EDUCATION FOR BLACK POWER IN THE EIGHTIES: PRESENT DAY IMPLICATIONS OF THE *BAKKE* DECISION

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Thank you. When Leon Bass initially called me and asked me to speak at this symposium, he told me that the symposium was entitled "Education For Black Power In The Eighties." Since that title, has been dropped, I will adopt it as the first portion of my title, "Education For Black Power in the Eighties: Present Day Implications of the Bakke Decision." I want to begin with a quote from a famous or not so famous (though he ought to be famous) 17th century intellectual and freedom fighter named Martin Delaney. He said that, "no people can be free who themselves do not constitute an essential part of the ruling element of the country in which they live."[1]

"Education for Black power in the Eighties." I like the sound of this original topic for this symposium. It seems far too long since I've heard those words "Black Power!" chanted on a hot dusty Mississippi road by a young SNCC[2] worker in 1966. "Black Power!" Words that inspired us to demand our rightful share in the nation's riches and struck fear in the hearts of our white brothers and sisters. "Black Power!" Words that remind us that despite the myth of a color-blind meritocracy, our destiny as individuals is dependant upon our strength as a group. "Black Power!" Words that echo the continuing validity of Martin Delaney's insight, that without the power to determine our own destiny we cannot be free.

The act begins with the idea, and one cannot determine what constitutes the most efficacious form or forum for the education of our people without first being clear about the goals of that education. We have made an auspicious beginning in identifying Black power as the appropriate goal of our educational task. I will not presume to proffer the single educational strategy that will most effectively provide us with the skills and understandings of ourselves and the world—skills that are necessary to our continuing struggle. We are a diverse people and our paths to a common goal must also be diverse. I will instead limit myself to some observations about how we as lawyers can best prepare ourselves to face the struggle ahead.

Initially, it is important to recognize that there is no need for us to remake the wheel in our efforts at formulating an effective and affirmative strategy. The NAACP's first lawyers, Charles Houston, William Hastie, Sr., Thurgood Marshall and others, conceived and implemented a master plan for Black lawyers almost forty years ago. That strategy was designed to bring an

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1. MARTIN DELANY, THE POLITICAL DESTINY OF THE COLORED RACE ON THE AMERICAN CONTINENT, (1854), *quoted in* V. HARDING, THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA, 186 (1981).

2. Student Non-Violent Coordinating Committee.

end to legally sanctioned segregation. The issues addressed were in some ways different from those we face today, but the genius of that strategy that led to *Brown v. Board of Education*[3] lay in its fundamental understanding of how the political system must be attacked. Much can still be learned from that course.

There are several aspects of the *Brown* strategy that deserve emulation. First, the early planners recognized that any effective legal reform or strategy must be an approach that seeks to change the political context in which the law is made and at the same time, pursue legal remedies within the confines of the present political reality. In the years preceding *Brown*, NAACP lawyers realized that they had to engage in massive community and societal education to demonstrate how segregation harmed people, and to prove that separate was not equal and never could be. At the same time the lawyers had to bring suits within the framework of existing law so that the *Sweatt*[4] case, the first law school case, and the *McLaurin*[5] case, the graduate school case, were argued within the limitations of the *Plessy v. Ferguson*[6] "separate but equal" doctrines.

The same lawyer-leaders were also busy exposing white supremacy for what it was, and working within their own commmunities to build organizations to instill a counter-ideology that would do battle with racism. Today, as lawyer-leaders, we must be involved in the battle of ideas to alter the conceptual limits and political realities within which we legislate and litigate, even as we press suits within the current doctrinal parameters. The early NAACP lawyers understood the need for community support. They realized that generals are only as good as their armies, and that unless they stayed close to the people they represented, and aided in the organization of a parallel political struggle, all of their legal strategies would be worthless.[7]

A second part of the *Brown* strategy which deserves our attention is its recognition of the importance of symbolism in the struggle for power. In attacking segregated schools the NAACP's early lawyers were not simply seeking access to the more abundant resources that were made available to white children. They were also challenging a system that labeled them and their brothers and sisters as inferior, untouchable, and unfit to assume the responsibilities of power. Fifteen years after the *Brown* decision, one of the strategy's implementors, Robert Carter (now Judge Robert Carter), noted that the consequences of the decision as measured by increased school integration, were negligible but that indirect consequences were awesome. He said, and I quote:

> *Brown v. Board of Education* fathered a social upheaval the extent and consequences of which cannot even now be measured with certainty. It marks a divide in American life. The holding that the segregation of Blacks in the nation's public schools is a denial of the Constitutional command, implies that all segregation in American public life is invalid. . . . As a result of this seminal decision, Blacks had the right to use the main, not the separate waiting room; to choose any seat in the bus; to relax in public parks on the same

3. 347 U.S. 483 (1954).
4. Sweatt v. Painter 339 U.S. 629 (1950).
5. McLaurin v. Oklahoma 339 U.S. 637 (1950).
6. 163 U.S. 537 (1896).
7. For an excellent analysis of the history of *Brown see*: R. KLUGER, SIMPLE JUSTICE (1976).

terms as any other member of the community. This and more became their birthright under the Constitution.

Equal rights legislation could no longer be regarded as a gift benignly bestowed by an enlightened and liberal minded electorate.... Thus the psychological dimensions of America's race relations problems were completely recast. Blacks *were no longer supplicants*—seeking pleading, begging to be treated as full-fledged members of the human race. No longer were they appealing to morality, to conscience, to white America's better instincts. They were entitled to equal treatment as a right under the law. When such treatment was denied, they were being deprived—in fact robbed— of what was legally theirs. As a result the Negro was propelled into a stance of insistent militancy. Now he was demanding—fighting—to secure and possess what was rightfully his.[8]

As the rights which Blacks demanded moved from the token symbolism of the removal of "White Only" signs, to the reality of political power and economic equality, racism reasserted itself disguised in a new ideology. The new racist ideology began by declaring that racial discrimination had been eliminated. If whites could be made to believe that equality had been achieved, then programs designed to improve the status of minorities would be viewed as giving those minorities an unfair advantage or so-called "reverse discrimination." The ideological illusion is achieved as follows: (1) First, it is declared that racial discrimination no longer exists. If this is so, then Black and white individuals are similarly situated (*i.e.*, neither is burdened by his race and so they must be treated similarly, as individuals who are judged solely on the basis of merit); (2) If this similar treatment results in a condition that burdens Blacks more than it does whites, it is nevertheless proper because it pursues the honorable, universally shared value of color-blindness and individual merit; (3) Unspoken and more insidious is the third step, and that is if Blacks continue to fail under this so-called similar treatment, it must be because they are somehow inferior. This is the false ideology of equal opportunity. It is perhaps more poisonous than the segregationist creed because of its inherent claim to support the highest of ideals.[9]

The legal issue in *The Regents of the University of California v. Bakke*[10] was posed in a way that lulled many of us into acquiescence and turned us from the militant path to power which we had been pursuing. *Bakke* raised the question of whether a professional school could voluntarily set aside sixteen percent of its available seats for such historically disadvantaged minorities as Blacks, Latinos, American Indians and Asians. The supporters, of special minority admissions programs, argued that racial preference was the only way to integrate formerly lily-white professional schools. They justified professional admission for minorities as a remedy for years of societal discrimination.

Opponents of special admissions called those programs "reverse discrimination." They argued that race consciousness undermines the value of individual merit and requires innocent persons to pay the price for crimes committed by others in the distant past. "The Constitution is color-blind,"

8. CARTER, THE WARREN COURT AND DESEGREGATION: A CRITICAL ANALYSIS 46, 55-56, (R. Sayler, B. Byer, R. Gooding, *et al.* eds. 1969).

9. *See* Lawrence, Book Review, 35 STAN. L. REV. 831 at 850 (1983) (reviewing D. KIRP, JUST SCHOOLS: THE IDEA OF RACIAL EQUALITY IN AMERICAN EDUCATION (1982)).

10. Regents of the University of California v. Bakke 438 U.S. 265 (1978).

they declared, and thus racial preference is not justifiable. However, in debating the efficacy of special admissions, few on either side questioned the legality or morality of regular admissions standards used to select the vast majority of students. The Bakke debate presupposed that regular admission standards were racially neutral, non-discriminatory, and based on merit. In fact, considerable evidence indicates that [standardized] examinations exclude all but a handful of Black and Latino applicants, leaving unconsidered other less culturally biased factors that indicate the potential for the success of these applicants. Moreover, there is little, if any, evidence that these standardized tests soundly measure academic aptitude or predict professional success. In other words, regular admission policies used and continue to use criteria which exclude virtually all Blacks and Latinos, even though existing evidence calls into question the relevancy of the criteria to the educational goals.[11]

The ideology of equal opportunity had done its work before the *Bakke* debate began. The law had already created its illusion and the debators on both sides had accepted the ideological image that portrayed the status quo as meritocracy. Regular admissions standards were thus considered non-discriminatory in *Bakke* because it had not been proved that they were adopted for the purpose of racial exclusion. This "non-intentional" discrimination was treated as the "absence of" discrimination which in turn was conceived of as "racial neutrality" which became "meritocracy." When the Supreme Court decided that the University could continue its minority affirmative action programs so long as it did not announce numerical quotas, many Blacks rejoiced at what seemed a major victory, but the false ideological images remained unchallenged. We had once again assumed the position of supplicant, not demanding the right to participate on behalf of our group in the determination of what constituted the "best qualified," but seeking as individuals to be granted the token privilege of admission by their standards, the privilege of the house slave, the privilege to be determined best qualified to serve the interest of the master. In accepting the ideology of equal opportunity, we also separated ourselves from our real source of power—the support of our people.

I recall that when I first began teaching at the University of San Francisco, there was a faculty appointments issue that helped me to understand

11. *See* TOWARD A DIVERSIFIED LEGAL PROFESSION: AN INQUIRY INTO THE LAW SCHOOL ADMISSION TEST, GRADE INFLATION, AND CURRENT ADMISSIONS POLICIES (D. White ed. 1981) [hereinafter TOWARD A DIVERSIFIED LEGAL PROFESSION]. In recent years, law schools have placed increased weight on the Law School Admission Test (LSAT) in calculating the admissions index. This has had a particularly devastating effect on minority applicants. Many more Blacks have excellent undergraduate grades than high LSAT scores. This means that de-emphasizing grades in favor of LSAT scores greatly reduces the number of Blacks that law schools accept. For example, 40% of white applicants to law schools in 1976 had college grades of 3.25 or higher, and 37% had LSAT scores above 600. In contrast, high test scores are much rarer for top Black college students. While 13% have 3.25 or better grade point averages, only 3% score above 600 on the LSAT. Requiring both high test scores and high grades decimates the pool of top black law school applicants. *See* White, *An Investigation into the Validity and Cultural Bias of the Law School Admission Test*, in TOWARD A DIVERSIFIED LEGAL PROFESSION, *supra*, at 115 (citing statistics from Brief for the Law School Admissions Council as Amicus Curiae at 21, *Bakke*, 438 U.S. 265 (1978)). A recent study indicates that Black and Hispanic law school applicants score an average of 100 points lower on the LSAT than do white applicants who attend the same undergraduate school and achieved similar grades. Ganon, *College Grades and LSAT Scores: An Opportunity to Examine the "Real Differences" in Minority-Nonminority Performance*, in TOWARDS A DIVERSIFIED LEGAL PROFESSION, *supra*, at 275-77; *see also* White, *Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record*, 14 HARV. C.R.-C.L. L. REV. 89 (1979).

the nature of my position as a token minority faculty member and the importance of a continuing relationship with my constituency in the Black community. One of my colleagues had written a letter opposing the appointment of a candidate who would have been the second Black on that faculty. His opposition was based on the grounds that the prospective appointee did not posess the required expertise in the area in which he was being hired to teach which was corporations. Corporations it was argued was a "very complex course" and the Black candidate obviously was not a person who had sufficient experience. This argument was made despite the fact that the Black applicant had been working in the corporate division of Pillsbury, Madison & Sutro for the five years preceding and had considerably more experience than his critic. It was interesting, that my colleague's letter was received by all the members of the faculty but me. The letter was passed on to me by another colleague. I was outraged and immediately sat down to respond. I was most angered by the "Blacks can't play quarterback" implications of my colleague's insistence that corporations was too complex a subject for this candidate to teach. I was in the midst of slamming away on my typewriter, responding to this letter, when two of my black students walked in. When I showed them the letter that I was writing, they said, "Professor Lawrence we really wish you wouldn't send this letter out because, while we'd like to have two Black professors, we'd rather have one than none. If you send this letter out you may be fired; you are untenured and this is your first year teaching here." I said, "I'm not going to be fired—not because I'm highly qualified, not because my teaching and scholarship matches that of any of my colleagues, but because you won't let them fire me. And if you let them fire me, then I don't want to be here." That's what I mean when I say that we have to think about where the source of our power resides and remember how we have gained access to these white institutions. Our first step in educating ourselves for Black power must be to understand from whence our power comes and from whom it must be taken.

The last thing I want to do is talk very briefly about a plan that was proposed almost twenty years ago by Vincent Harding. Harding, a Black historian, has recently written a brilliant, powerful, moving history of the United States and Black peoples' struggle in the United States called *There Is A River*[12] which I recommend to you. Harding's proposal was responsive to what he saw as the "Black brain drain" from historically Black colleges like Spelman, Morehouse, Fisk, and Howard. Some of the students and faculty from these schools were being whisked off to the Harvards, Yales, Stanfords, and University of Chicagos. Harding realized that we could not ask these students and professors to forego the opportunity to enter into the mainstream of American society. But at the same time he saw that our own institutions were being destroyed, our own ability to come together as a people and struggle as a group was being undermined. What he proposed was brilliant. I'm sure the proposal was never adopted precisely because of its brilliance, precisely because it would have most effectively advanced the liberation of Black folk. What he proposed was that we establish an institution called The Insti-

12. V. HARDING, THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA (1981).

tute of the Black World.[13] Under Harding's proposal The Institute of the Black World would be a place where the Black students and professors who went to the Harvards, Yales, Stanfords and University of Chicagos of the world could spend a year in a predominantly Black academic setting. The scholarship that they had at Harvard or Yale would pay for that year. And every third year a professor who was teaching at a Harvard or a Stanford would be given the opportunity to teach at The Institute of the Black World. The plan would provide Black students and intellectuals with the advantages of access to the white run system, as well as the advantages of maintaining group consciousness and solidarity through joint intellectual and institutional efforts with other Blacks.

I think that one of the good things about this kind of symposium is that we are beginning to do this in a very small way. This symposium and others like it should further our understanding and appreciation of the fact that the United States is a country where individuals have achieved because of the power and support of their constituencies. Despite all the rhetoric about individual achievement, we have always gained access through the power and militancy of our group. One of the practical kinds of things we can begin to fight for in the institutions where we work and study is for support from those institutions for these kinds of programs that will allow us to come together and map out our own future. Thank you.

13. The Institute of the Black World was later established in Atlanta but it did not take the form that Harding had originally proposed.