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CLAIMS FOR REPARATIONS FOR RACISM UNDERMINE THE STRUGGLE FOR EQUALITY

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My views on the question of reparations for racism are shaped by who I am and what I have done. I am a 66-year-old white law professor and for much of the 40 plus years since my graduation from law school I have been involved in issues of racial equality. I write and speak on the subject extensively and have litigated a considerable number of racial discrimination cases. The cases have ranged from school segregation, to fair housing, to voting rights, to race-based adoption, to the racially differential census undercount. I am a strong proponent of race-based affirmative action and race-conscious admissions policies in colleges and universities. But with all of that, I have not suffered racial discrimination, as have people of color in the past and to some extent even today. My perspective on the question of reparations for racism, like my perspective on all issues of racial equality, is a white perspective.

But that perspective is a very important one. African-Americans make up about 13% of the national population.¹ Therefore, unless reparations for racism is ordered by the courts, which will not happen as I will demonstrate, the claim for reparations will not be successful unless it has substantial white support. In my many years of involvement in issues of racial equality, I spent considerable time seeking support on those issues from my fellow whites. In earlier times, I tried to persuade whites to support civil rights laws and school desegregation. In more recent times, my focus is on obtaining support for affirmative action and race-conscious admissions policies. After

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1. U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS (visited Feb. 3, 2002) <http://www.census.gov/Press-Release/www/2001/tables/dp_us_2000.pdf>.

many years of seeking such support, I think I now have a good understanding of what is necessary to persuade whites to "support equality for blacks." Claims for reparations for slavery and past racism will endanger white support for equality for blacks in the United States.

I. WHEN DO WHITES SUPPORT EQUALITY FOR BLACKS?

I think that there are two factors that help to bring about white support for equality. The first is white self-interest and the second is a sense of injustice. Of white self-interest, Professor Derrick Bell of New York University, a prominent African-American law professor, said many years ago that whites will not do anything for blacks unless whites themselves benefit.² To a large extent I agree with this view. Civil rights laws benefit whites. The civil rights laws attempt to end other forms of discrimination that reach whites, such as discrimination on the basis of gender. They also eliminate the human and economic costs resulting from systemic racial discrimination, some of which are borne by whites. School desegregation, if properly carried out, can improve the quality of education for both minority and white students in the school system. It is now recognized that the benefits of affirmative action and race-conscious admission policies in colleges and universities extend beyond the minority persons that are the immediate beneficiaries.

Let me develop this latter point more fully. As Justice Powell's opinion in *Regents of the University of California v. Bakke*³ demonstrates, a racially diverse student body has educational advantages for all students, white as well as minority, by promoting

2. This statement is an oversimplification of Professor Derrick Bell's racial interest convergence principle. Under this principle, Professor Bell maintains that, "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interest of whites." Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). The principle is explained more fully in the article and also in DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW*, 212-214 (4th ed. 2000).

3. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (Opinion of Powell, J.).

“[t]he atmosphere of ‘speculation, experiment and creation’ - so widely essential to the quality of higher education.”⁴ Most universities today want to have a racially diverse student body, and where they are prohibited by court decision or state law from using race-conscious admissions policies, they are likely to resort to “factors that correlate with race,” such as residence, high school class standing, and economic disadvantage.⁵

Corporate America has similarly concluded that it is to its advantage to use race-based affirmative action in employment. Ironically, the commitment of corporate America to affirmative action came about as the unintended consequence of the policies of the Reagan Administration, which purportedly was opposed to affirmative action. The corporations wanted to get out from under federal enforcement of affirmative action requirements by the Office of Federal Contract Compliance Programs (“OFCCP”).⁶ So, they made a bargain with the

4. *Id.* at 312-13.

5. See the discussion of “factors that correlate with race” in *Hopwood v. Texas*, 78 F.3d 932, 947 (5th Cir.), *cert.denied*, 518 U.S. 1033 (1996). In that case, the Fifth Circuit held that any use of race in determining admission to a public university, such as the University of Texas, violated the Equal Protection Clause. The use of residence or high school class standing to determine admissions will secure the admission of some number of minority students, particularly from inner city high schools. This is because of extensive residential racial segregation in the major metropolitan areas, where the African-American and Hispanic populations are concentrated. It is also widely believed that the use of the “economic disadvantage” consideration will secure the admission of some minority students, since racial minorities are disproportionately disadvantaged in comparison with whites. After the *Hopwood* decision, the Texas Legislature adopted a “10 percent plan,” under which all students in the top 10% of the graduating class in every Texas high school are eligible for admission to every public university in the state, including the flagship University of Texas-Austin. For a discussion of the operation of the Texas plan, see David Orentlicher, *Affirmative Action and Texas’ Ten Percent Solution: Improving Diversity and Quality*, 74 NOTRE DAME L.REV. 181, 182 (1998).

6. The OFCCP administers laws that prohibit discrimination based on race, color, religion, sex, national origin, disability, or veteran status. The programs require nondiscrimination and affirmative action in employment by Federal contractors and subcontractors. The OFCCP’s activities include conducting compliance reviews of

Reagan Administration for “self-policing.”⁷ Under a policy of “self-policing”, corporations are able to hire and promote minorities and women, but within a framework that enables them to maintain a great deal of autonomy. Once this policy was initiated, corporations found that affirmative action had many advantages. Herman Belz, a strong critic of affirmative action, noted that by the 1980's race and gender conscious affirmative action became “institutionalized . . . as part of the corporate culture,” and, “[t]he prevalent business attitude was toleration of affirmative action, provided that it was modified to permit greater employer autonomy and self regulation.”⁸ The corporate world believed that it benefited from affirmative action in a number of ways: (1) increasing the number of minorities and women they employed helped the companies avoid successful discrimination lawsuits; (2) a formal reduction in a company’s affirmative action policy would be likely to provoke grievances among employees who were beneficiaries of affirmative action, while continuing the policy would foster their loyalty; (3) corporate equal employment opportunity officers and executives believed that affirmative action expanded the pool of available talent and led to increased productivity; and (4) affirmative action improved a company’s public image and customer relations.⁹

Federal contractors and subcontractors, receiving and investigating complaints, publicizing findings, litigating cases, and providing compliance assistance to Federal contractors.

7. See Exec. Order 11246, 46 Fed. Reg. 42,968 (1981).

8. HERMAN BELZ, EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION 196-97 (1991).

9. *Id.* at 197-8. Belz quotes a General Motors executive as saying: “I hate to think where this corporation would be today without these [affirmative action] programs. GM should be a reflection of the larger community around us.” *Id.* at 198. It must be noted that General Motors has its corporate headquarters in the City of Detroit, which, according to the 2000 census, is approximately 80% black in population. U.S. CENSUS BUREAU, POPULATION BY RACE AND HISPANIC OR LATINO ORIGIN, FOR THE 15 LARGEST COUNTIES AND INCORPORATED PLACES IN MICHIGAN: 2000 (visited April 7, 2002) <http://www.census.gov/Press-Release/www/2001/tables/mi_tab_5.PD>. He also cites surveys showing “that many large firms believed affirmative action was

Since the nation's universities and corporate America are white dominated and support affirmative action, this lends further credence to Bell's thesis that whites will do things that benefit blacks only when whites themselves benefit as well.¹⁰

The second factor of white support for racial equality comes from what the legal philosopher Edmond Cahn has called the "sense of injustice."¹¹ One of the many facets of the greatness of Martin Luther King was his ability to touch the "sense of injustice" of white America when confronting them the evils of racial discrimination and segregation. This "sense of injustice" was aroused by King's unforgettable "I Have a Dream" speech," and was the impetus behind the enactment of the Civil Rights Act of 1964 and, after King's tragic assassination, the Civil Rights Act of 1968. Today, "the sense of injustice" is touched by racial profiling. It is fundamentally unfair for the police to stop and question African-American people solely because of their race. The fundamental unfairness of this discriminatory practice is not mitigated by the claim that the crime rate among African-Americans is higher than the crime rate among whites. Even at this time of national tragedy, perpetrated by persons of middle-eastern origin, the "sense of injustice" is touched by racial profiling of people on this basis.

simply a part of doing business, and that within two decades all companies would have irrevocably altered their business culture." *Id.* I related the corporate institutional support of affirmative action, as set forth by Belz, to the broader issue of a constitutional political consensus in favor of employment equality. Robert A. Sedler, *Employment Equality, Affirmative Action, and the Constitutional Political Consensus*, 90 MICH. L.REV. 1315 (1992) (Reviewing HERMAN BELZ, *supra* note 8 and MELVIN I. UROFSKY, *A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION* (1991)).

10. Race-based affirmative action favoring racial minorities will, of course, have the immediate effect of disadvantaging some of the whites who are competing with racial minorities for university admission or for jobs. The white "intra-racial" disagreement over race-based affirmative action may reflect a disagreement between that segment of white society that perceives that it benefits from race-based affirmative action policies, and that segment of white society that perceives that it does not.

11. EDMOND N. CAHN, *A SENSE OF INJUSTICE* (1949).

Touching white Americans' "sense of injustice" is another way of securing white support for claims for racial equality.

II. A SOLUTION TO THE HISTORY OF RACISM IN LIES IN THE EQUAL PROTECTION OBJECTIVE RATHER THAN IN REPARATIONS.

My overriding concern is the consequences of the long and tragic history of racism in this nation. I described this history in a 1979 law review article for a symposium on the *Bakke* case in the *Harvard Civil Rights-Civil Liberties Law Review*:

The history of racism in America ...had its genesis in the institution of chattel slavery, and it is a history of inferiority established by law; of rampant discrimination in employment; of ghettoization; of segregated and tangibly inadequate schooling; and of the denial of access to societal power. Racial discrimination was commanded by government at all levels, and when it was not commanded, it was tolerated and encouraged. Private entities and individuals added their significant contribution to the social pattern of racism. Indeed, only in the last two decades has any real progress been made in halting much of the overt discrimination practiced against blacks in America.¹²

I defined overcoming these consequences in terms of the equal participation objective. In a 1980 law review article for a symposium on affirmative action in the *Wayne Law Review*, I explained the equal participation objective as follows:

The goal of the equal participation objective is to end white supremacy and black inequality in all of its manifestations, and in the words of Justice Marshall [in *Bakke*] to achieve "genuine equality" between blacks and whites in American society.

What the equal participation objective ultimately means is that blacks as a group will participate equally with whites as a group in

12. Robert A. Sedler, *Beyond Bakke: The Constitution and Redressing the Social History of Racism*, 14 HARV.C.R.-C.L. L. REV 133, 135 (1979).

all aspects of American life. Blacks, as well as whites, will participate in societal governance. Blacks, as well as whites, will share positions of power and prestige. Blacks will be meaningfully represented in the American economic system, and blacks will not be disproportionately lower-income in comparison with whites. The consequences of the social history of racism will no longer be so strikingly visible in American society.¹³

I went on to say that:

The equal participation objective is not based on any notion of “reparations” or “proportionality.” It does not mean that because blacks have been subject to a long history of discrimination and victimization, white society owes blacks “reparations” and must give blacks benefits at the expense of whites. Nor does it mean that blacks as a group are entitled to the “proportionate” share of the benefits... in exact proportion to their representation in the general population. . . . The equal participation objective is not concerned with “reparations” for the past or with “proportionality,” but with the absence of full participation of blacks as a group in all aspects of American life. It is concerned with the present consequences of the social history of racism that are felt by blacks as a group today. The equal participation objective does not seek to give blacks the proportionate share of societal participation and power that they would have had in the absence of the social history of racism, but to give blacks as a group *some* meaningful share of societal participation and power, and to bring them into the “*mainstream* of American life.”¹⁴

When I look at American society today, I see that we have made progress toward achieving the equal participation objective. This is due in no small part to race-based affirmative action and race-conscious university admission policies. As I wrote in an op-ed piece in the *Detroit Free Press* in 2001:

13. Robert A. Sedler, *Racial Preference and the Constitution: The Societal Interest in the Equal Participation Objective*, 26 WAYNE L. REV. 1227, 1236 (1980).

14. *Id.* at 1238.

Because of race conscious admissions policies in law schools over the last generation, the representation of racial minorities in the legal profession has substantially increased, and the legal profession today is very different from what it was a general ago. The public interest is likewise advanced by the equal participation of racial minorities in every other profession and area of American life. Because of race-conscious admission policies in most American universities over the past generation, we have seen a marked increase in the numbers of minority doctors, professors, journalists, executives, government officials, and the like. As a Nation, we are moving closer than ever to the full and equal participation of racial minorities.¹⁵

Race-based affirmative action, however, cannot and does not purport to solve the most devastating consequence of our nation's long and tragic history of racism, disproportionate racial poverty and segregation. In 1967, the National Advisory Commission on Civil Disorders lamented that there were "two societies, black and white, separate and unequal."¹⁶ Some thirty years later, the census figures tell us that we are a little less separate and a little less unequal, but not very much so. In the last 30 years, there has been a significant growth in the size of the African-American middle-class.¹⁷ However, there has also been an increasing gulf between the African-American middle-class and the overwhelming numbers of the African-American population that live concentrated in the Nation's central cities,¹⁸ such as Detroit, amidst a

15. Robert A. Sedler, *Society Fares Better When Races Learn and Work Together*, DETROIT FREE PRESS, March 30, 2001, at 10A.

16. UNITED STATES KERNER COM'N, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

17. The 1999 median income for African American households, \$27,910, was the highest ever recorded. U.S. CENSUS BUREAU (visited Mar. 2, 2002) <<http://www.census.gov/Press-Release/www/2000/cb00-158.html>>.

18. Blacks are more likely than non-Hispanic whites to live in metropolitan areas (86% compared with 77%). U.S. CENSUS BUREAU, THE BLACK POPULATION OF THE

high degree of poverty and the consequences that poverty produces. The consequences, as many African-American political leaders have put it, are “black on black crime, drugs destroying the black community, and babies having babies.” Fortunately, in the last few years, there has been some improvement in each of these categories,¹⁹ but the underlying problem of disproportionate racial poverty and segregation remains. We still see tangible forms of racial discrimination in American society today, such as “the crime of driving while black,” and the disparate treatment of African-Americans in the criminal justice system.

III. WHY REPARATIONS FOR RACISM WILL NOT BE SUPPORTED BY SOCIETY.

In my opinion, claims reparations for racism trivialize and divert attention from the real issues of racial equality that exist in American society today. I believe that it is in the public interest to achieve the full and equal participation of African-Americans and other racial minorities in all important areas of American life. It is in the public interest to deal with the problems of America’s inner cities and the disproportionate racial poverty and segregation that are their root cause. I believe it is in the public interest to eliminate every vestige of racial discrimination in American society, such as the “crime of driving while black,” and the disparate treatment of African-Americans in the criminal justice system. I fail to see how a claim for reparations for racism will bring us any closer to achieving these objectives and attaining a true condition of racial equality in American society.

The theory of reparations is that individuals should be compensated for wrongs done to them by the government. Congress voted to pay reparations to the surviving Japanese-Americans who had been sent to

UNITED STATES (March 1999) <<http://www.census.gov/prod/2000pubs/p20-530.pdf>>.

19. For example, the 1999 poverty rate for African Americans, 23.6 percent, was the lowest ever measured by the Census Bureau, and about 700,000 fewer African Americans were poor in 1999 (8.4 million) than in 1998 (9.1 million) U.S. CENSUS BUREAU, *supra* note 17.

relocation camps in World War II.²⁰ The Federal Republic of Germany has paid reparations for illnesses and other harms suffered by victims of the Holocaust, and the German companies that used slave labor during World War II have settled lawsuits against them by an agreement to make payments to the victims that slave labor.²¹ In all of these cases, the payment of reparations was specific to the victim who had suffered the wrong. If the victim had not survived, there were no payments to the victim's descendants. It may be possible to provide reparations for something that has happened many years ago, such as rebuilding the black community of Tulsa that was destroyed by white rioters in 1921. However, it is far too late to compensate the victims of slavery and the victims of long past racial discrimination for the harm that was inflicted upon them. The purpose of reparations is not advanced by giving money to the descendants of slaves.

The proponents of reparations for slavery and for the racism that followed in its wake focus on the wrongs committed against the victims, but do not succeed in explaining how those wrongs will be redressed by giving money to their descendants. When pressed on this point, the response is typically that white society must first admit and apologize for the wrong, and then black society may decide what it will do with the money. This argument will not find much support among whites. First, reparations for racism will not benefit whites, and it is not designed to do so. Second, and more importantly, a claim for reparations for racism will not touch whites' "sense of injustice."²² Abhorrent as whites may find slavery and our Nation's long and tragic history of racism, their "sense of injustice" does not connect that abhorrence with giving money to the descendants of the victims. As in many other contexts, bringing in money may cheapen the intensity of the injustice. From my own perspective, I cannot justify a claim for

20. Civil Liberties Act of 1988, 100 Pub.L.No. 383: 102 Stat. 903 (1988) (Congress provided restitution to individuals of Japanese ancestry who were interned during World War II or their children.)

21. A German foundation was formed to compensate the victims of Nazi persecution. Payouts from that \$5.2 billion fund began in 2001.

22. See CAHN, *supra* note 11.

reparations for racism to my fellow whites. I cannot justify it to myself. Reparations for racism will fail completely in the political arena because white society will in no way support the claim.

IV. WHY REPARATIONS FOR RACISM WILL FAIL IN THE COURTS.

White support is irrelevant when the claim for reparations leaves the political arena and goes to the courts. I can attest to this from my own experience in litigating constitutional claims that provoked enormous white resistance, such as busing for school desegregation across school district boundaries.²³ However, a legal claim for reparations would fail dismally in the courts. The initial concern in bringing suit for reparations is to determine who would be suing whom for what and on what theory? That is, who is the plaintiff and who is the defendant and what is the theory of liability? Suppose that an African-American citizen, as the descendant of slaves, sues the United States government to recover reparations for the enslavement of her ancestors. The suit will be dismissed forthwith because of the government's sovereign immunity, and that will be the end of the matter. Now suppose that she can somehow locate both the plantation in South Carolina on which her ancestors were enslaved and a descendant of the slaveowner or that she can locate the bank in Massachusetts that financed the purchase of her

23. See *Newburg Area Council, Inc. v. Board of Education*, 489 F.2d 925 (6th Cir.1973), *vacated and remanded*, 418 U.S. 918, *reinstated*, 510 F.2d 1358 (6th Cir.1974), *cert. denied*, 421 U.S. 931 (1975). This case involved the 1975 desegregation of the Louisville and Jefferson County, Kentucky, school districts, and a county-wide busing remedy. There was enormous opposition by white parents, including a school boycott and the National Guard riding "shotgun" on the school buses. Interestingly enough, after the plan was implemented, academic achievement improved throughout the school system, the community came around to supporting the desegregation plan, and the school system continues to be desegregated today. See generally the discussion of the situation in Louisville-Jefferson County and a comparison between that situation and the situation in Detroit, where metropolitan desegregation was disallowed in *Milliken v. Bradley*, 418 U.S. 717 (1974) in Robert A. Sedler, *The Profound Impact of Milliken v. Bradley*, 33 WAYNE L. REV. 1693, 1703-22 (1987).

ancestors. She sues the slaveowner's descendant in South Carolina and the bank in Massachusetts to recover reparations for that enslavement.

Both suits would be dismissed as barred by the statute of limitations because the events happened over 100 years ago. Even assuming that the plaintiff could somehow avoid the limitations problem, she would lose on the merits, because when the events happened, slavery was fully legal throughout the United States. Slavery was not some aberration that happened at some time in the Nation's past, as the Holocaust happened in Germany from 1933-1945. Our Nation was founded on the institution of slavery. The Constitution specifically protected the slave trade until 1808,²⁴ requiring that runaway slaves be returned to their owners,²⁵ and counting slaves as 3/5th of a person for purposes of representation in the House of Representatives.²⁶ When Chief Justice Roger Taney said that "[Negroes] had for more than a century before [the Constitution] been regarded as beings of an inferior order . . . and so far inferior that they had no rights which the white man was bound to respect,"²⁷ and that, "[t]he right of property in a slave is distinctly and expressly affirmed in the Constitution,"²⁸ Taney was merely explaining why, under our constitutional system, slavery was fully legal throughout the United States. As Supreme Court Justice Thurgood Marshall said at the time of the Bicentennial of the Constitution, African-Americans should not celebrate a Constitution that recognized and legitimized the slavery that caused so much misery to their ancestors.²⁹

24. U.S. CONST. art. I, §9, cl.1, *repealed* by U.S. CONST. amend. XIII.

25. U.S. CONST. art. Art. IV, §2, cl.3, *repealed* by U.S. CONST. amend. XIII.

26. U.S. CONST Art. I, §2, cl.3, *repealed* by U.S. CONST. amend. XIV, §2.

27. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1858).

28. *Id.*

29. Justice Thurgood Marshall, *Commentary: Reflections on the Bicentennial of the United States Address Before the Annual Seminar of the San Francisco Patent and Trademark Law Association* (May 6, 1987) in 101 HARV. L. REV. 1, 2 (1987).

With regard to the plaintiff's claim against the South Carolina descendant of the slave owner and against the Massachusetts bank, the plaintiff will lose on the merits, because she will not be able to establish the violation of any of her ancestor's legal rights. As Taney said, under the Constitution her ancestor "had no rights which the white man was bound to respect."³⁰ South Carolina was a slave state, where the enslavement of her ancestors was supported in every respect by South Carolina law, and while Massachusetts was not a slave state, it is extremely unlikely that Massachusetts law prohibited financing the purchase of a slave in a state where slavery was legal.

Once we recognize that slavery was fully legal throughout the United States prior to the promulgation of the Thirteenth Amendment in 1865, we realize that any legal claim for reparations for slavery will fail. The same is true of a legal claim for reparations for the harm caused to the Nation's African-American citizens by the racism following in the wake of slavery. The federal government is immune from suit for the claims, the claims are almost certainly barred by the statute of limitations, and all or virtually all of the conduct characterized as racism was fully legal at the time it occurred.

V. CONCLUSION

Since white society will not support a claim for reparations for racism, the claim is politically untenable. Congress and the state legislatures will not appropriate funds to pay African-Americans reparations for racism. The claims will not be successful in the courts either. Therefore, difficult to see how pursuing claims for reparations for racism could advance the struggle for racial equality. I believe that pursuing such a claim will, in fact, seriously undermine that struggle. It will trivialize and divert attention from the real issues of racial equality that exist in American society today. It will create the perception that, in the final analysis, the struggle is really about money rather than about equality. Finally, a claim for reparations is backward-looking rather than forward-looking at a time when our focus should be on moving forward.

30. *Dred Scott*, 60 U.S. at 407.

As a long-time participant in the struggle for racial equality and one who has an understanding of the politics of the struggle, I ask "From where does the movement for reparations for racism come?" It seems to me that it is coming from African-American intellectuals and the more affluent segments of African-American society. It is not coming from African-American political leaders - most of whom have been very silent about it. It is not coming from the "black preachers," who have perhaps the most political influence among the African-American polity. A claim for reparations for racism is far removed from the real concerns of the African-American communities in the Nation's inner cities. We do not hear the leaders of those communities calling for reparations.

Reparations for racism will not happen. The claim for reparations for racism has the unfortunate effect of undermining the struggle for equality. It should be abandoned entirely, and the focus should be on dealing with the real issues of racial equality that exist in American society today.