Brown II*'s equivocal commands<sup>84</sup> was compounded by the remand of authority to local district court judges for "adjusting and reconciling public and private needs."<sup>85</sup>

Sixteen years later, *Swann v. Board of Education*<sup>86</sup> revealed a Court increasingly troubled by the implications of its position. The Court was cognizant, on the one hand, of "the evil"<sup>87</sup> that is segregation, but unable to abandon the belief that racial separation is also somehow natural.<sup>88</sup>

<sup>82</sup> In one sense, *Plessy* was the flip side of Justice Bradley's coin. The *Civil Rights Cases* declared that "private" actors were immune from constitutional restriction, even where their actions burdened "civil" rights; *Plessy* declared that even "state" actors were immune from constitutional restriction where their actions mandated only a "social" order, as opposed to a "political" one. In neither case, of course, did the Court consider experiential proof to challenge its categorizations: the "private" actors in the *Civil Rights Cases* were ipso facto not manifesting the "State," and the "social order" in *Plessy* was ipso facto not a manifestation of "political" ordering.

<sup>83</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>84</sup> For instance, the Court in *Brown II* wrote that the segregated schools make "a prompt and reasonable start" toward compliance with *Brown I*, that they achieve "good faith compliance at the earliest practicable date," and that they proceed on this course "with all deliberate speed." 349 U.S. 294, 300-01 (1955).

<sup>85</sup> *Id.* at 299-300. Most federal judges, Georgia Lieutenant Governor Ernest Vandiver gleefully noted in response to *Brown II*'s "mandate," "are steeped in the same traditions that I am . . . . A 'reasonable time' can be construed as one year or two hundred . . . . Thank God we've got good federal judges." C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 153 (3d rev. ed. 1974).

<sup>86</sup> *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *Swann* is neither the document that its authors originally intended it to be, nor, apparently, is it the opinion that any single Justice of the Court truly wanted. See generally BERNARD SCHWARTZ, *SWANN'S WAY* (1986) (describing the internal processes of the Court that generated *Swann*). The opinion went through no less than six drafts in an effort to obtain unanimity. On the de jure/de facto issue the opinion reflects both Chief Justice Burger's and Justice Black's insistence that the clear distinction be asserted as well as Justice Douglas', Justice Brennan's, and Justice Stewart's various suggestions that the distinction may at times be more artifactual than real. *Id.*; see also BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN* 312 (1981) [hereinafter *THE BRETHREN*] (noting that certain passages in *Swann* tending to undermine the clear distinction were insisted upon by Justice Marshall).

<sup>87</sup> *Id.* at 22.

<sup>88</sup> The Chief Justice wrote in *Swann* that "[w]e are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds." *Id.* In his initial draft, the Chief Justice identified those forms

The belief that racial separation is natural informs the de jure/de facto distinction, a reflection of the state/society dichotomy which produces an odd fragmentation of "the state" in both a geopolitical and temporal sense. Racial segregation beyond the borders of the political entity in question is presumptively not attributable to the state.<sup>89</sup> Racial segregation which post-dates the formal segregative activities of that entity may be cured of its "state" taint by a "reasonable" period of constitutional conduct.<sup>90</sup> Any lingering segregation must be de facto: "private," "social," "natural."<sup>91</sup>

## 2. *Rebellion's Vision*

Justice Harlan's dissenting opinions in the *Civil Rights Cases*<sup>92</sup> and *Plessy v. Ferguson*<sup>93</sup> rejected the state/society dichotomy for a deeper humane critical analysis which viewed the state and society as a single coherent entity. There was nothing "natural" about race hatred and nothing "reasonable" about the segregationist scheme.<sup>94</sup>

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of "racial prejudice" which were beyond the reach of the Court's desegregation decisions: "residential problems, employment patterns, locations of public housing, or other factors beyond the jurisdiction of school authorities . . . ." SCHWARTZ, *supra* note 86, at 216. This language was ultimately tempered: "We do not reach in this case the question whether school segregation [a]s a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree." 402 U.S. at 23.

<sup>89</sup> See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*) (vacating the district court's order of metropolitan-wide desegregation relief for the Detroit public schools).

<sup>90</sup> *Board of Education of Oklahoma City Public Schools v. Dowell*, 111 S.Ct. 630 (1991).

<sup>91</sup> The "state" shrinks in other ways in the Court's Equal Protection jurisprudence. The "state" may be held accountable under the Equal Protection clause only when it acts with an "intent" to discriminate, perhaps provable only through formal proclamation. See *infra* notes 191-194 and accompanying text. Where the "state" does manifest its "intent," it is responsible only for the impacts that it "causes." See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498, 504 (1989). "Causation" is an artifact which enjoys a unique reputation for manipulability in other doctrinal realms. See Morton S. Horwitz, *The Doctrine of Objective Causation*, in *THE POLITICS OF LAW* 201 (D. Kairys ed. 1982) ("causation" requirement in tort law developed to counter re-distributive political tendencies). This "causation" is particularly elusive as a nexus between the real world and the abstract, fragmented "state" of Equal Protection doctrine.

<sup>92</sup> *The Civil Rights Cases*, 109 U.S. 3, 54 (1883).

<sup>93</sup> 163 U.S. 537, 560 (1896).

<sup>94</sup> *Civil Rights Cases*, 109 U.S. at 54-60; *Plessy*, 163 U.S. at 560-62.

Three generations passed before the Court accepted Justice Harlan's critique in *Brown v. Board of Education*.<sup>95</sup> *Brown* did more than overturn *Plessy*'s "separate but equal" doctrine; *Brown* obliterated *Plessy*'s logic. The constitutional harm in *Brown* was undeniably from *Plessy*'s "social" realm,<sup>96</sup> but the *Brown* Court recognized what only Justice Harlan acknowledged in *Plessy*, that the "social" realm and its contents were often constructed by the state. There was nothing "natural" about the stigma of inferiority perpetuated by segregated schools; it was a harm politically constructed and maintained, and it was within the Court's power to undo it. The *Brown* Court recognized, as only Justice Harlan had in *Plessy*, that "private" choices made with the sanction of the state are not "private" at all.

*Brown II* began a political retreat by re-granting constitutional status to the demands of "social" order, but it did not retreat from the position that "social" order alone could not justify manifest inequality.<sup>97</sup> *Swann*, too, while rejecting a completely unified vision of state and society, explicitly observed the interaction of the "public" and "private," the "state" and "society," in its discussion of the inter-relationship between school board decision-making and residential patterns.<sup>98</sup> Even *Keyes*,<sup>99</sup> for all of the gyrations it manifests in the apparent attempt to command a majority,<sup>100</sup> largely continued the deconstruction of the state/society dichotomy. Jus-

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<sup>95</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). In fact, some of *Brown*'s foundation was laid in earlier years. Of particular significance here, is Chief Justice Vinson's opinion for the Court in *Sweatt v. Painter*, 339 U.S. 629 (1950). While *Sweatt* expressly reserved the question whether "separate but equal" was constitutional, *id.* at 636, it did conduct an empirical assessment of the "substantial equality" claimed on behalf of segregated law schools, an assessment fundamentally at odds with *Plessy*'s detached vision of "political" equality. Moreover, in comparing the legal educations offered to black and to white students, the Court considered, in addition to quantifiable variables, the respective schools' "standing in the community, traditions and prestige," as well as the opportunities for students to interact with current and future "lawyers, witnesses, jurors, judges, and other officials." *Id.* at 634. Among the factors that rendered segregated legal education "unequal," in other words, were factors distinctly from *Plessy*'s "social" realm.

<sup>96</sup> The very fact of separation according to race, the *Brown* Court held, necessarily created a constitutionally cognizable harm: "[t]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494.

<sup>97</sup> *Brown v. Board of Education of Topeka*, 349 U.S. 294, 300 (1955) (*Brown II*).

<sup>98</sup> *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 20-21 (1971).

<sup>99</sup> *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973) (upholding desegregation order for school district without history of formal codified segregation).

<sup>100</sup> See Woodward & Armstrong, *THE BROTHERS*, *supra* note 86, 96-112 (1981) (noting the internal disputes and negotiations preceding the Court's decision).

tice Brennan's opinion for the *Keyes* Court notes the potential relationship between purposeful segregative acts (the de jure segregation of the "state") and actual segregation (the de facto segregation of "society"), even where the actual segregation is geographically and temporally removed from the state activity.<sup>101</sup>

But the rebel's voice was stilled in *Milliken*.<sup>102</sup> The concept of a unified state and society again became an expression of dissent, and for the most part it has been that ever since.<sup>103</sup> And so, last term, Justice Marshall was left to express the dissenting voice in another desegregation decision: *Board of Education v. Dowell*<sup>104</sup> brings the cases full circle.<sup>105</sup>

### 3. *Rebellion's Critique*

The rebel rejects the Court's redemptive vision of the state/society dichotomy for at least two reasons: it is embarrassed by the historical record; and its existence is entirely contingent upon the self-perpetuating perspectives of power.<sup>106</sup>

The historical record embarrasses the redemptive claim that "societal" racial discrimination is in some sense pre-political. Racism did not originate in a pre-existing private realm, rather, the "private" realm was constructed to preserve the politically manufactured racism.

The American institution of slavery developed not from racial instincts, but in response to a determinate economic need: a demand for cheap labor in a market where the labor supply was small, unstable and expensive.<sup>107</sup> The Africans' skin color provided

<sup>101</sup> *Keyes*, 413 U.S. at 201-03, 208-09, 211. Concurring in *Keyes*, both Justice Douglas and Justice Powell argued for the abolition of the de jure/de facto distinction.

<sup>102</sup> *Milliken v. Bradley*, 418 U.S. 717 (1974).

<sup>103</sup> The Court's decision in *Milliken* prompted separate dissents by Justices Douglas, White, and Marshall, each challenging the state/society dichotomy re-erected in the majority opinion. *Id.* at 745, 757, 762, 781.

<sup>104</sup> 59 U.S.L.W. 4061 (1991).

<sup>105</sup> "In a district with a history of state-sponsored school segregation," Justice Marshall was forced to remind the Court, "racial separation, in my view, *remains* inherently unequal." *Id.* at 4070 (emphasis original).

<sup>106</sup> The dichotomy is plagued, as well, by an inherent theoretical dilemma. If the state does not reflect the society that created it, it is not, in theory, a legitimate state. If the state does not order society at all, then it is not, in reality, a meaningful state. There is at this level no avoiding the dilemma: to some extent, the state/society dichotomy must fail, or else there is no "state." See Regina Austin, *The Problem of the Legitimacy of the Welfare State*, 130 U. PA. L. REV. 1510, 1514-17 (1982).

<sup>107</sup> PETER KOLCHIN, UNFREE LABOR: AMERICAN SLAVERY AND RUSSIAN SERFDOM 1-31 (1987).

an unmistakable label, a designation of chattel status.<sup>108</sup> But in the first decades of African slavery, the rigid "color line" was at first no line at all.<sup>109</sup> In the colonies, "fluid class alliances" united African and European, slave and servant.<sup>110</sup>

The drawing of the color line was likely a response to two developments: one empirical, one theoretical, both reflecting a need for order. As to the first "empirical" development, as the numbers of African slaves increased,<sup>111</sup> and as succeeding generations of slaves became increasingly familiar with the new environment, the threat of insurrection necessarily escalated.<sup>112</sup> Colonial authorities responded to the growing threat of rebellion by dividing the rebel class. Colonial laws codified the division of black and white.<sup>113</sup> By the mid-eighteenth century, with the change in

<sup>108</sup> This, indeed, was the great pragmatic advantage of African slavery. Initial attempts to coerce labor in the colonies were not limited to, or even dominated by, African slavery. But neither Europeans nor American Indians made satisfactory bondsmen: both had a pre-colonial experience familiar to the master class that rendered their status ambiguous; both were prone to escape; Europeans could purchase their freedom; and Indians posed a considerable threat of reprisal. Africans, because they were alien and distinctly perceptible as such, were less problematic on all counts. *See id.* at 31–32; VINCENT HARDING, *THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA* 3–8 (1981); HIGGINBOTHAM, *supra* note 47 at 151–52; WINTHROP P. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550–1812* 89 (1969).

<sup>109</sup> It apparently did not mean much to the Africans: distinctions among tribes were more important to the Africans than were distinctions based on skin color. *See* NATHAN I. HUGGINS, *BLACK ODYSSEY: THE AFRO-AMERICAN ORDEAL IN SLAVERY* 20 (1977). Nor did it mean much to the Europeans: early European accounts of encounters between European slave traders and Africans are noticeably devoid of the pejorative descriptions of the dark-skinned people that would characterize discourse a century later. *See* KOLCHIN, *supra* note 107, at 184 (noting that "colonial enslavers rarely expressed a belief in permanent, inherent black inferiority . . . and in any case neither the Africans' color nor their other apparently distinctive attributes created either the need or the desire for slavery."). *See also* FRANK M. SNOWDEN, JR., *BEFORE COLOR PREJUDICE: THE ANCIENT VIEW OF BLACKS* 63–108 (1983) (noting that the ancient Egyptians, Greeks, Romans and early Christians were largely indifferent to the colors of human skin).

<sup>110</sup> KOLCHIN, *supra* note 107, at 31–33. *See also* HARDING, *supra* note 108, at 26–27; HUGGINS, *supra* note 109, at 86; HIGGINBOTHAM, *supra* note 47, at 20–26, 66–68, 272–73; MORISON, *supra* note 44, at 90. Throughout most of the 17th century, Professor Peter Kolchin notes, "the rigid dichotomy of later years between black and white, slave and free, did not yet exist." KOLCHIN, *supra* note 107, at 31–33.

<sup>111</sup> The Treaty of Utrecht in 1713 ensured British domination of the African slave trade: the supply of slaves, only gradually increasing until then, became plentiful. *See* KOLCHIN, *supra* note 107, at 15; MORISON, *supra* note 44, at 139.

<sup>112</sup> HARDING, *supra* note 108, at 30–31; HIGGINBOTHAM, *supra* note 47, at 9, 26–31. Indeed, the 16th and early 17th centuries saw a number of rebellions: class rebellions, not slave rebellions, comprised of alliances of Americans of African and European descent. KOLCHIN, *supra* note 107, at 32–34; ZINN, *supra* note 67, at 32–38; HIGGINBOTHAM, *supra* note 47, at 35; MORISON, *supra* note 44, at 113–15, 149.

<sup>113</sup> Some of these were laws of segregation: laws against miscegenation, laws against fraternization. *See* HIGGINBOTHAM, *supra* note 47, at 40–47, 154–59; others were more insidious, erecting new hierarchies of privilege within the servile class, pitting slave against

racial demographics, the segregation of the servile class meant, for all practical purposes, the segregation of African slaves.<sup>114</sup>

The theoretical threat to order arose from the emergence of modern liberalism. The bourgeois ethic of seventeenth century Europe had been largely hospitable to the institution of slavery.<sup>115</sup> The emerging liberal tenets of political liberty, economic autonomy and equality were obviously more difficult to reconcile with the existence of involuntary servitude. The new political ethic demanded a reconceptualization of slavery and the slave. The defenders of slavery found the roots of the new order in the color of their bondsmen's skin. The new order was memorialized in 1787 as a founding premise for the national government: the exclusion of African slaves from the new body politic became America's great and tragic "constitutional contradiction."<sup>116</sup> For the next two centuries, defenders of racial hierarchy found its justification in the very dichotomy on which slavery and the nation were founded. Against the intrusions of political democracy, the master class asserted the sanctity, indeed the necessity, of the pre-political social order.

These notions of natural racial hierarchy have survived Emancipation and two Reconstructions. To each effort aimed at restoring equality, the preservers of hierarchy have for the past two centuries echoed the same refrain: leave it alone, it is only natural.<sup>117</sup> Jim Crow laws emerged out of notions of natural racial

servant, bondsman against poor man, and, ultimately, black against white. KOLCHIN, *supra* note 107, at 34-35; ZINN, *supra* note 67, at 36-38; HARDING, *supra* note 108, at 28-34; HIGGINBOTHAM, *supra* note 109, at 38, 54-55, 154-59.

<sup>114</sup> See KOLCHIN, *supra* note 107, at 35; HIGGINBOTHAM, *supra* note 109, at 154-60. Even at that, the "black"/"slave" equation was never complete, due in substantial part to the inherent ambiguities of "race." See MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY 1810-1860* 140 (1981).

<sup>115</sup> See KOLCHIN, *supra* note 107, at 31; see also ISAAC KRAMNICK, *REPUBLICANISM & BOURGEOIS RADICALISM: POLITICAL IDEOLOGY IN LATE EIGHTEENTH-CENTURY ENGLAND AND AMERICA* 8 (1990).

<sup>116</sup> See DERRICK BELL, *AND WE ARE NOT SAVED* 26-42 (1987) ("The Chronicle of the Constitutional Contradiction"); see also WIECEK, *supra* note 45, at 57-61 (1977).

<sup>117</sup> Contemporary sociologists, predating modern sociobiologists by nearly a full century, opined that "[r]ace prejudice is an instinct originating in the tribal stage of society . . . [and i]t, or some analogue of it, will probably never disappear completely . . ." William I. Thomas, *The Psychology of Race-Prejudice*, in *THE SOCIOLOGY OF RACE RELATIONS: REFLECTION AND REFORM* at 7, 9 (Thomas F. Pettigrew ed. 1980) [hereinafter *SOCIOLOGY OF RACE RELATIONS*]. William Graham Sumner insisted that "stateways cannot change folkways," and decried the "[v]ain attempts . . . to control the new order by legislation." VANN WOODWARD, *supra* note 7, at 104. The Ku Klux Klan, meanwhile, vowed to protect "the established order of societies." Guy B. Johnson, *A Sociological Interpretation of the New Ku Klux Movement*, in *SOCIOLOGY OF RACE RELATIONS*, *supra*,

hierarchy, but like the peculiar institution it replaced, Jim Crow's palsied and contradictory beginnings, including elements of southern racial moderation that outlasted the federal commitment to Reconstruction, demonstrate that the emergence of Jim Crow was not preordained, immutable or unchangeable.<sup>118</sup> Crass politics, however, ultimately prevailed, and by the 1890s southern bi-racial populism was a casualty of economic crisis and party politics.<sup>119</sup> Yet it is possible that the forces of racism might not have won the day were it not for the "permission to hate" signals that came from Reconstruction-era northern liberals and the federal courts.<sup>120</sup>

The tradition of racial discrimination persists today.<sup>121</sup> The redeemers of the social order insist that the tradition has been broken. What lingers today, they maintain, is the natural race hatred that lives in every individual's soul. The rebel responds that racial discrimination is meaningless without the political exigencies that create it, nurture it and sustain it against the struggle for equality. The "natural" discrimination that pervades the "private" realm owes its existence to the "state" discrimination that pervades the "public" realm. As the historical record demonstrates, Americans have learned and constantly re-learned racism because of, not in spite of, the demands for political order.<sup>122</sup> Second, the rebel rejects the state/society dichotomy as a political construct to perpetuate existing power structures. Professor Fried laments the "cynicism and self-hatred" that informs the rebel's critique of these self-perpetuating power structures.<sup>123</sup> He regrets:

[the] sense that the history of American dealings . . . with our own minorities and with our own poor people, was

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at 70, 73 (quoting the Imperial Wizard of the Ku Klux Klan). "The Klansman," Guy Johnson wrote in 1923, "does not adjust, he defends: that is why he is a Klansman." *Id.* at 75.

<sup>118</sup> See VANN WOODWARD, *supra* note 7, at 65.

<sup>119</sup> *Id.* at 74-82.

<sup>120</sup> *Id.* at 81.

<sup>121</sup> See ALPHONSO PINKNEY, *THE MYTH OF BLACK PROGRESS* 13-15 (1984).

<sup>122</sup> See KOLCHIN, *supra* note 107, at 185-88 (noting the essentially political reasons for the gradual conflation of racism and slavery in America); Karst, *supra* note 75, at 9 (noting that "[t]he most serious problem of racism is not a problem of evil hearts but of culture"); Oliver C. Cox, *The Modern Caste School of Race Relations*, in *SOCIOLOGY OF RACE RELATIONS*, *supra* note 117, at 134, 137 (noting, in 1942, that "the greater the relative cultural advancement of Negroes, the less will be the need of the white man's protecting his color.").

<sup>123</sup> FRIED, *supra* note 5, at 15.



so far tainted that the prosperous had not earned their prosperity and that the poor were the victims of everyone else (as if the way we had treated the American Indian typified our treatment of everything and everyone—including one another).<sup>124</sup>

Professor Fried's concerns expose the bias in perspective that underlies the very conception of a state/society dichotomy. Who is the "we" that constructed "the history of American dealings with . . . our own minorities," the "we" that dealt with "our own poor people?" Is it a "social" "we," a collection of "private" selves who hate the history of their dealings with others? If so, it is an exclusive bunch: it is not minorities, it is not poor people. This is a "we" with power enough to make the history of American dealings with minorities and it is a "self" that regrets the history it has made. This "we," this "America," looks curiously like "the state."

This "we" preserved its political power even through Emancipation and Reconstruction through the formal assertion of the state/society dichotomy. But the dichotomy exists only as a "formal" assertion, only as a creation of the "state," only as a "private" expression of "public" power.

For the rebel, however, the triumph of political will manifest in the dichotomy cannot erase the fundamental truth of the human condition as it is experienced. The history which "America" constructed and the orders which persist today are united in their exclusion and subordination of African-Americans. Only the exercise of political power could fashion this near-total subordination of a people, and only political will achieves the exclusion of their lived truths from the inquiry into their condition.<sup>125</sup>

For the rebel, formal dichotomies cannot deny the universal quality of human suffering.<sup>126</sup> Thus for the rebel and for those whose lives are touched by racism, the distinction between the public and private causes of discrimination is not merely conceptually problematic, or practically untenable, it is utterly irrelevant.

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<sup>124</sup> *Id.* at 15–16.

<sup>125</sup> See Austin Sarat, ". . . *The Law Is All Over*": Power, Resistance and the Legal Consciousness of the Welfare Poor, 2 YALE J.L. & HUMAN. 343, 343 (1990) (noting the pervasiveness of "the law" in the lives of the welfare poor).

<sup>126</sup> See Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 311 (1987) ("[As minorities, w]e know, indeed we live, the bogus public-private distinction.").

For the rebel, then, the coherent vision of state and society authentically reflects the truths of human experience; the insular state, meanwhile, reflects principally a certain political ideal.<sup>127</sup> Rebellion thus rejects the vision of an insular state as an epistemological premise; that vision suppresses, rather than promotes, a truth consonant with the human condition.

What is remarkable to the rebel is that the advocates of the insular state would themselves accept it as a description of reality. Then again, perhaps they do not:

At first view when we walk about amongst our fellow-men, we may not observe the omnipotent influence and controlling effect of the law. Its power is so subtle and all-pervading that everything seems to take place as the spontaneous result of existing conditions and circumstances . . . . It is over, under, in and around, every action, that takes place. Its silent reign is seen in the order preserved, the persons and property protected, the sense of security manifested . . . . The mighty river of things generally moves on with an undisturbed current; but only because it is kept in its banks and regulated in its course by the power of law.<sup>128</sup>

"[S]ociety and law are so intimately connected," the author concluded, "that the hypothesis of one is the hypothesis of the other."<sup>129</sup> The passage is from an 1884 lecture; the lecturer was Justice Joseph P. Bradley.<sup>130</sup>

### *B. Visions of Personhood and Difference*

Black and white are different. It is true as tautology, and an axiom of dominant Western conceptual constructions. Black and

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<sup>127</sup> See, e.g., Kenneth M. Casbeer, *Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379, 429 (1983); Duncan Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1, 16 (1983); Ira Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297, 366 (1977).

<sup>128</sup> JOSEPH P. BRADLEY, MISCELLANEOUS WRITINGS, 240-41 (Charles Bradley, ed. 1901) (1986).

<sup>129</sup> *Id.* at 245.

<sup>130</sup> *Id.* The date was October 1, 1884, *id.* at 227, roughly a year after Justice Bradley's intellectual journey from the *Slaughterhouse Cases* to the *Civil Rights Cases*.

white, however, have no meaning apart: they exist only in a gestalt, their essence dependent upon the contrast afforded by their opposite.<sup>131</sup> This simple contradiction, the difference and inter-relatedness of black and white, is at the heart of the second epistemological debate in the dialogue on equality: the competing visions of personhood.

Redemption perceives personhood as the product of Creation,<sup>132</sup> imbued as such with certain inherent and immutable traits. Concomitantly, redemption embraces the concept of objective human differences, and insists that those differences are real, are measurable, and that they thus permit meritocratic ordering. "Black" and "white" are, in this view, absolute and unyielding. The differences between them may be traced to the inherent qualities of "blackness" and "whiteness," and may consequently be ordered as inferior or superior.

Rebellion, on the other hand, perceives personhood as substantially the product of social re-creation, defined in the context of, and through the processes of, social interaction.<sup>133</sup> The rebel consequently views human difference as the product of perception of the social subject. The locus of difference thus shifts for the rebel from the natural human object to the relationship between

<sup>131</sup> This is true most obviously for sensory perception. In visual schemes of color, for example, black is "at the extreme end of grays, opposite to white, absorbing all light incident upon it," RANDOM HOUSE COLLEGE DICTIONARY 139 (Rev. Ed. 1975), while white is "without hue at one extreme end of the scale of grays, opposite to black," *id.* at 1501. Meanwhile, there are countless cultural connotations of "black" and "white," some related to human skin colors, most suggesting opposition on a single axis. *See, e.g.,* JORDAN, *supra* note 108, at 4–11 (noting the opposed connotations in Elizabethan England and their impact on early European encounters with Africans); *see also* Patrick Brantlinger, *Victorians and Africans: The Genealogy of the Myth of the Dark Continent*, in "RACE," WRITING AND DIFFERENCE, *supra* note 3, at 185 (reviewing the confluence of science, politics and religion that prompted British imperialism in Africa and the construction of the myth of the "dark" continent). Most significantly, the concept of opposition, when applied in hegemonic fashion to human attributes, leads quite easily to an extreme hierarchy; this, to be sure, happened with the "white" construction of "black" and "white." *See* Sander L. Gilman, *Black Bodies, White Bodies: Toward an Iconography of Female Sexuality in Late Nineteenth-Century Art, Medicine, and Literature*, in "RACE," WRITING AND DIFFERENCE, *supra* note 3, at 223, 231–32 (observing that in a tortured extension of the 18th-century "chain of being," "the black occupied the antithetical position on the scale of humanity.").

<sup>132</sup> Creation refers here not to a specific theistic or general religious account of human origins. It is used rather to describe the view that personal identity, particularly racial identity, is shaped by natural, non-human forces and may be traced to a primal moment. This view is distinguished from the view that identity results not from a single, natural act of "Creation," but rather from perpetual processes of social re-creation.

<sup>133</sup> *See* Kenneth J. Gergen, *Correspondence Versus Autonomy in the Language of Understanding Human Action*, in METATHEORY IN SOCIAL SCIENCE, *supra* note 68, at 136, 138–49.

the human object and subject. Difference is constructed in the context of that relationship. Difference is consequently largely reified, is necessarily relative, and is measurable only to the extent that apparent traits may be compared to manufactured norms. For the rebel there is no “black” and “white” at all, no single axis on which to order humanity; there is just the space around people, in the context that unites them.<sup>134</sup>

### 1. *The Redemptive Vision*

In *Plessy v. Ferguson* Justice Brown condoned disparities arising from segregative legislation as merely the result of social, or pre-political, differences between the races.<sup>135</sup> In remarks that would resonate for generations, Justice Brown reminded the Nation that “[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.”<sup>136</sup>

A century later, the dominant conception of racial difference has not much changed. In *Washington v. Davis*,<sup>137</sup> the Court sanctioned the view that racial disparity in achievement was presumptively the result not of political constructions of “race” and “racial difference,” but of natural constructions and objective racial group

<sup>134</sup> Dr. W.E.B. Du Bois wrote:

High in the tower where I sit beside the loud complaining of the human sea I know many souls that toss and whirl and pass, but none there are that puzzle me more than the Souls of White Folk. Not, mind you, the souls of them that are white, but souls of them that have become painfully conscious of their whiteness; those in whose minds the paleness of their bodily skin is fraught with tremendous and eternal significance.

*The Souls of White Folk*, in W.E.B. DU BOIS: A READER 298 (Meyer Weinberg ed., 1970).  
<sup>135</sup>

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

*Plessy v. Ferguson*, 163 U.S. 537, 543 (1896). See also *id.* at 549 (“[I]f he be a colored man and be so assigned [to a colored coach], he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.”)

<sup>136</sup> *Id.* at 551.

<sup>137</sup> 426 U.S. 229 (1976).

deficiencies.<sup>138</sup> In *City of Richmond v. Croson*,<sup>139</sup> the Supreme Court rejected “societal discrimination” as a predicate to race-conscious remedial action in a city where white contractors secured municipal contracts over black contractors at a rate approximating seventy-five to one. “[T]he sorry history of both private and public discrimination,”<sup>140</sup> the Court concluded, was not necessarily the cause of the disparity: minorities in Richmond might make different career choices,<sup>141</sup> might be less eligible,<sup>142</sup> or might be less qualified;<sup>143</sup> minorities, in short, might simply be “different.”

At the same time, however, the redemptive vision denies the possibility of a “minority perspective.” Dissenting in *Metro Broadcasting Inc. v. FCC*,<sup>144</sup> Justice O’Connor condemned the governmental interest in “diversity of broadcast viewpoints” as “too amorphous, too insubstantial,” and too much like “the vague assertion of societal discrimination” she had rejected the previous term.<sup>145</sup> Minority groups may collectively make some unique choices—they may be, for example, seventy-five times less likely to pursue a career in contracting than their white counterparts—but these reflect qualities that are too mystical in origin and too “amorphous” in character to deserve much attention.<sup>146</sup>

## 2. *Rebellion’s Vision*

Justice Harlan’s dissent in *Plessy v. Ferguson* is often cited for the proposition that race-conscious governmental activity is

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<sup>138</sup> *Id.* (holding that disparate racial impact in employment testing is not proof of racial discrimination absent evidence of discriminatory intent).

<sup>139</sup> 488 U.S. 469 (1989).

<sup>140</sup> *Id.* at 499.

<sup>141</sup> *Id.* at 503.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 502.

<sup>144</sup> 110 S. Ct. 2997 (1990).

<sup>145</sup> *Id.* at 3034–35 (O’Connor, J., dissenting). Indefiniteness is a recurring critique in Justice O’Connor’s conceptions of racial discrimination. Compare *id.* with *Croson*, 488 U.S. at 499 (rejecting as “sheer speculation” the asserted effects of an “amorphous claim” of past racial discrimination in Richmond’s construction industry); see also *Allen v. Wright*, 468 U.S. 737, 752–56 (1984) (rejecting the “abstract” claim of stigmatic injury resulting from racial discrimination and dismissing as “entirely speculative” the suggestion that federal tax relief to segregated schools encourages segregation).

<sup>146</sup> There is an alternative reconciliation that transcends the text of the opinions: Justice O’Connor’s opinion in *Croson*, which reads like a manual for affirmative action plans, albeit an impossibly rigorous and hypertechnical manual, may have been an effort to secure the possibility of affirmative action from an increasingly hostile Court. See Karst, *supra* note 75, at 39–42.

prohibited by the Constitution. But Justice Harlan explicitly recognized the political re-creation of “race” as a subordinate class, and explicitly recognized the authority, and moral obligation, of the legislatures and courts to provide a remedy. The injustice of Louisiana’s “separate but equal” scheme was not its invocation of “race,” but the use of “race” to perpetuate rather than prevent a hierarchy. The “real meaning” of the segregation law, Justice Harlan dissented in *Plessy*, was “that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens.”<sup>147</sup>

Justice Harlan rejected the argument of symmetry. The Louisiana law was not “color-blind” in the sense that the Fourteenth Amendment and the Civil Rights Acts, which invoked “race” but treated all races the same, were “color-blind.” For Justice Harlan, context was critical. The undeniable racial context for the Louisiana statute consisted of social dominance and political hegemony.<sup>148</sup> It was not the race line *qua* race line that condemned the Louisiana statute, but the fact that the race line was used to subordinate. In other words, “color-blind” did not mean that courts and legislatures must be blind to the political realities of “color.” It meant instead that they could not assert “natural” differences of “color” to perpetuate class dominance, the “most intolerable” of all tyrannies.<sup>149</sup>

Eighty years later Justice Brennan used this conception of constructed difference to challenge the use of a non-validated employment test in *Washington v. Davis*.<sup>150</sup> By failing to ensure that the employment screening process provided a valid and reliable predictor of job performance, the District of Columbia Police Department risked substituting the manufactured biases of social/racial hierarchy for the genuine criteria of a meritocracy. Justice

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<sup>147</sup> *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

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It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.

*Id.* at 556–57.

<sup>149</sup> *The Civil Rights Cases*, 109 U.S. 3, 61–62 (1883) (Harlan, J. dissenting).

<sup>150</sup> *Washington v. Davis*, 426 U.S. 229 at 270 (1976) (Brennan, J., dissenting).

Brennan insisted that, confronted with evidence of racial differentiation, the Department be required to prove that it was in fact rewarding “merit.”<sup>151</sup>

The effective shift in the burden of proof urged by Justice Brennan reflects a different baseline presumption about the nature of assessed difference. While the dominant view was that the “difference” was presumptively inherent in the objects of assessment, Justice Brennan understood “difference” as presumptively a subjective product of the assessment process. Given the choice between racial inferiority and assessment deficiencies, Justice Brennan presumed the latter.

Justice Marshall developed a similar theme in *City of Richmond v. Croson*. The “neutral” criteria of business success alluded to in Justice O’Connor’s opinion for the Court—the entrepreneurial choices, the eligibility standards for trade association membership, the capital and contacts to qualify for contracting bids<sup>152</sup>—weren’t really “neutral” at all. As Justice Marshall observed, they were at least in part the products of discriminatory practices, a trend the City of Richmond was seeking to halt: “The more government bestows its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination, the tighter the deadhand grip of prior discrimination becomes on the present and the future.”<sup>153</sup>

What unites these opinions of Justices Harlan, Brennan and Marshall is their refusal to accept as natural and inviolate the manufactured constructions of “race” and racial “difference.”

### 3. *Rebellion’s Prescription*

Color-blindness and color-consciousness have conventionally been constructed as the sole, mutually-exclusive solutions to racial disparities. A century ago, Justice Bradley insisted that those who

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<sup>151</sup> *Id.*

<sup>152</sup> *Croson*, 488 U.S. at 502–03.

<sup>153</sup> *Id.* at 538 (Marshall, J., dissenting). Justice Marshall reminded the Court that “discrimination takes a myriad of ‘ingenious and pervasive forms.’” *Id.* at 540. Reviewing the record, Justice Marshall concluded that “to suggest that the facts on which Richmond has relied do not provide a sound basis for a finding of past racial discrimination simply blinks credibility.” *Id.* at 541. Given this assessment, the allusions to “choice” and to “qualifications” to explain the racial disparity in the award of City contracts were simply red herrings: “[i]f Richmond indeed has a monochromatic contracting community . . . this most likely reflects the lingering power of past exclusionary practices.” *Id.* at 543.

have “emerged from slavery” must, at some stage in their “elevation,” cease to be a “special favorite of the laws.”<sup>154</sup> In other words, race neutrality is the proper order. But the dilemmas posed by color are too complex to submit to such simple solutions.<sup>155</sup> As Justice Harlan responded in the *Civil Rights Cases*, “[i]t is . . . scarcely just to say that the colored race has been the special favorite of the laws.”<sup>156</sup> Justice Harlan’s dissent in *Plessy* recognized the complexity of the dilemma posed by color:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power . . . . But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens . . . . Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.<sup>157</sup>

Justice Harlan’s dissent in *Plessy* confronted the central contradiction of “race”: there is, in reality, but not ideally, a dominant “race.” The remedy, for Justice Harlan, was to accept both the real and the ideal and to struggle against the contradiction. The assertion that “[t]he humblest is the peer of the most powerful” is oxymoronic in any other context. It is a statement of struggle and of rebellion.

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<sup>154</sup> *Civil Rights Cases*, 109 U.S. at 25.

<sup>155</sup> See WILLIAMS, *supra* note 2, at 48:

Race-neutrality in law has become the presumed antidote for race-bias in real life. With the entrenchment of the notion of race-neutrality came attacks on the concept of affirmative action and the rise of reverse discrimination suits. Blacks, for so many generations deprived of jobs based on the color of our skin, are now told that we ought to find it demeaning to be hired, based on the color of our skin. Such is the silliness of simplistic either-or inversions as remedies to complex problems.

<sup>156</sup> 109 U.S. at 61 (Harlan, J., dissenting).

<sup>157</sup> 163 U.S. at 559 (Harlan, J., dissenting).



The invocation of Justice Harlan's opinion to assail "race"-conscious remediation ignores this critical aspect of his argument.<sup>158</sup> To thus invoke Justice Harlan, as Justice Kennedy does in his dissent in *Metro Broadcasting*,<sup>159</sup> is to ignore both the message Justice Harlan found objectionable and Justice Harlan's own message. It is one thing to say, as Louisiana did, that a racial group is naturally inferior;<sup>160</sup> it is quite another thing to say, as the City of Richmond did through its affirmative action plan, that this racial group deserves attention because it is economically deprived.<sup>161</sup> Justice Harlan objected to the first message because it perpetuated racial caste as natural and proper; the latter message does no more than acknowledge what Justice Harlan himself saw, the existence of real caste, and does what Justice Harlan sought to do, bring about its demise.

Justice Harlan's dissent suggests an alternative dichotomy to replace the Hobson's choice of race-consciousness and race-neutrality: usages of race which recognize and seek to dismantle manufactured racial hierarchies are essential; usages of race which perpetuate subordination under the guise of natural difference are impermissible. What emerges, then, is the most elegant of dichotomies: that between love and hate.

But even a message of love can meet resistance: the end of privilege will not necessarily sit well with the privileged.<sup>162</sup> Justice Harlan knew this as well. But he made his choice clear: the "evils" that might attend the destruction of hierarchy were "infinitely less" than the evils of "a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens."<sup>163</sup> "The thin disguise," Justice Harlan wrote, "of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done."<sup>164</sup>

The Supreme Court has not heeded Justice Harlan's message of rebellion: his recognition of the existence of racial inequality and his rejection of its innateness.<sup>165</sup> On the contrary, the current

<sup>158</sup> See Ross, *supra* note 30, at 13.

<sup>159</sup> 110 S. Ct. at 3044 (Kennedy, J., dissenting) (rejecting race-conscious measures to promote broadcast diversity as comparable to *Plessy*'s segregation scheme).

<sup>160</sup> See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>161</sup> See *City of Richmond v. Croson*, 488 U.S. 469 (1989).

<sup>162</sup> See *Metro Broadcasting*, 110 S. Ct. 2997 (Kennedy, J., dissenting).

<sup>163</sup> *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting).

<sup>164</sup> *Id.*

<sup>165</sup> See *supra* notes 156–164 and accompanying text.

Court's lament of "the sorry history of both private and public discrimination"<sup>166</sup> looks quite a bit like crocodile tears in light of the empty message that history conveys.<sup>167</sup> The majority of Justices have explicitly refused to consider the possibility that the hierarchies which they sanction reflect not absolute "merit," but "racial" privilege.<sup>168</sup> But "race" and racism exist, and neither will be made to disappear by the mere exhortation of "neutral criteria."

A candid acknowledgement of the persistent significance of race is essential to a meaningful dialogue on racial equality. As long as ours is a society that speaks of "race," "race" must be, ipso facto, a part of our discourse. What is imperative is that "race" be used in an insightful fashion, that it reflect an understanding of the artifactual nature of racial differences. And what

<sup>166</sup> *Croson*, 488 U.S. at 499.

<sup>167</sup> See, e.g., Linda S. Greene, *Race in the 21st Century: Equality Through Law?*, 64 TULANE L. REV. 1515, 1527-28, 1533 (1990); D. Martin Jones, *Unrightable Wrongs: The Rehnquist Court, Civil Rights, and an Elegy for Dreams*, 25 U.S.F. L. REV. 1, 38 (1990); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 321 (1988).

<sup>168</sup> But see *Washington v. Davis*, 426 U.S. 229 (1976) (Brennan, J., dissenting); *Croson*, 488 U.S. at 528 (Marshall, J., dissenting); both discussed *supra* in this section.

Academic achievement may provide a paradigm example of manufactured racial difference. The artifactual nature of "intelligence," see, e.g., STEPHEN J. GOULD, *THE MISMEASURE OF MAN* 23-26 (1981); the profound fallacies that inhere in the intelligence measurement, see, e.g., *id.*; the class and cultural biases that attend such assessment, see, e.g., HAYMAN, *supra* note 7; the potential impacts of socio-economic status on the organic bases for intelligence, see, e.g., Herbert L. Needleman, Allan Schell, David Bellinger, Alan Leviton & Elizabeth N. Allred, *The Long-Term Effects of Exposure to Low Doses of Lead in Children: An 11-Year Follow Up Report*, 322 NEW ENG. J. MED. 83 (1990); the gross disparities in educational opportunities afforded to lower-income Americans and to minorities, see, e.g., HOUSE COMM. ON EDUCATION AND LABOR, 101ST CONG., 2D SESS., *A REPORT ON SHORTCHANGING CHILDREN: THE IMPACT OF FISCAL INEQUALITY ON THE EDUCATION OF STUDENTS AT RISK* 19-24, 44 (Comm. Print 1990) (prepared by William Taylor & Diane Piche); and the disparate treatment of black and white students even within "integrated" schools, see, e.g., KENNETH J. MEIER, JOSEPH STEWART, JR. & ROBERT E. ENGLAND, *RACE, CLASS, AND EDUCATION: THE POLITICS OF SECOND-GENERATION DISCRIMINATION* 4-5 (1989); all may combine to artificially depress the academic achievement of African-American students.

This process may be heightened by the subordination and exclusion of the African-American epistemology. This epistemology may be reflected in a distinct learning style, see, e.g., JANICE E. HALE-BENSON, *BLACK CHILDREN: THEIR ROOTS, CULTURE AND LEARNING STYLES* 21-40 (1986), and in distinct attitudes towards public school education. See, e.g., John U. Ogbu, *Structural Constraints in School Desegregation*, in *SCHOOL DESEGREGATION RESEARCH* 21, 37 (Jeffrey Prager, Douglas Longshore & Melvin Seeman, eds. 1986).

The promise of *Brown* rested substantially in the hope that desegregation would help end racial hegemony over academic achievement, a promise that was shortly realized in a narrowing of the "achievement" gap between black and white students. See, e.g., Gerald D. Suttles, *School Desegregation and the "National Community,"* in *id.* at 47, 49; Mark Granovetter, *The Micro-Structure of School Desegregation*, in *id.* at 81, 102-03.

is imperative as well is that “race” not be used to perpetuate contingent orders, but rather that it be pressed into the service of the one constant value, human love.

### III. Metaphysical Rebellion and Redemption: Love and Order

One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

—Dr. Martin Luther King, Jr.<sup>169</sup>

The competitions in the dialogue on equality are not merely visions of the world as it is, they are as well competing visions of the world as it should be. Ultimately, the world may appear as it does largely in response to metaphysical demands.<sup>170</sup> In the jurisprudence of equality, the conceptual contexts for the competition of metaphysics are essentially twofold. The first is a complex and unstable set of issues surrounding the proper role of “the law”—in its various and at times competing guises—in ordering human affairs. It is principally a competition between the ideology of the open market, and the moral imperative to heal. The second context is constituted by the issues surrounding the nature and potential of “the law.” It is principally a competition between the desire for order, and the promise of humane judgment. What follows is a brief attempt to articulate these visions as they are manifest in the debate over the scope of Equal Protection. It is, in its essence, an application of a much broader dialogue on political metaphysics, a dialogue between, on the one hand, the redeemers of the “meritocratic” order and, on the other hand, those who rebel in the name of human love.

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<sup>169</sup> *Letter from Birmingham Jail*, in *WHY WE CAN'T WAIT* 77, 86 (1964).

<sup>170</sup> See e.g., Jones, *supra* note 167, at 25:

The ultimate power of the metaphor of [judicial] restraint is that it contains within it enough of a cognitive model for interpreting the meaning of law, and judges'

### A. *The Role of "The Law"*

#### 1. *Redemption's Vision: Negative Rights and the Reactive State*

Justice Bradley's opinion in the *Civil Rights Cases* established a redemptive metaphysical construction for understanding the Equal Protection Clause that has prevailed to this day. Its twin essential components are a negative conception of constitutional rights, and a concomitant belief that governmental power should be exercised only reactively.<sup>171</sup> Its driving ideological force is a devotion to the free market qualified by a commitment to the preservation of "meritocratic" order.<sup>172</sup>

Among the occasional doctrinal expressions of the redemptive perspective, three are particularly worthy of note, in part for the clarity of their nexus to the metaphysic, and in part for the frequency with which they are invoked. They are: first, the general commitment to principles of federalism; second, a notion of judicial restraint derived from separation of powers; and third, the requirement of discriminatory "intent" as a predicate to remediation under the Equal Protection Clause.

The first two of these doctrines, commitments to federalism and to separation of powers, are generally consistent with the laissez faire vision. The fact that they are doctrinal rationalizations of underlying ideology rather than first order principles in their own right is apparent from the haste with which these principles are abandoned when the call of meritocracy demands. For all of the paeans to "local autonomy"<sup>173</sup> and for all of the cautions against "judicial tutelage,"<sup>174</sup> the redeemers on the Supreme Court have shown a spectacular willingness to impose their vision of natural order on local governors who had the audacity to believe that the promise of equality in the Fourteenth Amendment was a promise

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roles, that the metaphor blends with fact; one's belief in its corollaries blends with one's perception of reality.

<sup>171</sup> The *Civil Rights Cases*, 109 U.S. 3 (1883). See generally Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

<sup>172</sup> See *infra* notes 173–190 and accompanying text.

<sup>173</sup> See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 741 (1974).

<sup>174</sup> *Board of Education v. Dowell*, 111 S. Ct. 630, 632 (1991).

that they could make good.<sup>175</sup> The historic alterations in state-federal relations worked by the Reconstruction Amendments are then trudged out as a matter of ideological convenience.<sup>176</sup> When, however, the federal actor reappears on the Court's docket, the lessons of Reconstruction are returned to the reserve shelf, there to gather more dust.<sup>177</sup>

It is the third doctrinal expression, the requirement of "intent," that is invariably consistent with the meritocratic vision and is accordingly applied with consistency and zeal. Its root notion is the belief that hierarchy results from a natural meritocratic ordering. The metaphysical mandate is to leave the ordering alone. Exceptions are made only when, and only to the extent that, governments have perverted the process through the unnatural interjection of "race."

Not all intrusions of "race" warrant judicial intervention. Most "racial" impacts are not the result of political action at all, but are instead natural: "race," as an implicit correlate of "merit," is not infirm.<sup>178</sup> Unwitting interjections of "race" can also be accommodated by the natural market order. "Race," as an ersatz expression of "merit," is tolerable. Even when it does not express "merit," it will be weeded out by the efficient operation of the market.<sup>179</sup> Only when the market is corrupted by the deliberate, persistent introduction of "race" is the meritocratic order threatened. This is possible only when "race" is used explicitly or, in exceedingly rare cases, when the market is corrupted by a silent conspiracy.<sup>180</sup>

<sup>175</sup> See *City of Richmond v. Croson*, 488 U.S. 469 (1989).

<sup>176</sup> See *id.* at 490-91.

<sup>177</sup> See *Metro Broadcasting v. FCC*, 110 S. Ct. 2997, 3028 (1990) (O'Connor, J., dissenting); *id.* at 3044 (Kennedy, J., dissenting).

<sup>178</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>179</sup> See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>180</sup> See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (racial disparity in licensing practices violates equal protection); *Batson v. Kentucky*, 476 U.S. 79 (1986) (racial disparity in prosecutorial use of peremptory challenges to criminal petit jurors may give rise to rebuttable presumption of discriminatory intent). The free market convictions that underlie the "intent" requirement have lately been confounded by vague appeals to notions of culpability. See, e.g., *McCleskey*, 481 U.S. 279 (no equal protection violation unless discriminatory animus was an affirmative motivating factor); *Board of Education of Oklahoma City Schools v. Dowell*, 111 S. Ct. 630 (1991) (school boards should not be "condemned" to "judicial tutelage" for mere de facto segregation). These, however, are not at odds with the meritocratic commitment, and almost certainly do not signal an abandonment of it. They are instead quite likely the consequences of the doctrinal autonomy that results from fifteen years of intense maturation, see, e.g., Kennedy, *supra* note 68 (describing process of gradual "loopification" of liberal legal distinctions): it is only reasonable to expect that, by now, "purpose" would have a life of its own.

It is possible to conceive of all three doctrinal expressions in market terms. In this sense, the *Civil Rights Cases* may be viewed as laying the foundation for a vertical free market of government (i.e., for federal deference to local governmental autonomy), and *Plessy v. Ferguson* may be viewed as laying the foundation for a horizontal free market of government (i.e., for judicial deference to the coordinate branches). But a third cornerstone is needed, not only to explain the “intent” requirement of *Washington v. Davis*, but also to explain the apparent abandonment of deference in *City of Richmond v. Croson*, and for that matter, in the *Civil Rights Cases* themselves.

The triumvirate is probably best completed by *Lochner v. New York*.<sup>181</sup> *Lochner*’s conviction that the market was sacrosanct compelled the edict that disturbance of the economic hierarchy was beyond the state’s police powers. Furthermore, it provided an inordinately skeptical view of the evidence proffered in support of conventional legislative purposes.<sup>182</sup> *Lochner* thus provides the critical caveat to the twin doctrines of restraint. Federal judicial intervention is appropriate to protect the natural operation of the market, that is, to redeem the meritocratic order. The “intent” requirement is merely an expression of the belief that all is basically well in the state of nature. *Croson*, the flip side of the coin, simply demonstrates the Court’s resolve to vindicate the natural balance. *Croson* is, in most respects, *Lochner* revisited,<sup>183</sup> replete with its obstinate refusal to recognize that there is precious little that is “natural” about the order it is redeeming.<sup>184</sup> *Croson*, like *Lochner*, is simultaneously blind to the role of the state in creating and maintaining the market,<sup>185</sup> and blind to the coercive power of

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<sup>181</sup> 198 U.S. 45 (1905).

<sup>182</sup> See Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 877–79 (1987).

<sup>183</sup> See Jones, *supra* note 167, at 53–55; see also Sunstein, *supra* note 182, at 894–98, noting the re-emergence of *Lochner*’s themes in challenges to “affirmative action,” in the requirement of discriminatory intent and in the de jure/de facto distinction.

<sup>184</sup> See Sunstein, *supra* note 182, on *Lochner*’s presumption that market ordering was natural and not a legal construct.

<sup>185</sup> See David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53, 67 (1989) (observing that the poor person’s situation “is at least partly the result of the state’s enforcement of various rules that establish and regulate the market and that distribute and redistribute resources”); Sunstein, *supra* note 182 at 882 (noting that the *Lochner* Court “took as natural and inviolate a system that was legally constructed and took the status quo as the foundation from which to measure neutrality.”); Austin, *supra* note 106, at 1510–11 (noting that “the state has become in significant respects both the regulator and the competitor of private economic concerns.”); cf. James N. Baron & Andrew E. Newman, *For What It’s Worth: Organizations, Occupations, and the Value*

property implicit in the "natural" order.<sup>186</sup> It is, in both cases, the blindness that results from a powerful ideological commitment.<sup>187</sup>

It is a commitment that embodies a certain faith. It is not merely that the free market *qua* free market is good; it is also that the free market will produce good things. As George Gilder writes in the supply-side manifesto "Wealth and Poverty":

Capitalist production entails faith in one's neighbors, in one's society, and in the compensatory logic of the cosmos. Search and you shall find, give and you will be given unto, supply creates its own demand . . . . One does not make gifts without some sense, possibly unconscious, that one will be rewarded, whether in this world or the next. Even the biblical injunction affirms that the giver will be given unto.<sup>188</sup>

It is, of course, this same "compensatory logic of the cosmos" that underlies the willingness to forego "race"-conscious remedies in response to "race"-created problems. "Neutral" criteria, of course, will not ease the suffering of those whom the criteria have perpetually subordinated but, in the long run, the "compensatory logic of the cosmos" will prevail. And so "equality" means "equal opportunity" for the Supreme Court because there is no fairness, no justice, like that produced by Creation. In the state of nature, in the free market, everyone gets their just rewards. It is an extraordinary abdication of human responsibility, of constitutional responsibility, to the benevolence of fate.

And if it is an act of faith, it is nonetheless an act of supreme indifference. As Camus wrote:

Progress, paradoxically, can be used to justify conservatism. A draft drawn on confidence in the future, it allows

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of *Work Done by Women and Nonwhites*, 55 AM. SOC. REV. 155, 172-73 (1990) (observing that the distinction "between market and political determinations of wage rates may itself be specious" in view of the fact that organizational politics and social custom may both mediate and define the relevant "market").

<sup>186</sup> See JEFFREY REIMAN, *JUSTICE AND MODERN MORAL PHILOSOPHY* 243 (1990) (observing that the Lockean line culminates in a libertarian vision that is "congenitally blind to the coercive threat of property and thus unable to dispel the suspicion of subjugation.").

<sup>187</sup> See Freeman, *supra* note 167, at 371-85 (reviewing the "ideological" commitment to equality as "equality of opportunity").

<sup>188</sup> GEORGE GILDER, *WEALTH AND POVERTY* 24-25 (1981).

the master to have a clear conscience. The slave and those whose present life is miserable and who can find no consolation in the heavens are assured that at least the future belongs to them. The future is the only kind of property that the masters willingly concede to the slaves.<sup>189</sup>

“If man realized,” Camus wrote elsewhere, “that the universe like him can love and suffer, he would be reconciled.”<sup>190</sup> But as Camus knew, it is humans who suffer, and humans who love; and it is humans who, faced with an indifferent world, must rebel.

## *2. Rebellion's Vision: Positive Rights and the Interactive State*

The essential metaphysical premise for the rebel is the possibility of human love. Jurisprudential rebellion, then, demands the liberation of human compassion; in its constitutional form, it is committed to constructions of constitutional text which promote or, at the very least, permit the perpetual healing of humanity.

Rebellion rejects the talismanic invocation of federalism or of separation of powers because of its crippling effect on the movement toward real equality. In response to the invocation of federalism, rebellion notes the historical truth of Reconstruction. The Reconstruction Amendments forever altered the balance of the original Constitution, less between federal and state governments than between local order and human equality. No state today possesses the right to perpetuate suffering under the rubric of local autonomy. Similarly, rebellion accepts the role of the judiciary to review and to reject majoritarian expression which conflicts with fundamental constitutional principles. Rebellion denies the inviolable sanctity of the general will. In accepting both terms of the essential contradiction between the reality and the realizability of equality, rebellion accepts its obligation to transform.

The constitutional command of equality is, for the rebel, a normative mandate which can and must be realized in human terms. It necessarily imbues the state with a human moral content

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<sup>189</sup> CAMUS, *THE REBEL*, *supra* note 1, at 194.

<sup>190</sup> CAMUS, *An Absurd Reasoning*, in *THE MYTH OF SISYPHUS*, *supra* note 8, at 13.



that requires relentless expression. Without denying the instrumental value of structural governmental arrangements, rebellion insists that this value can never be superior to, and must always be consistent with, the substantive mandate of equal protection.

Rebellion rejects the redeemers' requirement of "intent" as a predicate to proving unconstitutional inequality. Human "intent" is inherently indeterminate; the search to identify it is undermined by the possibility of infinite regression.<sup>191</sup> Distorted by the peculiar legal prism, replete with its distinction between positive intent (i.e., motivated by) and negative intent (i.e., indifferent to),<sup>192</sup> and its requirement of particularized (i.e., individually targeted) objects,<sup>193</sup> the search for a discriminatory "intent" is constrained and disjointed. Divorce the "state" from the "society" that constitutes it, and deprive the "state" of any responsibility for the "society" it governs, and the search for a discriminatory "intent" to explain inequality becomes an exercise in pre-ordained futility. Ignore, finally, the real functional autonomy of the modern bureaucratic state, and the search for an anthropomorphic intent becomes utterly meaningless.<sup>194</sup>

The "intent" requirement obscures the truth of human responsibility. The constitutional command of equal protection imposes an affirmative obligation on the "state" to break the cycle of racial subordination, and to make certain that inequality is not perpetuated under its watch.<sup>195</sup> In the absence, then, of a compelling "natural" explanation for real inequality—and none have been forthcoming to date—the unequal enjoyment of rights or resources

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<sup>191</sup> See Gergen, *supra* note 133, at 148.

<sup>192</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987).

<sup>193</sup> See, e.g., *id.* at 292–93.

<sup>194</sup> See Craig Haney, *The Fourteenth Amendment and Symbolic Legality*, 15 LAW & HUM. BEHAV. 183, 187 (1991) (noting that "[n]early every aspect of our lives is touched by powerful organizations and agencies that have developed a forceful logic and momentum of their own, one that often alters and transcends the intentions and values of their individual members."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection*, 39 STAN. L. REV. 324–25 (1987) ("By insisting that a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged, the Court creates an imaginary world where discrimination does not exist unless it was consciously intended. And by acting as if this imaginary world was real and insisting that we participate in this fantasy, the Court and the law it promulgates subtly shape our perceptions of society.").

<sup>195</sup> See, e.g., *Civil Rights Cases*, 109 U.S. 3 at 46–52 (Harlan, J., dissenting) (noting that Section Five of the Fourteenth Amendment is an affirmative grant of power to Congress to take positive action to promote equality); *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting) (observing that "[t]he destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.").

must be the responsibility of the "state," with or without the demonstration of a discriminatory "intent." "Racial" ghettos are no more natural than slave plantations;<sup>196</sup> if the "state" is to be permitted to forsake this responsibility, it must be for more compelling reasons than respect for governmental autonomy, the need for rule determinacy, or the fear of too much justice.<sup>197</sup>

The redemptive vision obscures this responsibility. This vision apparently commands attention today for at least two reasons. The first is the declaration of the ethos of "equal opportunity" on the plane of "racial" group history. Justice Bradley's call of a century ago for an end to racial "favorit[ism]"<sup>198</sup> is indistinguishable from the message some Justices of the Court offer today.<sup>199</sup> The voice of the redeemer has a certain constancy.

Rebellion responds that equality of opportunity is a theory "not really of equality but of justified and morally acceptable inequality."<sup>200</sup> The truth of "societal" discrimination has been only partly mitigated by the fact of "beneficent legislation;" the subordinating constructs of "racial" difference have been only partly dismantled by the "elevation" to citizenship. Until both are consigned to distant history, equal opportunity is, in the context of "race," a rationale and not a reality.

The second explanation for the apparent triumph of the second Redemption may rest in the political realities of the postmodern world. The persistence of "racial" suffering in the face of repeated expressions of equality is truly absurd. In a world increasingly marked by contradiction, this one anomaly poses a particular threat: it is nothing less than a challenge to the human capacity to construct a fair world. The temptation to elude the contradiction is a powerful one, all the more so for those who might benefit, materially, psychologically, and of course politically, from its suppression. Comprehension and compassion do not always come easily; they often require, in fact, persistent struggle. That is the nature of rebellion.

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<sup>196</sup> See C. VANN WOODWARD, *supra* note 7, at 162 ("The present seems depressingly continuous with the past . . . the continuity of plantation and ghetto is borne in upon us.")

<sup>197</sup> See the dialogue between Geneva Crenshaw and the narrator in BELL, AND WE ARE NOT SAVED, *supra* note 116, at 72.

<sup>198</sup> *Civil Rights Cases*, 109 U.S. at 31.

<sup>199</sup> See notes 137-145 and accompanying text.

<sup>200</sup> KRAMNICK, *supra* note 115, at 14-15.

## *B. The Nature and Potential of "The Law"*

### *1. Redemption's Vision: Law as Order*

If one key to the redemptive vision is its professed faith in the benevolence of the universe, the other key is an equal and opposite distrust of humanity. In particular, the redeemers deny the ability of humanity to articulate and realize a vision of equality. Frustrated, then, by the simultaneous demands for determinacy and restraint, equality ultimately yields to the divinity of the status quo. The unique and ironic implication of the deification of order is the relentless perpetuation of hierarchy under the rubric of equality: form is exalted over substance, largely out of fear.

Professor Fried has urged "a return to law as a rather technical subject, somewhat cut off from its ethical, philosophical, and other heady roots" in order that "we can once more have a measure of order, predictability, discipline and limitation put into the law." That the "we" might exclude "the layman" is not mere accident: "this notion of the layman being frozen out is not as bad as it sounds and not the worry it is supposed to be."<sup>201</sup> "If the law is to do its work," Professor Fried advises, "which I want to insist is modest work, it must once more be viewed as a local, rather than a grand and global discipline."<sup>202</sup>

This is why the legal "state" is so utterly vacuous,<sup>203</sup> and why the Constitution makes no promises:<sup>204</sup> the legal "state" and the Constitution are deliberately divorced from their "heady roots."<sup>205</sup> Reified law knows no human morality, and the interpretive process admits of no human expression. This too is one reason why "race" must be categorically excluded: the difference between "benign"

<sup>201</sup> Charles Fried, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 331, 332-33 (1988).

<sup>202</sup> *Id.*

<sup>203</sup> See KRAMNICK, *supra* note 115, at 91 (noting that in this mechanistic conception, "the state consists of nothing but material matter [that] attracts and repels according to the gravitational laws of interest.").

<sup>204</sup> See Morton S. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 399 (1988) (noting that "[o]ne of the most important tendencies of liberal rights theories is that they achieve universality (and thus 'objectivity') by sacrificing substantive content.").

<sup>205</sup> See Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Bros. v. Brooks*, 130 U. PA. L. REV. 1296, 1301-02 (1982).

and “invidious,” between “love” and “hate,” require human judgment, a quality unknown to the legal mind.<sup>206</sup>

Indeed, exclusion may be the key to the law’s determinacy. Elsewhere, Professor Fried argues that “[w]ords create meaning as a bond or a channel between persons, a common and identical possession—identical because only then can it be common, offering an escape from solipsism. To doubt the reality of this common possession is to doubt other minds and thus to doubt community and humanity.”<sup>207</sup>

This is why “racial balkanization” is the opposite of “the common market of the human spirit,”<sup>208</sup> and why “race” and real equality are such threats. Each challenge the notion that there is but one meaning, and that this meaning has been realized in the meritocratic order.<sup>209</sup> They challenge hegemony over “words,” over “minds,” over “humanity.” Uniformity, predictability and determinacy are ensured only through the intellectual segregation of competing perspectives; order is maintained only through the subordination of the truths of diverse experience. There is a common humanity in this scheme, but it is an empty one: of form but not substance, of illusions but not dreams.<sup>210</sup>

It is an oppressive vision. Camus recognized this when he wrote:

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<sup>206</sup> See Richard Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 25–26 (insisting that racial classifications should generally be prohibited to prevent judicial expressions of “personal values”).

<sup>207</sup> Fried, *Sonnet LXV and the “Black Ink” of the Framers’ Intention*, 100 HARV. L. REV. 751, 757–58 (1987).

<sup>208</sup> See Fried, *supra* note 6 at 108–10.

<sup>209</sup> See Freeman, *supra* note 167, at 384:

Meritocracy at its base is an inquiry as to whether a particular subject does or does not possess any of the cultural capital already more or less possessed by the powerful . . . . Other forms of knowledge or practice, deviant from the one that claims universality, are silenced, marginalized, dismissed, or simply ignored.

<sup>210</sup> See Jones, *supra* note 167, at 66:

The Rehnquist Court has situated America across the tension bridge [between American legal reality and the normal world], within a cramped, barren legal world in which it cannot find the true meaning of equality. Nor, therefore, can it find a way to make moral sense of itself. America cannot find the moral truth it needs because, from its distance across the bridge, within the detached world the Rehnquist Court has made, it cannot hear the story of Dr. King. It was a good story, full of dreams.

From the moment that laws fail to make harmony reign, or when the unity which should be created by adherence to principles is destroyed, who is to blame? Factions. Who comprise the factions? Those who deny by their very actions the necessity of unity. Factions divide the sovereign; therefore, they are blasphemous and criminal.<sup>211</sup>

The reality of difference, of faction, and of "race" can be denied, but it is only at the expense of eluding the absurd contradiction and of excluding those who suffer. All are equal, by formal imperative, becomes tautology, because all are same. But as Camus grimly noted, "[A]t the heart of this logical delirium, . . . the scaffold represents freedom. It assures rational unity, and harmony in the ideal city."<sup>212</sup> But not for long: "Factions join with factions, and minorities with minorities, and in the end it is not even sure that the scaffold functions in the service of the will of all."<sup>213</sup>

If deference to the "free market" was an expression of indifference, this demand for determinacy can be viewed only as an expression of fear. It is a fear of too much difference, of too much knowledge, of too much justice.<sup>214</sup> Ultimately, it is a fear of too much humanity. Again, Camus:

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<sup>211</sup> CAMUS, *THE REBEL*, *supra* note 1, at 124.

<sup>212</sup> *Id.* at 126.

<sup>213</sup> *Id.* at 127.

<sup>214</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting):

The Court next states that its unwillingness to regard petitioner's evidence as sufficient is based in part on the fear that recognition of *McCleskey's* claim would open the door to widespread challenges to all aspects of criminal sentencing . . . . Taken on its face, such a statement seems to suggest a fear of too much justice.

See also Haney, *supra* note 194, at 201:

What would it mean to look honestly at the social realities depicted in cases like *McCleskey*? . . . At the very meager least, it would force us to confront the manifest injustice of condemning to die those persons whose lives are in large part the product of our failure to confront th[e] long litany of equal protection problems. But to do these things would effect intolerable disruptions in existing economic and institutional arrangements. We tolerate contradictions between social reality and symbolic legality instead.

*Cf.* Morton S. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425 (1982) (noting that 19th-century legal thinkers hoped to separate law from politics by "creating a neutral and apolitical system of legal doctrine and legal reasoning free from what was thought to be the dangerous and unstable redistributive tendencies of democratic politics").

But, after all, nothing is true that forces one to exclude. Isolated beauty ends up simpering; solitary justice ends up oppressing. Whoever aims to serve one exclusive of the other serves no one, not even himself, and eventually serves injustice twice. A day comes when, thanks to rigidity, nothing causes wonder any more, everything is known, and life is spent in beginning over again. These are the days of exile, of dessicated life, of dead souls.<sup>215</sup>

## 2. *Rebellion's Vision: Law as Transcendence*

In the context of the struggle for equality, rebellion's imperative is the dismantling of hierarchy. In this effort, there is no such thing as too much knowledge or too much justice: rebellion embraces an unblinking comprehension of the complexity, contingency, and context of human experience, and an unyielding commitment to the possibility of real compassion. There is no such thing as too much humanity, only too little, and rebellion's resolve is to restore humanity to its rightful priority in the adjudication of human affairs.

Rebellion insists on the re-cognition of race as a critical factor in human experience. It thus decries the exclusion of the "racial" perspective from the juridical process. The perpetuation of this epistemological hegemony merely masks the issues of "race": this ignorance may be bliss, but it also promotes misunderstanding and mistrust.<sup>216</sup> Over twenty-five years ago, Professor Joseph Himes observed that confronting the realities of "race" forces a clarification of "core values and the means of their achievement."<sup>217</sup> The historical record confirms this thesis,<sup>218</sup> but a generation later, "race" seems more taboo than before. But community, rebellion maintains, can be constructed without exclusion: comprehension and compassion demand the re-cognition of the genuine differences in experience and perspective; they simultaneously condemn the

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<sup>215</sup> CAMUS, *Return to Tipasa*, in *THE MYTH OF SISYPHUS*, *supra* note 8, at 139–141.

<sup>216</sup> See, e.g., Ogbu, *supra* note 168, at 37–38 (summarizing research demonstrating African-American distrust of white-dominated public education).

<sup>217</sup> Joseph S. Himes, *The Functions of Racial Conflict*, in *THE SOCIOLOGY OF RACE RELATIONS*, *supra* note 117, at 245, 250–52.

<sup>218</sup> See, e.g., HOWARD SCHUMAN, CHARLOTTE STOH & LAWRENCE BOBO, *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 211 (1985) (concluding that "[t]hose years involving the most open dispute and conflict seem also to have resulted, at least for questions of principle, in the most positive change in [racial] attitudes.").

creation of a separate and subordinate community of deviants and victims.<sup>219</sup> "The community of victims," Camus wrote, "is the same as that which unites victim and executioner. But the executioner does not know this."<sup>220</sup>

Rebellion insists as well on constitutional constructions which liberate the possibility of human compassion. Accordingly, rebellion rejects the exclusion of humanity from the adjudicatory process: it is at once both futile and wrong. Interpretation necessitates choice: the decision to subordinate human compassion to the efficient functioning of a technocratic process is itself a political choice of the first order.<sup>221</sup> Every act of interpretation is thus an act of transformation. Even the perpetuation of the status quo produces a new positivist ideal, more rigid and entrenched than before. The appeal to "judicial restraint" is a shibboleth, a guise for suppressing the transformative powers of human compassion. "Judicial restraint" is, substantially, a metaphor for "ideological constraint."

This difference between rebel and redeemer is not the difference between utopian and pragmatic thinking, rather it is the substitution of one utopia for another.<sup>222</sup> For the redeemers' utopia of an abstract justice flowing naturally from "the compensatory logic of the cosmos," rebellion substitutes its vision of a real justice, forged through the struggles of humanity, and maintained in a human cosmos relentlessly transformed by reason and compassion. If this "utopia" seems less "pragmatic," it is due solely to a needless dichotomy: if the faith in "humanity" seems opposed to

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<sup>219</sup> See Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?* 23 HARV. C.R.-C.L. L. REV. 407, 410 (1985) ("[People of color] have a community, of a sort, (courtesy of racism) in our common victimhood."). Professor Delgado observes that a broader "community in the sense of shared visions has yet to be fully formed, or, if formed, has begun to weaken." *Id.* at 412.

<sup>220</sup> CAMUS, *THE REBEL*, *supra* note 1, at 16 n.2.

<sup>221</sup> See *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting) (criticizing the majority's retreat "into a sterile formalism" to condone state inaction in a child abuse case); see also Drucilla Cornell, *Time, Deconstruction, and the Challenge to Legal Positivism: The Call for Judicial Responsibility*, 2 YALE J.L. & HUMAN. 267, 289-91 (1990); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1107 (1990).

<sup>222</sup> Cf. Gerald E. Frug, *Cities and Homeowners Associations: A Reply* 130 U. PA. L. REV. 1589, 1600 (1982) (noting that the difference between a "free market" concept of human interaction and a vision of human relationships founded on friendship "is not the difference between being utopian and being practical: the difference is [in the] utopias.").

the “logic” of the world, it is only because the “logic” of the world has been constructed that way.<sup>223</sup>

The manifestations of these competing utopian visions in the dialogue on equality are obvious and profound. Writing a century ago, Justice Bradley concludes that the equality proclaimed by the Declaration Of Independence must have been a “political equality”:<sup>224</sup> “each man having an equal voice in the civil government of his country.”<sup>225</sup> But this equality, Justice Bradley noted, “is exercised originally, and only so”:

[B]y public decrees and constitutions, the people deposit a certain portion of their own power with particular individuals, . . . [those individuals] are not a privileged class. We have *no orders* of society. No *privileged classes*. We have plenty of classes, and this class is one of them. It is made their *business* and their *duty* (they might have declined it if they pleased) to attend to public matters. It all arises from the necessity of the division of labor. All cannot rule, nor can all be ruled. All cannot plow, nor can all sow, nor reap.<sup>226</sup>

What then is this equality? The equal right to participate in the fashioning of civil society, and then to enjoy the station (but it is not an “order”) prescribed by civil society. It is no more, no less, than an equal right to the existing hierarchy.

This may indeed have been the cause that animated the American Revolution; it may have been the cause that animated the struggle to preserve the Union a century later; it may even have been the cause that permitted, if it did not motivate, the First and Second Reconstructions. Perhaps the expressions of equality have always been but cynical attempts to preserve privilege through token movements toward equality.<sup>227</sup> But such truths, if they are

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<sup>223</sup> Cf. Shweder, *supra* note 68, at 177 (observing that “science” and “humanity” are in opposition only because of the unnecessary insistence on dichotomous realms of inquiry).

<sup>224</sup> Bradley, *Equality*, in MISCELLANEOUS WRITINGS, *supra* note 128, at 90–92.

<sup>225</sup> *Id.* at 92.

<sup>226</sup> *Id.* at 92–93 (emphasis original).

<sup>227</sup> See BELL, *supra* note 116, at 140; Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).



that, are only the bases for disappointment; they are not cause for despair. For history is made every day; the Constitution is transformed by every reading; and the human condition—in this Nation, as much as any other—testifies at each new dawn not only to the truth of suffering, but to the transcendent possibilities of human love. It is only right, Camus wrote, “that those whose desires are limited to man and his humble yet formidable love should enter, if only now and then, into their reward.”<sup>228</sup>

#### IV. Conclusion: The Nature of Transcendent Equality

Our brothers are breathing under the same sky as we; justice is a living thing. Now is born that strange joy which helps one live and die, and which we shall never again postpone to a later time. On the sorrowing earth it is the unresting thorn, the bitter brew, the harsh wind of the sea, the old and the new dawn. With this joy, through long struggle, we shall remake the soul of our time . . . .

—Albert Camus<sup>229</sup>

What follows is an attempt to articulate the predicates to a transcendent vision of equality under the constitutional mandate of equal protection. It offers something of a prescription for the realization of a real constitutional equality. Consistent with the mandates of rebellion, it simultaneously constrains and liberates human judgment in its demands for both comprehension and compassion.

This modest framework for equality is comprised of four tenets, two of which are epistemological, and two metaphysical.

##### *A. The Epistemological Premises of Transcendent Equality*

###### *1. De-privilege Voices*

Every voice has the same claim to legitimacy. There can be no “traditional orderings” of experiential truth. As Camus wrote:

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<sup>228</sup> CAMUS, *THE PLAGUE*, *supra* note 8, at 280.

<sup>229</sup> CAMUS, *THE REBEL*, *supra* note 1, at 306.

There is, in fact, nothing in common between a master and a slave; it is impossible to speak and communicate with a person who has been reduced to servitude. Instead of the implicit and untrammelled dialogue through which we come to recognize our similarity and consecrate our destiny, servitude gives sway to the most terrible of silences. If injustice is bad for the rebel, it is not because it contradicts an eternal idea of justice, but because it perpetuates the silent hostility that separates the oppressor from the oppressed. It kills the small part of existence that can be realized on this earth through the mutual understanding of men.<sup>230</sup>

Rebellion, then, rejects hierarchy, and it does so in the name of all humanity: rebellion "is not only the slave against master, but also man against the world of master and slave."<sup>231</sup>

In the context of the legal struggle for equality, meaningful dialogue requires that the voices of the unempowered, the alienated and the subordinated be recognized in the legal process.<sup>232</sup> Anyone seeking to learn the truth of "race," and anyone who purports to take seriously a claim to "racial" justice, must actively solicit the perspective from what Professor Matsuda has referred to in another context as "a new epistemological source": "the actual experience, history, culture and intellectual tradition of people of color in America."<sup>233</sup>

The result should be a dialogue among equals, honestly exploring the meaning of "racial discrimination," of "race," of "dif-

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<sup>230</sup> CAMUS, *THE REBEL*, *supra* note 1, at 283. See also Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2439 (1989) (footnotes omitted):

Racial and class-based isolation prevents the hearing of diverse stories and counterstories. It diminishes the conversation through which we create reality, construct our communal lives. Deliberately exposing oneself to counterstories can avoid that impoverishment . . . and can enable the listener and the teller to build a world richer than either could make alone.

<sup>231</sup> CAMUS, *THE REBEL*, *supra* note 1, at 284.

<sup>232</sup> "The voice of the oppressed alone can tell the real meaning of oppression and, though the voice be tremulous, excited, and even incoherent, must be listened to if the world would learn and know." DU BOIS, *The Races in Conference*, in W.E.B. DU BOIS: A READER, *supra* note 134, at 407, 408.

<sup>233</sup> Matsuda, *supra* note 79, at 64.

ference,” and of “equality.”<sup>234</sup> Through the resultant dialogue, rebellion seeks to occupy the space demarcated by “race,” to fill it, for the time being, with real experiential meaning, in anticipation of the day—not yet come—when its boundaries are not merely indeterminate, but, in the context of “equality,” utterly meaningless.

A corollary of this project, rebellion believes, will be the demise of “natural” meritocracy as an explanatory phenomenon.<sup>235</sup> Every serious participant in the dialogue on equality must accept the fundamental proposition that “difference” is made, it does not naturally occur. Those “differences,” including those attributed to “race,” warrant account in the effort to re-construct the contexts which produced them, but they cannot be mistaken for measures of human worth. On the contrary, real equality demands the rejection of all ideological tenets that, in Camus’ words, “refuse to admit that any one life is the equivalent of any other.”<sup>236</sup>

## 2. Universalize Empathic Perspective

Recognition of the reality of experiential difference requires more than the simple addition of new voices to the dialogue, it also requires the development of new ways of listening. It requires the development of an accommodative epistemology, one that does not reject experiential truths merely because they cannot be rec-

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<sup>234</sup> See Lawrence, *supra* note 194, at 386:

Blacks and other historically stigmatized and excluded groups have no small stake in the promotion of an explicitly normative debate. While their version of shared values or fundamental principles—the victim’s perspective—may not hold sway at the moment, the courts can become a legitimate forum for the persuasive articulation of that version. And once the debate is made explicit, the hegemonic function of the law is diminished.

Cf. TIMOTHY O’NEILL, *BAKKE AND THE POLITICS OF EQUALITY* 256 (1985) (noting the “power of the judicial process to place items on the public agenda” and lamenting the impoverished nature of the juridical dialogue on equality).

<sup>235</sup> Cf. Mary Louise Pratt, *A Reply to Harold Fromm*, in “RACE,” WRITING, AND DIFFERENCE, *supra* note 3, at 400, 401 (arguing that part of the project of the critique of “race” is to “destabilize fixed, naturalized meaning systems around race and other lines of hierarchical differentiation.”).

<sup>236</sup> CAMUS, *THE REBEL*, *supra* note 1, at 170.

onciled with the dominant heuristic.<sup>237</sup> Particularized understandings, including those of the “racial” experience, require, in short, a commitment to universal empathy,<sup>238</sup> a dedication, especially on the part of white Americans, to overcome what Judge Higginbotham has referred to as the “historically persistent failure of perception.”<sup>239</sup>

The result should be a certain solidarity of compassion, a recognition of the truths of lived “difference” in the broader context of the universal qualities of the human condition.<sup>240</sup> It entails more than an abstract commitment to eventual equality; it is what Camus referred to as “specific solidarity,” real and immediate. “He who loves his friend,” Camus wrote, “loves him in the present . . . .”<sup>241</sup> And in the struggle for “racial” equality, no one can be less than a “friend.”

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<sup>237</sup> “As [Chinua] Achebe points out, whether they come from Victorian or modern England, the America of Grover Cleveland or Ronald Reagan, ‘travellers with closed minds can tell us little except about themselves.’” Brantlinger, *supra* note 131, at 218, quoting Chinua Achebe, *An Image of Africa*, 9 RES. AFRICAN LITERATURE 2, 12 (1978).

<sup>238</sup> See Lynne N. Henderson, *Legality and Empathy* 85 MICH. L. REV. 1574, 1585 (1987):

I cannot empathize totally with the pain of blacks in racist societies, because I am white, and my whiteness both protects me and has influenced me at levels to which I do not have ready access . . . . To the extent I understand what I face, I understand my moral options. I simply cannot pretend absolute certainty.

<sup>239</sup> HIGGINBOTHAM, *supra* note 47, at 7; see also ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM 32 (1990) (“The real problem with the application of formal equal opportunity has less to do with formalism than with the degree of deference given to African Americans’ view of reality.”).

<sup>240</sup> See WILLIAMS, *supra* note 2, at 149–50:

One summer when I was about six, my family drove to Maine. The highway was straight and hot and shimmered darkly in the sun. My sister and I sat in the back seat of the Studebaker and argued about what color the road was. I said black, she said purple. After I had harangued her into admitting that it was indeed black, my father gently pointed out that my sister still saw it as purple. I was unimpressed with the relevance of that at the time; but with the passage of years, and much more observation, I have come to see endless over-heated highways as slightly more purple than black. My sister and I will probably argue about the hue of life’s roads forever. But the lesson I learned from listening to her wild perceptions is that it is possible to see things—even the most concrete things—simultaneously yet differently; and that seeing simultaneously yet differently is more easily done by two people than one, but that one person can get the hang of it with time and effort.

<sup>241</sup> CAMUS, THE REBEL, *supra* note 1, at 239.

*B. The Metaphysical Premises of Transcendent Equality**1. Liberate the Expression of Human Compassion*

Rebellion recognizes the moral imperative to heal human suffering. It is an essentially personal commitment, realizable, however, in all aspects of human endeavor. The constitutional expression of this commitment is a refusal to permit or perpetuate human suffering, including the distinct suffering that is both the essence and the product of "racial" subordination. No juridical artifact, not "standing," not "judicial restraint," not the "state/society" dichotomy, can ever take precedence over the constitutional command to heal the pain of "racial" suffering. No judge, no lawyer, no witness to the judicial process, should ever forget that "the dream of justice concerns persons."<sup>242</sup>

Humanity is always the primary object of rebellion's efforts, and its needs cannot be satisfied by the blind adherence to ideology.<sup>243</sup> Deference to an external "just" force, whether it is the economic market, the majoritarian will, the "intent" of the Framers, or the "compensatory logic of the cosmos," is an absurd abdication of judicial responsibility. As Camus wrote:

To silence the law until justice is established is to silence it forever since it will have no more occasion to speak if justice reigns forever. Once more, we thus confide justice into the keeping of those who alone have the ability to make themselves heard—those in power.<sup>244</sup>

The commitment to equality thus requires the rejection of any doctrinal requirement which frustrates human compassion. It denies the right of redemptive ideologies to "put an abstract idea above human life, even if they call it history, to which they themselves have submitted in advance and to which they will also decide, quite arbitrarily, to submit everyone else."<sup>245</sup>

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<sup>242</sup> LEONARD W. DOOB, *SLIGHTLY BEYOND SKEPTICISM: SOCIAL SCIENCE AND THE SEARCH FOR MORALITY* 207 (1987) (noting that justice for "others" is perhaps "more likely to be salient when the person or persons are vividly or realistically perceived and not viewed as abstractions").

<sup>243</sup> As Professor Boston has observed: "people cannot eat ideology, no matter how pure." THOMAS D. BOSTON, *RACE, CLASS, AND CONSERVATISM* 159 (1988).

<sup>244</sup> CAMUS, *THE REBEL*, *supra* note 1, at 291.

<sup>245</sup> *Id.* at 170.

## 2. *Re-construct the Possibility of Human Happiness*

Rebellion's preoccupation, Camus wrote, "is to transform."<sup>246</sup> It is thus committed to the perpetual re-construction of the human condition, a struggle that, in the context of the constitutional commitment to equality, necessitates a relentless effort toward the dismantling of hierarchical constraints on human happiness.

The effort presupposes acceptance of the truths of the human condition, however unpleasant they may be. False claims deny the experiential truth and obscure the need for transformation. As Justice Marshall has noted: "'We the People' no longer enslave, but the credit does not belong to the framers. It belongs to those who refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them.'"<sup>247</sup> Thus informed, the constitutional rebel simultaneously acknowledges the existence of hierarchical constraints while denying them their eternal verity.<sup>248</sup> The struggle for constitutional transcendence means that no barrier to "racial" equality can stand: the same processes which constructed the barriers are summoned to tear them down, and to reconstruct a Constitution which ensures real equality for all Americans. As always, rebellion's efforts are proportional to its task, and its task, here, is a Constitution that counts. In its efforts, it has but these tools: comprehension, compassion, and the words of the Constitution. But these are enough.

Rebellion's task entails a certain Sisyphean effort: the struggle for equality must be waged ceaselessly. For each Reconstruction, perhaps, there will be a Redemption;<sup>249</sup> for each truth, a new falsehood; for each transcendent realization of the capacity for love, a new order, condemning humanity to despair.<sup>250</sup> But false-

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<sup>246</sup> *Id.* at 10.

<sup>247</sup> Marshall, *supra* note 65, at 5.

<sup>248</sup> See CAMUS, *THE REBEL*, *supra* note 1, at 298 ("Politics, to satisfy the demands of rebellion, must submit to the eternal verities.").

<sup>249</sup> "Rebellion and discipline rise and fall together . . ." Donald Black, *The Elementary Forms of Conflict Management*, in *NEW DIRECTIONS IN THE STUDY OF JUSTICE, LAW, AND SOCIAL CONTROL* 43, 49 (School of Justice Studies, Arizona State University ed., 1990).

<sup>250</sup> See BELL, *supra* note 116, at 256-57:

Then Geneva turned to face the delegates. "I am now convinced that the goal of a just society for all is morally correct, strategically necessary, and tactically sound. The barriers we face, though high, are not insuperable . . . [L]et us find solace and strength in the recognition that black people are neither the first nor

hoods and orders are the creatures of humanity. Forces may tend to destroy equality, but only human indifference can permit their triumph. Rebellion decries the willful indifference that permits suffering to go unrecognized and denounces the perpetuation of suffering in the pursuit of an idea. Humanity, rebellion knows, is not an Idea.<sup>251</sup>

In the end, rebellion is left with its contradictions: so much love to give, so little compassion given; so many truths to hear, so little comprehension. And the rebel, incessantly, wonders why, and the rebel, relentlessly, struggles for something better. And ultimately the rebel insists: for each Redemption, there will be a new Reconstruction.

### Epilogue

We never did play kick-the-can that day. Fig's mom started calling for him when the sun went down, and soon after, Michael's dad was calling for him. Most of the street lights were out that evening, and it was pretty cold to boot, so I didn't make much of a fuss when my sister came for me. The next few days seemed awfully cold, and it snowed not long after that, and we never managed to sneak in another game of kick-the-can. Tony and his family moved that spring, and I never heard from him again. Fig told me that summer that he often wondered about Tony. Mostly, he said, he was hoping that the kids in Tony's new neighborhood were nice. I told him I hoped that too. And I wondered, I said to Fig, whether the kids in Tony's new neighborhood played kick-the-can. Fig said he hoped so; he hoped the kids in Tony's new neighborhood did play kick-the-can. And then Fig said that he hoped something else too: he hoped that in Tony's new neighborhood, the only rule to the game was that every kid can play.

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the only group whose age-old struggle for freedom both still continues and is worth engaging in even if it never results in total liberty and opportunity. Both history and experience tell us that each new victory over injustice both removes a barrier to racial equality and reveals another obstacle that we must, in turn, grapple with and—eventually—overcome. For emancipation did not really free the slaves; and Lincoln's order was but a prerequisite, the necessary first step in a process that will likely continue as long as there are among us human beings who, for whatever reason, choose to hold other human beings in their power.”

<sup>251</sup> See CAMUS, *THE PLAGUE*, *supra* note 8, at 153–54.