

# **Prejudicial Exploitation:**

## **Group Injuries Inflicted by Law Without Legal Redress**

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## Introduction:

### 1) The intent of the paper:

This paper is a search for a new ethical and conceptual basis for policies toward the results of the social practices traditionally and unsatisfactorily known as racism and castism. Its discussion of particular statutes and case law is slight, often relegated to footnotes. The paper's concern<sup>1</sup> is two steps back from positive law: it dwells on the *assumptions* of the *policies* behind the laws. I am convinced that conventional legal policies toward those phenomena are misconceived. Conventional policies express a compromise position held by the dominant group. The dominant group relinquishes portions of a former legal regime which had given explicit backing of the state's monopoly of force to enforce the exploitation of a subordinate group. But these conventional policies normally do not prevent the exploitation itself, nor do they substantially dismantle the effects of prior exploitation. The policies assume that because a deprived and mistreated group has complained, the problem is one of that group, that the appropriate legal response should be designed to put the that group on some type<sup>2</sup> of abstractly<sup>3</sup>

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<sup>1</sup> This concern found its focus in the assumptions behind policies for many American civil rights lawyers in the 1980's. As the old voices of the Warren Court were replaced by the callow and callous voices of Reagan and Bush appointees, civil rights lawyers came to realize that if the more they pursued appeals through the Federal Courts, the worse the results would be for their clients because each step up the appeals ladder offered larger opportunities to right wing judges to roll back civil rights advances made between 1954 and 1972. Some of the Republican appointees were so obviously political hacks with limited knowledge and doubtful integrity that it became impossible to think of law except as political maneuvering. In despair that the practice of law could benefit *anyone's* rights (except those of corporations and the state, if they're considered human), I turned my attention to the basic assumptions of policies.

<sup>2</sup> In India and the United States, the most popular debate raging around the notion of equality of groups is between "equality of result" and "equality of opportunity," but both terms are highly ambiguous. Amartya Sen has recently

equal footing with the dominant group, and that the institutions of the dominant group should do this. From the perspective of the weaker group, however, the problem is not theirs, but is a moral problem of the dominant group, for the dominant group maintained a regime which granted immunity to itself to commit large categories of crimes and torts against the weaker group. Because the dominant group as a whole profited from this activity, the weaker group believes in the collective guilt of the dominant group. The dominant group, however, never acknowledges this grievance. It blandly assumes that these crimes and torts were performed by individuals or by proper authorities, and that the guilty parties and the beneficiaries of the misdeeds are long gone and irrelevant to the present scene.

These two views are so far apart that no permanent reconciliation is possible between them. Consequently the actual goal of all policies made on the assumption of the dominant group is merely temporary political compromise, a keeping of the peace rather than an attempt to render justice. The weaker group inevitably senses that the political and legal agents of the dominant group (and those members of the weaker group they co-opt) act in bad faith<sup>4</sup>—that is, that they

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clarified some of the conceptual problems and technical issues of measurement in Inequality Reexamined, (Cambridge, Mass.: Harvard, 1992) and On Economic Inequality, (Delhi: Oxford, 1998.) The modern debate goes back to Rousseau; in it, definitions of equality became a crucial issue because of the incommensurable conceptions of Utilitarians and Marxists, both of whom took equality to be a basic value, but with different meanings and implications. An earlier version of the debate, with Democritus, Demosthenes, and some of the Stoics on one side and Plato and Aristotle on the other, bequeathed to us little explication of concepts of equality either because the writings of the democrats were suppressed or because it was not fully waged, the aristocrats having claimed *not* to value any form of equality except equality *before the law*. That sort of equality, which aristocrats asserted democracies *destroyed* (because they were supposedly biased against the rich), became the doctrine of equality embodied in merely “formal” rights Marx attacked.

<sup>3</sup> “Equality of opportunity” is always abstract because the question of whether the opportunity is graspable by or real for the individual cannot be answered without examining individuals. Equality of groups in general is inherently abstract because it is subject to the fallacies of composition and division. Proof that a group has been injured or healed cannot be proof that each individual has been equally injured or healed in the same respect. Equality of rights is abstract to the degree to which ability to exercise a right is contingent on the existence of circumstances not named by the right. The Indian and U.S. legal regimes purporting to offer equality treat equality abstractly in one or more of these senses.

<sup>4</sup> The main sense of “bad faith” I want is Sartre’s: one acts in bad faith when one determines one’s actions by considering one’s self from the point of view of the other rather than by reacting directly to one’s own perceptions. American Blacks frequently feel they are engaged in a perpetual game of hide-and-seek with White officials because the Whites act specifically *so that they cannot be perceived to be racists*, not at all because they believe Blacks are

offer benefits with a view to how their actions will be perceived, not with any genuine intent to benefit, nor with remorse for the injuries the benefits purport to remedy. This mismatch in the perceptions of institutional transactions between the two groups vitiates efforts at remediation, no matter how it is conceived or performed. Group conflict can change its form and become more subtle, but it will not subside until substantial numbers of the dominant group act upon the perception that fundamental principles of justice have not been served by the positive law, that group guilt, though unconscious and inherited, does exist, riding on the back of a material substratum, and that any improvement requires individual and group moral commitments as well as legal procedures. Gandhi once said, “Everyone is always looking for a way not to have to be good.” Consequently working out an ideal legal policy is in itself inadequate, for the dominant group uses the claim that its legal policy is sufficient in order to disown responsibility and blame the plaintiff group for its difficulties. A legal policy addressing the results of centuries of abuse must consider more fundamental features of social life and understanding than mere legal codes and decisions.

Blacks in America and the Scheduled Castes in India are not reconciled to their current positions because their actual human causes have not yet been honestly addressed in the public space of law and politics. All the solutions publicly pursued have foreshortened the perspectives in which they must be seen to be understood and ameliorated.

## **2) The Design of the Paper:**

The first half of this paper makes a simple conceptual and diagnostic argument. But the *subject matter* of the argument--the relationship between the legal statuses of Blacks in the United

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or should be equal to Whites. There is mounting social scientific evidence that Blacks are correct in this assessment. See John F. Dovidio and Samuel L. Gaertner, “On the Nature of Contemporary Prejudice: the Causes, Consequences, and Challenges of Aversive Racism,” in Jennifer L. Eberhardt and Susan T. Fiske, eds., Confronting Racism: The Problem and the Response, (Delhi: Sage, 1998), pp. 3-32.

States of America and the Scheduled Castes in India on the one hand and the positions of those groups in *real* (e.g., social, political, economic, and moral) terms--involves an indefinitely large mass of material. The propositions<sup>5</sup> of the simple argument are numbered and in bold print.

Explanations and justifications for these basic propositions are given after them in text. Factual support for those explanations and justifications and rebuttal of alternative arguments is provided in footnotes.

I adopt this method because I believe the basic argument is so strong that only massive alterations in the supporting arguments and their factual bases could defeat it. Many circumstances could lead me to reformulate the explanations and justifications of the basic propositions, but the basic propositions themselves and the argument they form is the result of enough years of experience and sufficient reflection that I cannot now imagine desiring to alter them. On the other hand, if I had nothing else to do with my life, I believe I could spend the rest of it adding to the footnotes.

The second half of the paper is a broad critique of current law's operation in society and some recommendations for individual, group, and legal action. It breaks from the customs of legal

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<sup>5</sup> I designate these propositions by the logical term "theses" because they form a sorites, a chain of logical arguments leading to a conclusion. A hypothesis is one sort of thesis. These theses cannot all be termed "hypotheses" because they do not all refer to relationships among matters of fact which may or may not exist. Testable statements of scientific theories are often called hypotheses because they assert that certain categories of existing entities bear certain relationships to each other. It is hypothetical whether the entities exist in the categories named and whether they bear the named relationships. The world being greater and other than descriptions of it, the term "hypothesis" recognizes the uncertainty of the statement and invites tests. Policy, however, is not a social science; it is a craft that uses social scientific information. Policy arguments assert that certain actions should be performed, and are therefore a subspecies of ethical arguments. By calling my ten propositions "theses," I do not mean to assert their *certainty*; they can have no more certainty than the social scientific hypotheses of their causal terms. Instead, I mean only to isolate them from the supporting statements because I am asserting that the conclusion depends upon the truth of the theses. Because the conclusion contains ethical terms, it and the propositions contributing those terms cannot be termed "hypotheses" because they do not hypothesize that certain facts bear certain relationships to each other. These theses, however, do lead to a social scientific hypothesis—the one in the conclusion.

That policy bears lies between ethics and social science, and that it consists of such arguments, should not require debate. Even practitioners of the "hardest" of the social sciences, economics, now acknowledge the role of ethics in their studies. (See Amartya Sen, *On Ethics and Economics*, (London: Blackwell, 1987).) If ethics even affects the contents of social science, how can policy be conceived as a social science properly consisting only of

writing by viewing law non-technically, and from the customs of policy writing by discussing the situation of the writer and readers. In the guise of impersonality and objectivity, the dominant group (more in the United States than in India) uses the conventions of legal and policy writing to sever ethics from law and policy. This Laputan way of talking evades responsibility. We earthlings each have our own concrete history in the maze of group relationships. Each of us understands the other's position on the basis of our own guesses about the other's history, experience, and commitments. All the efforts to surmount or escape our individual situations only result in assimilation to the conventional trappings of the presented image that one belongs to the ruling class by writing as its legal technocrats write for public consumption.

I present the first half with a certainty I am chary of in the second. Everybody knows the policies of the U.S. government toward Blacks and of the Indian government toward the Scheduled Castes have failed. In the first half I claim only that the basic reason for this is just as well known, but has been ruled inadmissible. The combination of the first knowledge, which is overt, with the second, covert, knowledge, is the source of my certainty. For the second half, I am less certain the more impersonal the statement. I think we all are. Had solutions been publicly knowable and admissible, they would long ago have been acted upon, and we would not have the problems we have now. So I am more concerned to provoke thought than to provide answers. We will not know we have an answer until we discover love for each other. As Wystan Hugh Auden said, "We must love one another or die."

## **I. The Grievance of Subjection to Prejudicial Exploitation**

Thesis 1: *American Blacks and Indian Scheduled Castes overqualify for the Status of Minorities under International Human Rights Law.*

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hypotheses which are proven or disproved? In light of this I think the more traditional term of ethical argumentation, "thesis," more accurate.

Under International Human Rights Law, Blacks in the United States of America and the Scheduled Castes in India belong in the same category: both qualify as minorities under Article 27 of the International Covenant of Civil and Political Rights.<sup>6</sup> In fact, under the criteria of Article 27, they are much more similar than they need to be in order to qualify, and they qualify in more ways than most minorities do:

- 1) Both comprise approximately 12.5% to 15% of the population.
- 2) Both have an ethnic<sup>7</sup> background both they and the dominant culture believe<sup>8</sup> to be distinct from the dominant culture.

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<sup>6</sup> “In those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their religion, or to use their own language.”

<sup>7</sup> The ICCPR’s use of the term “ethnic” is, of course, subject to whatever stipulative definitions the Convention’s Committee on Human Rights gives it, and so cannot be authoritatively second-guessed by anthropologists, who, in turn, because of the complexities of their subject and the needs of their own theorizing, are forced to stipulate their own definitions. There is no unique world-wide phenomenon corresponding to the term “ethnic group;” rather, the ethnicity of one ethnic group bears what Wittgenstein terms a “family resemblance” to the ethnicity of another. The adjective “ethnic” is applied to a set of overlapping similarities, any one of which, taken as a necessary defining feature in the Aristotelian sense, could exclude a majority of the groups to which the term is applied in both common and technical usage.

The common usage derives from the Greek meaning of “*ethnos*,” for which, in their erudite deconstructive essay on its etymology, Elizabeth Tonkin, et. al. say, “No attempt will be made here to provide the right definition.” and then cite a complex of usages including a multitude, a throng, a swarm, and do on, the meaning being determined by context and the word’s relationships to other available terms. (“History and Ethnicity” in John Hutchinson and Anthony D. Smith’s *Ethnicity*, (Oxford: Oxford U.P. 1996) at 18-24. Tonkin et. al. trace the development of meanings through Latin, French, and English.

The anthropologist Dipankar Gupta in *The Context of Ethnicity*, (Delhi: Oxford, 1996) at p. 6 adopts a simple and unequivocal meaning: “in my view ethnicity can be a useful technical term, for in contemporary usage, it connotes, above all else, the signification of the primordially constituted ‘other’ as outsider.” In this sense any of the Scheduled Castes could serve as the *prototype* of an ethnic group, having been governmentally defined on the basis of exclusion and disability.

The definitions of other anthropologists are more complex. *Ethnicity* contains 101 pages by 21 anthropologists in its first two chapters on “Concepts of Ethnicity” and “Theories of Ethnicity” detailing such definitions and their consequences. Although it is impossible to repeat its 16 efforts to conceptualize phenomena designated by the term and its cognates, and to construct basic theories of ethnicity, it is worth noting that the Scheduled Castes as well as Blacks fit into the more refined and narrower definitions of “ethnic group” the editors favor. On pp. 5-6 they write:

“*The concept of ethnic*

The key term in the field is that of ‘ethnic group’ or ‘ethnic community’, but it is one for which there is no agree stipulative or ostensive definition. The issue is complicated by the levels of incorporation which named human communities display. Handelman has distinguished four such levels: that of *ethnic category*, the loosest level of incorporation, where there is simply a perceived cultural difference between the group and outsiders, and a sense of the boundary between them. In the next stage, that of the *ethnic network*, there is regular interaction between ethnic members such that such that the network can distribute resources among its members. In the *ethnic association* the members develop common interests and political organizations to express these at a collective,

corporate level. Finally, we have the ethnic community, which possesses a permanent, physically bounded territory, over and above its political organizations; an example would be an *ethnie* in command of a nation state (Handelman, 1977).

In fact, most people would tend to equate the latter with what are termed ‘nations’, and to simplify these levels by opposing the *ethnic category* to the *ethnic community*. The former is much as Handelman describes, but the latter conflates the *ethnic network* and the *ethnic association*. An ethnic community of *ethnie*, then, is one where the members interact regularly and have common interests and organization at a collective level.”

Using Handelman’s terms, a caste is more than an ethnic category and normally more than an ethnic network; being traditionally governed by a caste association which has the power to expel members, it must be counted as an ethnic association. It could only acquire more cohesion and boundedness by becoming a nation, which (according to Hutchinson and Smith) in the usage of most anthropologists, who do not use the term “ethnic community” as Handelman does, would make it a *nation*, a political and legal, not an anthropological entity. Thus Scheduled Castes with caste organizations have the highest degree of ethnicity in terms of the cited conceptualization. Any of the Scheduled Castes which for some reason has no caste organization is nevertheless an ethnic network, more than an ethnic category. Taken together, the Scheduled Castes are a collection of ethnic associations and ethnic networks. In the U.S. the National Association for the Advancement of Colored People is taken by the courts in class action suits to have the capacity to speak for American Blacks; thousands of other Black organizations also constitute American Blacks as an ethnic association.

Hutchinson and Smith then turn to ‘Schermerhorn’s well-known definition,’ which they say ‘points us in the right direction:’

“An ethnic group is defined here as a collectivity within a larger society having real or putative common ancestry, memories of a shared historical past, and a cultural focus on one or more symbolic elements defined as the epitome of their peoplehood. Examples of such symbolic elements are: kinship patterns, physical contiguity (as in localism or sectionalism), religious affiliation, language or dialect forms, tribal affiliation, nationality, phenotypical features, or any combination of these. A necessary accompaniment is some consciousness of kind among members of the group.” (Schermerhorn, *Ethnic Plurality in India*, 1978, p. 12.)

The ethnicity of Blacks and all or nearly all of the Scheduled Castes easily satisfy this definition because the “symbolic elements are presented as an optional list. Hutchinson and Smith cite A.D. Smith’s reanalysis of this definition into six parts, five of which each Scheduled Caste clearly fits. For each Scheduled Caste there is a common name, the myth of a common ancestry (enforced by rules against intermarriage), shared historical memories, *one or more* elements of a common culture, and a sense of solidarity *on the part of at least some section* of the *ethnie*’s population. Some ambiguity remains only in one rubric, “a link with a homeland, not necessarily its physical occupation by the *ethnie*, only its symbolic attachment to the ancestral land...” though for many of the castes, the homeland is the portion of India in which they presently live, where they believe they were once sovereign.

In *Ethnic Groups and Boundaries*, (Boston: Little, Brown, 1969) Fredrik Barth summed up the anthropological meaning of “ethnic group” over the preceding decades as one used “to designate a population which: 1. is largely biologically self-perpetuating; 2. shares fundamental cultural values, realized in overt unity in cultural forms; 3., makes up a field of communication and interaction; 4. has a membership which identifies itself, and it identified by others, as constituting a category distinguishable from other categories of the same order.” (in *Ethnicity* at p. 75.) Anthony P. Cohen, in *Self-Consciousness: An Alternative Anthropology of Identity*, (London: Routledge and Kegan Paul, 1994) claimed on p. 10 that “Fredrik Barth’s seminal writing on ethnicity... set the style for anthropological studies of ethnic identity for nearly twenty years...” we can take it that most anthropologists believe Barth correctly understood the tradition he so affected. Barth’s primary contribution to the tradition has been to insist that ethnicity is primarily a matter of self-perception and perception by others, an intrinsically intersubjective phenomenon. This definition implies that subjective *consequences* of the government’s scheduling of a caste themselves *increase* the caste’s qualification as an ethnic group.

*I have not been able to find a definition of ethnic group that the Scheduled Castes do not individually fit.*

When the Indian government now denies that Scheduled Castes are ethnic or racial groups, it indulges in the logical fallacy of division—assuming that what is true of the whole is also true of the parts. The category “Scheduled Castes” is a legal category, evolved over this century, which collects ethnically distinct castes into one group. The fact that the castes *together* do not share a unique *collective* ethnic history (despite the dominant culture’s admittedly common treatment of them, which was the basis of their legal classification), does not imply that the members of *each* of the castes does not share that caste’s *own* ethnic history.

3) Both have been subject to massive violations of the right to enjoy their own culture, so much so that they are often said to have been deprived of their culture.<sup>9</sup> Both have been forced to assimilate themselves to the dominant culture in what that culture regards as a privative<sup>10</sup> manner—that is, they are usually regarded as possessing not their own culture, but merely an inferior version of the dominant culture.

4) By deliberate separation of speakers of African languages, kidnapped Blacks were systematically and intentionally deprived of their languages in order to render the organizing of slave revolts impossible. The extent to which the numerous groups now called the Scheduled Castes may at some time have had separate languages is debatable, but it is clear that the dialects spoken by many Scheduled Caste groups are regarded as indicia of inferiority, as Black English is for Blacks, and are punished in schools. Abandonment of such speech is one of the costs of partial acceptance by the dominant cultures of both India and the U.S.A.

5) The religions of Blacks kidnapped in Africa were as systematically destroyed as their languages. They were also excluded from White Christianity. Blacks developed their own versions of Christianity, which Whites partially tolerated in the belief that Black beliefs were meaningless but pacific. Less is known about the much longer historical development of the

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<sup>8</sup> The senses in which race or ethnicity may be scientifically verifiable phenomena are subject to elaborate technical issues. In all senses that matter legally and politically, however, race and ethnicity are culturally defined. A person is Black in the United States or a member of the Scheduled Castes in India because others identify him or her as such, generally on the basis of parentage. Because in the American South for three centuries the “one drop rule” was followed, there are many people who identified as Blacks who are physically lighter than many people identified as Whites; biological ethnicity, certainly in the sense of color per se, is not the sense of ethnicity relevant to establishing minority status in the U.S.A. The significant issue is that over 99% of the U.S. population believe they can distinguish Blacks from Whites, and act according to what they think are the appropriate consequences of that belief. The biological distinctness of the Scheduled Castes is also a moot issue culturally.

<sup>9</sup> The extent of the deprivation varies widely from place and time to time; there is evidence of vibrant Black and Untouchable culture, language, and religion at various times and places. But of the existence of effective majority efforts at deprivation, there can be no doubt.

<sup>10</sup> I use the term in Heidegger’s sense in *Sein und Zeit (Being and Time)*; idle talk is the privative form of discourse, fear the privative form of anxiety. Many members of the dominant culture, often uncsciously, appropriately exhibit a sense of the inappropriateness of this attributed inferiority. There is no modern American music unaffected

religions of the Scheduled Castes, (who may for some time have been Buddhist) but exclusion from upper caste Hindu religious practice was more intense than exclusion of Blacks from White Christianity. The current results of the suppression of original religions and exclusion from the religious rituals of the dominant culture have been development of their own versions of the dominant religion, and, in recent times, conversion to other religions—in the U.S., Islam, in India, Christianity, Islam, and Buddhism.

6) Neither group, moreover, under any name, has ever been taken to have the characteristics which would make it fit within the other, more recent international legal category minorities, the Indigenous Peoples. Though arguably indigenous in the modern legal sense, the Scheduled Castes, Untouchables, Dalits, or Harijans have always been held to be distinct from the groups now designated as the Scheduled Tribes, and their “minority” status has not been attributed to indigenesness. American Blacks, Africans, or Afro-Americans have never been confused with Native Americans.

Representatives of both Blacks and Scheduled Castes have complained to the Human Rights Committee set up by Part IV of the International Covenant on Civil and Political Rights (ICCPR). The Committee on the Elimination of Racial Discrimination set up by the Convention on the Elimination of All Forms of Racial Discrimination (CERD) also holds both to be racial minorities. So their minority status is accepted.<sup>11</sup> That is not the issue. Because both qualify for that minority status in several more ways than necessary—in fact, by *all* of the means *possible*, one could naively think that minority status was constructed to *define* the status of such groups—

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by Black jazz, blues, and spirituals, for instance, and the poetic forms of Langston Hughes have become more typical of American poetry than the traditional British forms.

<sup>11</sup> India currently contests applicability of CERD to both SC and ST. In India’s tenth to fourteenth reports to the Committee on Elimination of Racial Discrimination, India claimed that it did not need to report on the condition of the Scheduled Castes. The Committee disagreed. See <http://www.hrw.org/reports/1999/india> on the Internet, Appendix E: The Concluding Observations of Caste of the Committee on the Elimination of Racial Discrimination, 49<sup>th</sup> session, 17 September, 1996.

many American Blacks, for instance, assume this. But Blacks and the Scheduled Castes were not and *cannot* have been the prototypes of minorities under these two conventions. At least, they could not have been if the conventions were designed intelligently *to protect* such minorities. But then the committee members that designed the conventions were chosen they the dominant groups of their respective nations, rarely belonged to minority groups, and were not elected by such groups. Never having worn it, they did not really know where the shoe pinched.<sup>12</sup>

Thesis 2: ***Minority Status under International Human Rights Law does not capture the Salient Legal Features of the Position of Blacks and the Scheduled Castes.***

The legally significant similarities between the Blacks and the Scheduled Castes do not end with the features Article 27 identifies. Consider the following:

1. Both were traditionally used as disposable labor—and as disposable people.
2. Both were traditionally forced to do the work no one else would do.
3. Both were traditionally the cheapest possible sources of labor.
4. Traditionally, both have been physically excluded from all the amenities of the majority culture: neither could not enter the houses of the dominant groups or could only enter through servant's entrances, and so on. In India this exclusion was the subject of extraordinarily complex rules which, if broken, also made the upper castes vulnerable to the need for ritual purification, and so were enforced against both sides.
5. Both traditionally have been subject to a firm rule against intermarriage, but the dominant group was allowed to use lower group women with impunity and without responsibility for the resulting children.

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<sup>12</sup> I ask those who regard this as an ad hominem argument to reflect on the law of evidence. To be qualified as an expert witness one needs to show a unique relationship between the knower and the known. A truck driver can be offer expert testimony on how a Ashok Leyland lorry handles. A hotel maid can be an expert witness on what hotel guests leave behind in their rooms. Who, then, is an expert witness on the inconveniences of being born Black?

6. Both were excluded from interdining. (In India this was a greater preoccupation of the upper castes because of the numerous religious rules regarding food; the Scheduled Castes were not allowed to touch water for the upper castes, and could not serve or be served by Brahmans.)

7. Both were regarded with visceral repulsion; the dominant group claimed the subordinate group smelled bad, was dirty, uncouth, unclean, and contaminating. This visceral repulsion recognized under Hindu law as a subjective corollary of ritual purity; Christianity in the southern states introduced the doctrine that Blacks were cursed because they were the children of Ham, who was cursed because he saw his father, Noah, naked.<sup>13</sup> The notion of ritual impurity was thus entwined with the emotional response. The two together formed the basis for casual behavior by the dominant groups which would have been considered tortious or criminal if inflicted on any other group. The emotional climate the threat of visceral disgust creates<sup>14</sup> is the basis of the sense of inferiority dominant groups sought to instill in Blacks and the Scheduled Castes. Behavior which did not exhibit the indicia of inferiority was held socially punishable.

8. The family structure of both Blacks and the Scheduled Castes is looser than that of the dominant culture. This is generally the result of hardship: Black family members during slavery were frequently sold separately, so traditionally the family core was a mother and her children. Later, Welfare discriminated against married women. Black and Dalit women were

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<sup>13</sup> This bit of vicious Southern Baptist nonsense reveals the personal guilt and shame Whites felt towards Blacks. The White preachers were unconsciously saying that they were punishing Blacks for having seen White authorities naked—for having seen Whites as they are, not as they wish to present themselves in public.

<sup>14</sup> Disgust is such an effective instrument in creating a sense of inferiority because every human infant is exposed to the threat of it when completely vulnerable before and during toilet training. Fecal excretion invariably interrupts feeding and cuddling, usually with some sign of irritation, distaste, or rejection. The only threat greater than the mother's rejection because of fecal excretion is her refusal to feed. Throughout childhood—and, if the social training is successful in adulthood--disgust readily calls up the original vulnerability and so is useful for the dominant group to assert superiority and authority.

often subject to sexual abuse, prostitution, and concubinage by White and upper caste men. Dalit women were often required to go bare-breasted.

9. Both groups were for centuries<sup>15</sup> excluded from education. Until 1865 it was illegal for any person to teach a southern Black in the South to read. The Laws of Manu prescribed the punishment of pouring molten lead in the ears of any lower caste person who heard the Vedas recited.

10. Both were traditionally cheated in money dealings because they had no legal recourse, no social connections, no political power, and no education.

11. Both were intentionally degraded and humiliated. For more than a millenium in India, Untouchables were forbidden to wear silk, adornments other than black iron, sandals, or even clean clothes, had answer to names like “Dirt” and “Slime,” and were sometimes forced to eat dung.<sup>16</sup> In America the ritualistic degradation of Blacks before 1960 is well known to every American of sufficient age. Every Black and Scheduled Caste person in either country over the age of 50 can remember clearly a time when otherwise actionable words were so routinely uttered

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<sup>15</sup> Legal mandates for the inclusion of both groups in educational institutions has progressed over roughly the same time period. The British began sporadically to challenge caste segregation in schooling after the Revolt of 1857. Jyotiba Phule began accepting S.C. students in the 1870’s, when schools for Blacks were first being built in the South. Until Independence in 1947, S.C. students were routinely segregated in some way; if they were allowed into schools, first preference was for a segregated school, and if none existed, they were often made to sit on the veranda. This sort of regime became illegal in 1949 in India with Articles 16(4), 17, and 46, and in 1951 with 15(4), and in 1954 in the U.S. with *Brown v. Board of Education*, but changes in fact have been slow and irregular since then. In the U.S. the actuality of integration has been primarily a function of the degree of segregation of housing from district to district, and quality of schooling has been largely a function of the degree of anomie in a district. In India the actuality and quality of education for S.C. students has depended primarily on the degree of urbanization.

In one significant legal feature this general parallelism is weaker. Affirmative action has a constitutional basis in India it does not have in the U.S. In the U.S. the status of educational affirmative action programs has been a creature of Supreme Court decisions, and began to be restricted by *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978.) Affirmative action may be expected to continue to deteriorate at least until at least half of the current Reagan and Bush appointees retire, which is unlikely before 2020. Indian affirmative action in education has a direct constitutional basis that needs to be renewed every ten years. Renewal is probable because reserved Lok Sabha seats put a sufficient number of S.C. candidates in office to exert political pressure when necessary.

<sup>16</sup> Bhimrao Ambedkar’s “The Annihilation of Caste” in *Collected Works*, Vol. 1, (Bombay: Education Dept., Gov’t of Maharashtra, 1979) contains the most extraordinary listing of the forms of degradation I know of, even though he did not include all the examples *he* knew of, others being scattered through his work.

against his or her family and friends that degradation and humiliation had to be regarded as the norm for their groups.

12. Both were and are lynched when the dominant group wants to put them “back into their place” if they’re “getting uppity.” In the U.S. lynchings peaked between 1890 and 1950; in India atrocities have been increasing over the thirty years. This is a social guerilla war initiated by the dominant group against the weaker group. Some counter movements, such as the Black Panthers, MOVE, the Black Muslims, and the followers of John Williams in the U.S. and, in India, the Dalit Panthers and the Naxalite Movement, have advocated self-defense, (and, at times, retaliation) and have been violently suppressed.

13. The militant movements of both are close: the Black Panthers and the Dalit Panthers, the role of Ambedkar in the mass conversion to Buddhism in Maharashtra and the role of Elijah Mohammed, Malcolm X, and Lewis Farrakhan in conversion to Islam. The link between militancy and religious conversion demonstrates a widespread belief among the weaker groups that one purpose of the dominant religion was to suppress them, and that, for them, belief in the dominant religion amounted to self-betrayal.

14. Marxism has been tried and failed in the movements of both groups. In India the Scheduled Caste perception has been that Marxism and Marxist-Leninism are controlled by the upper castes and represent landlord interests. In the U.S. the dominant Black perception is the Marxism is a White intellectual movement, even a Jewish movement, which attempts to manipulate them and does not respect them. In both cases, however, the official policies of the Marxist parties have been non-discriminatory and solicitous, and have certainly paid more attention and given more real aid than any of the other parties. But there is no generally credible Marxist position on the relationship between oppressed minorities and world revolution.

None of these similarities count in the international definition of “minority.” Yet most of them derive from legally defined actions and have legal implications. If two such groups having virtually no historical connection can be found on opposite sides of the world, and when the legal conflicts surrounding both groups have been equally intense, why does the ICCPR not provide any legal definition of a minority going to the heart of their predicament?

There are supposed to be two answers:

1) The other similarities are supposed to be a collection of injuries covered under the individual provisions of human rights law, and the overall mandate that rights are to be recognized without discrimination.

2) CERD is supposed to take care of the problem.

But these answers are inadequate.

1) These are not only individual injuries because they are caused by a once intentional group *strategy* of discrimination and

2) CERD, though adequately listing the relevant rights, does not take care of them because it too addresses the problem only as one of individual rights and because the enforcement mechanism is so weak as to be non-existent.

Some of the assumptions behind human rights law may be misleading.

1) The concept of “minority” is assumed to be the significant concept in dealing with the problems of Blacks and the Scheduled Castes. The doctrine behind this assumption is that the nations in which the problematic “minorities” are to be found are “democracies,” and that in democracies, majorities rule. Therefore any group which constitutes a majority can make whatever laws it wants, hence can adequately protect itself, and consequently needs no protection under international law. Under this doctrine, the position of Blacks under Apartheid was purely

anomalous, and so, the international community asserted, the special 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid could take care of that sole instance in which a minority ruled a majority.

But do majorities actually rule in most countries? Or is it simply that it has become *de rigueur* for a government not to admit that, in any salient sense, it does not represent a majority? If they don't, then minorities do not have the problems they have because they are minorities, but because they are powerless—politically, economically, socially, and psychologically.

2) Discrimination is regarded as an offense against an individual. If a White shopkeeper says, “You Nigger,” he is offending the individual he is speaking to *only if it is offensive to be Black*;<sup>17</sup> if an upper caste man says, “Stay out, you Chammar,” he offends *because being a Chammar* was regarded as *per se* offensive.<sup>18</sup> If it is not offensive to be Black, there is no offense. Therefore there is some offense against all Blacks. There may *also* be an offense against an individual, but it is logically impossible for that to be the *only* offense. Three defining features of discrimination are that the rationale, purpose, and effect of the discriminatory act are a) that the actor performs the act because he believes his victim is a member of the group he dislikes, b) that

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<sup>17</sup> When racial discrimination was in its heyday in the United States, knowingly and *falsely* to call a man Black constituted the tort of slander. It was not tortious to call a Black man Black; a Black man had “no right a White man is bound to respect,” as the Supreme Court pronounced Dred Scott in 1857. Such speech was slanderous because it could result in other people’s treating the individual as a Black: that is the consequence that could constitute the financial injury entitling the plaintiff to compensation. The implication is that the court acknowledged that individuals believed by the community to be Black suffered financial losses Whites did not suffer. Therefore the court had admitted that Blacks were financially injured *because of their group membership*.

<sup>18</sup> The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, has a more communal basis in this sense than the individual right basis of U.S. civil rights law. The Indian act is the focus of much contention because of irregularities in its enforcement. The upper castes resent it because the standard of evidence required for conviction is alleged to have been so low that mere assertions like “he abused me” has been taken as proof of discriminatory insult. The lower castes, on the other hand, resent what they regard as the act’s utter *lack* of enforcement; less than 5% of cases result in conviction. The act categorizes 15 offenses as “atrocities.” Because these offenses vary from the act of one who “10. Intentionally insults or intimidates with intent to humiliate...in public view” and obstruction of passage to rape, wrongful dispossession of land, forced evacuation from a residence, and malicious prosecution, uses and abuses of the act are necessarily highly variable. In India, as in the U.S., the crucial issue at trial tends to be the judge’s interpretation of the nature of intentionality required by the act and the sort of evidence required to prove it.

he performs the act with the intention of injuring the individual as a member of that group, and c) that his action has the effect of injuring the individual's sense of his membership in that group.

Definition: *The term “prejudicial exploitation” in this paper designates a dominant group’s shared complex of feelings, concepts, justifications, and actions which effectively exploit a weaker group by excluding, degrading, and intimidating it. The dominant group maintains the weaker group’s distinctness through law or custom implying that the weaker group is so inferior that intermarriage pollutes the dominant group.*

Thesis 3: *White treatment of Blacks in the United States and caste Hindu treatment of those outside the varna system are prototypes of prejudicial exploitation.*

Caste Hindu treatment of those outside the Varna system is similar, as is White treatment of Blacks, Asians, and “Coloureds” in South Africa, Yamato treatment of the Eta in Japan, French treatment of Algerians, British treatment of West Indians, and Israeli treatment of Palestinians.<sup>19</sup>

The treatment of Blacks by Whites in the United States, despite differences in its origins, is startlingly similar to the treatment of the Scheduled Castes by those within the Varna System in India. The cultural concept of caste which provides the framework for the social practice of castism has little<sup>20</sup> or no basis in race. But the cultural concept of race underlying the practice of American racism also has no clear basis in race.<sup>21</sup> First, modern genetic studies indicate that races

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<sup>19</sup> Spanish descendents’ treatment of the descendents of the Incas in the Andes has many similarities; others it shares with treatment typical of White treatment of indigenous peoples such as Native North Americans, Australian Aborigines, and the Maori in New Zealand.

<sup>20</sup> Shrirama, in “Untouchability and Stratification in Indian Civilization,” in S.M. Michael, ed., Dalits in Modern India, Vision and Values, (Delhi: Vistaar, 1999), gives a plausible explanation of the degree of racial distinction involved in castism on pp. 42-43. She argues that the distinction made by the earliest Aryans was purely racial, but that these Aryans, having a high ratio of men to women, intermarried. As successive waves of Aryans of greater racial purity entered India, Aryan priests already in positions of power in India converted the racial distinction into a ritual one in order so that the earlier waves would not lose their dominance.

<sup>21</sup> In the United States before Emancipation the general rule was that race was traced through the mother. This was a convenience for slave owners who wanted sex with female slaves but did not want the resulting children to be able to claim any inheritance rights. After emancipation, most of the South adopted the “one drop rule” by which an individual was held to be Black if a single Black ancestor could be found. Both rules allowed so much White ancestry in the Black community that many American Blacks are lighter than many American Whites—particularly

do not exist.<sup>22</sup> Hence the verbal paradox that races do not exist but racism does.<sup>23</sup> Caste and race are both cultural constructs designed to justify the behavior one dominant culturally identified group metes out to weaker culturally identified group. I do not claim that castism is identical to racism, but that the relationship of those within the caste system to those excluded from it has the same function as the relationship of Whites to Blacks.

**Thesis 4: *The gravamen of the complaint of those injured by exploitative racism is that the injuries inflicted upon them were recognized crimes and torts when committed against members of the dominant group, but that the dominant group conspired to grant themselves immunity to commit those crimes and torts for profit, and that the profit, power, and prestige they thereby gained still supports their heirs, who still use those benefits to the further injury of the exploited.***

This is the ultimate grievance that conditions all the other complaints of the injured groups. It concerns prejudicial *exploitation*, not racism or castism. Rulers of capitalist countries would address the issue of prejudice, (capital being colorblind, as is so often claimed)<sup>24</sup>, but would not

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Sicilians, for instance, who have Carthaginian ancestors, and many Spaniards, who have Moorish ancestors. Consequently the cultural definition of race in the United States has only a weak connection to the history of “races,” however they are defined. Divisions within the Black community, moreover, have less to do with “race” than with provenance: Blacks from the Deep South often find little in common with Blacks from the West Indies, both being alienated from Inner City Blacks in the North. (These divisions are analogous to the divisions between different Scheduled Castes, such as the Mala and Madiga in Andhra.)

<sup>22</sup> The Harvard geneticist Richard Lewontin claims that 98% of the human gene pool exists in every group of 1500 individuals, no matter how isolated, but that any two individuals chosen at random share only 38% of their genes. This implies that individuality is 31 times as significant in differentiating individuals as any group of “racial features” can be in differentiating any two groups. Therefore, no matter how one cares to define race genetically, the result is biologically trivial.

<sup>23</sup> “In fact, as a geneticist, I believed that, thanks to biology, I could help people see things more clearly by saying, “You talk about race, but what does the word mean?” And I showed them it couldn’t be defined without arbitrariness or ambiguity... In other words, there is no scientific basis for the concept of *race* and, as a result, racism must disappear. A few years ago, I could have argued that in making that statement I had properly discharged my role as a scientist and a citizen. And yet, though there are no *races*, racism certainly exists!” Albert Jacquard and J.B. Pontalis, “Entretien: une tete qui ne convient pas,” in *Le Genre humain*, no. 11, 1984-5, p. 15, quoted by Michel Wieviorka in *The Arena of Racism*, (London: Sage, 1995), p. 1.

<sup>24</sup> Marx asserted this, but Marxists have traditionally asserted that racism and castism would disappear with the demise of capitalism, often with the implication that capitalism develops and uses racism and castism to keep wages down, and that without capitalism they will lose their motive force. Stephen Burman in *The Black Progress Question*:

admit to economic exploitation. In the U.S. race is a constitutionally protected category, but poverty is not; nothing can interfere with the “right” the constitution mythically grants, the “freedom of contract,” which Marxists correctly perceived as the freedom to exploit. Marxists consequently properly took up the issue of exploitation, but always minimized the issue of *prejudice*. To obtain that consistency with their theory which, they believed, would alone bring the victory of the working class, Marxists always insisted on seeing exploitation solely in terms of class and economics. Marxists claimed prejudicial exploitation would disappear in the classless state—a claim poorly supported amid the domination of Russians over other ethnic groups in the USSR, and of the Han Chinese over all other ethnic groups in China,<sup>25</sup> particularly the Tibetans.

Socialist countries generally have a somewhat better record in addressing the issue. Certainly India’s constitution is far superior to the U.S. constitution, but because group equality is a slowly evolving idea, it is unfair to compare a fifty-year-old document with one over two hundred years old. India’s legal structure remains superior for ethnic groups, however, even if one compares, say, the position of the two governments in 1954. When *Brown v. Board of Education* was initiating the U.S. federal move against segregation, India was already establishing massive affirmative action programs, an idea unheard of in the U.S. The problem in India has always been more of judicial administration and enforcement than of legislation per se. In India policy-makers receive poor or no feedback on the effects of law, and make little response to what evidence they

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Explaining the African American Predicament, (Delhi: Sage, 1995) analyzes the incoherence of this argument in his fourth chapter, “Everything and Nothing: Marxism, Capitalism and Black Progress,” pp., 75-100. That the Marxist argument about the relationship between capitalism and prejudicial exploitation is incoherent does not imply, however, that capitalism does not often aid and abet it, or that it can or will cure it. I believe the two sources of the Marxist incoherence on the point are failures to recognize two general rules. First, worldwide, prejudicial exploitation has been originally a phenomenon of one form of organic solidarity of *agrarian* cultures, and has partially adapted itself to industry and urbanization. Second, they’ve overestimated of the role of economics relative to culture, and this is part of the inheritance of the notion of the “rational man” in classical economics, which Marx unconsciously shared in his analysis of the bourgeoisie. Capitalists need not be proper capitalists either in seeking their own self-interest nor that of their group, either in “color-blindness” or in using race or caste to lower wages.

<sup>25</sup> See Frank Dikotter, “The Idea of ‘Race’ in Modern China” in Ethnicity, pp. 245-254.

have. In the U.S. documentation is so overwhelming that only skilled and experienced professionals can claim substantial familiarity with its history, and politicians select only evidence favorable to their own projects. These contrary circumstances, however, are equally anti-democratic, and neither results in substantial improvement of the bulk<sup>26</sup> of the exploited ethnic groups.

In all cases the winning construction of the evidence responds to and benefits the dominant group, and the nub or crux of the complaint from below is lost. That oneself, one's family, one's ancestors, and one's friends have been exploited merely because they belonged to one's own group, and that this exploitation in several aspects—economic, social, political, and psychological—will continue to be suffered by one's children despite the dominant group's legal disclaimer—all this the dominant group officially denies. The position of the dominant group amounts to this: "Since we're not going to do anything about it, there's no point in talking about it. If you want to talk, talk on our terms."<sup>27</sup>

**Thesis 5: *The basic reason that the grievances of groups injured by exploitative racism cannot be resolved by legal means, international or domestic, results from the fact that the***

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<sup>26</sup> It has become obvious in both countries that the creation of an elite group of Blacks or Scheduled Castes does not result in the improvement of the lot of most. Following upon the unavoidable perception there is a vociferous search for culprits. The elite groups themselves are frequently blamed for failing to uplift their fellows, but no clear standard is ever mentioned for how *much* a successful ethnic group member owes to less fortunate, less ambitious, or less capable members of his group. I find it impossible to believe that the average elite ethnic group member does not contribute a much greater portion of his time and resources to his community than the average dominant group member contributes to the suppressed group. If affirmative action is designed to compensate for injury, the recipient of such benefits cannot be viewed as having received anything more than he would have received had his ancestors not been oppressed. Not having received extra benefits, he can have accrued no new obligations. Hence the moral burden still rests on the dominant group, not the minority elite, and comparison between minority elite contributions to the minority community and dominant group contributions to the same community is proper.

<sup>27</sup> In the U.S. a huge ideological repertoire drawn from an array of social sciences, pseudo-sciences, assorted intimidating doctrines offers itself to justify this limitation on discourse. Those who will not concede the point are "extremists," "irrational," "anti-democratic," "incapable of democratic compromise," "uncivilized," "ignorant," "impolitic," "immature," "beyond the pale," "anti-social," "deranged," "repetitive," "grand-standing" "self-interested," "egotistical," and on and on. If name-calling is not enough, lectures on civic virtues, social norms, and human nature take over. In 16 years of regular attendance at public meetings on racial issues, though I heard contrary rumors, I never actually witnessed a White official listening openly and responding candidly. The real issue was always foreclosed.

*injuries such groups sustained were inflicted by operation of law. Such grievances are ineradicable so long as ex post facto laws<sup>28</sup> are prohibited.*

Governments operate, as it were, behind their own heavy corporate veils. But the issue is not just sovereign immunity, which is waivable, or veils that prevent one reaching the individual culprits, for the veils could be pierced--though no government has ever made itself liable for the legislation and enforcement of its own past unjust laws.<sup>29</sup> The real issue is that the government, in framing prejudicially exploitative laws, both claimed to have been acting as the agent of the state (a claim it cannot relinquish because it holds it to be the basis of its own legitimacy) and exempted its citizens from liability. Consequently no Black can sue because his ancestors were kidnapped, tortured, falsely imprisoned, extorted, and killed. The White legislators who made these torts and crimes legal, or who made actions brought on them nonjusticiable, cannot be sued or prosecuted no matter how much they profited from the laws they made. This exemption of the lawmakers, executives, and judges—of the entire governmental structure—is the root of the continuing injustice after the laws are changed.

Thesis 6: *The perceptions of justice of the dominant and the subordinate groups remain opposed as long as the members of the dominant group take their own group as their reference group and feel in-group loyalty.*<sup>30</sup> Members of the dominant group form their life plans in

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<sup>28</sup> There are, of course, many other bars, such as statutes of limitations, limitations on the legal vulnerability of the deceased, various rules of evidence, statutes of limitations, restrictions on class action suits, the doctrine of *locus standi*, and so on, but the others are subject to statutory change. The prohibition on ex post facto laws is of a constitutional order in the U.S. and India. Lon Fuller argues in *The Morality of Law*, rev. ed., (Delhi: Universal Book Traders, 1995) that the prohibition on ex post facto laws is one the eight features of the “internal morality of law,” and therefore necessary to the functioning of *any* legal order. By this he seems to mean that no legal order which institutes ex post facto laws will be able to maintain its claim to legitimacy. (But perhaps he imagined the citizenry was composed of the Yale and Harvard law classes he routinely taught.)

<sup>29</sup> .Such liability has been *imposed* on two German governments, and subsequently on Swiss banks, as a result of the Nuremberg trials, but no government has done this voluntarily, and it has not occurred without the accession of a new government. The assumption of such liability seems to be a revolutionary act.

<sup>30</sup> By focusing on the exploited groups rather than on the interaction of exploitation, Indian law has confused an essential issue. The relevant issue in determining whether a person is discriminated against because of race or caste is **not** whether the subjugated individual feels loyalty any group but merely whether the dominant group believes him to

reference to other members of their group. Each White, for instance, believes she should be able to possess and achieve what her relatives and friends possess and achieve. Every child imitates adults and avoids anxiety by idealizing parents. In overcoming the barriers to the dominant group's acknowledgement of the claims of the suppressed group, in-group loyalty of the dominant group is a more intractable problem than their hatred or derogation of the out-group. Members of the dominant group see the surroundings of their childhood as givens; their parents, they believe, owned and did what it was natural and right for them to own and do. If the ancestors of the upper castes and Whites exploited Untouchables and Blacks, that, they believe, was the way of life of a former time and has no moral implications for the present. The fact that the dominant group's current projects in life *depend upon* the results of that exploitation is invisible to the dominant group. The dominant group always regarded the exploited as *too insignificant* to be depended upon. The upper castes and Whites thoroughly believed that Untouchables and Blacks either depended *upon them* or were totally irrelevant to their lives.<sup>31</sup>

Exploitation, however, cannot be ended unless the exploited realize that their labor has value. Treating one's own present and future labor as valuable, a complex of attitudes and

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belong to the subjugated group. On this issue U.S. law is clearer, probably because it did never assumed any intimate connection between ethnicity and religious affiliation. Hence the issue of whether a Black Muslim was still Black, quite properly, has never arisen; it would be regarded as a patent violation of the First Amendment to assert that a Black could be disintitiled under an affirmative action program because of conversion. I would think that the Indian Constitution's doctrine in the Preamble that India is a secular state, together with Article 15's prohibition of discrimination on the basis of religion, could and should be used to combat rulings that because of conversion to Islam or Christianity a member of the Scheduled Caste terminates membership in his caste. It is true, though irrelevant, that sociological studies of S.C. religions indicate that the caste structure is maintained within churches and mosques. Because the reason for scheduling the Scheduled Castes was compensation for discrimination by the rest of society, not religious preference, the special benefits which are offered to compensate for that discrimination should not terminate upon alteration of an adventitious feature.

<sup>31</sup> The Afrikaners' social perceptions, for instance, were often so distorted that when the inexpungable fact of their dependency on Blacks returned to them on the verge of revolution in the late 1980's and early 90's, they believed that Black laborers oppressed *them* by working for them. Right wing Afrikaner groups trained themselves in the belief that Blacks had afflicted them with by making them depend upon Black labor; because of this, they were all vulnerable to Black gardeners, cooks, and maids who knew their habits. They needed to free themselves from Black labor so that they could ban Blacks from White areas and send them "back" to their "homelands." It became a patriotic and heroic act to fold one's own lawn chairs after use. See Gerhard Schutte, What Racists Believe, (Delhi: Sage, 1995) pp. 101-139.

behaviors necessary for a productive life in a complex society, logically leads to the reflection that one's ancestors' labor had value also, then to the reflection that the reason one now faces one's current predicament is that *their* capacities were undervalued. The grievance is complex. It is not simply that one's ancestors' *labor* was undervalued, but that their *lives* were undervalued.

Because their lives were undervalued, they were prevented from doing the work they were capable of, pursuing their loves and dreams, creating better lives for their children, creating a community. Whatever of these things they could do—and of course they could not have survived had they not managed some of them--they had to do under duress and secretly. The injury one to one's own life one then feels is intrinsically a *group* injury. This creates what appears as a paradox to the dominant group: the personal transformation that enables one to enter professions of responsibility includes not only a rebellion against conservative members of one's exploited group, but a deeper identification with one's ancestors and community, a taking on of group grievances. This is the essence of what the conservatives of the dominant group will not tolerate. This makes them vicious.

**Thesis 7: *Whenever leaders of the injured group believe that a particular grievance has found no remedy, this ultimate grievance, looming always in the background, can be brought forward to claim that the unsatisfactory resolution of the particular complaint is merely evidence of the illegitimacy of the current authority. The more this claim is made, the more the society polarizes because the dominant group will reject both the claims that it is guilty and that its leadership is illegitimate.*** In the United States this process began with the assassination of Martin Luther King.<sup>32</sup> The primary expression of it has been the inner city riots from his death to the present. Whites refuse to admit the obvious message of the riots, that many Blacks believe

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<sup>32</sup> In this subsection I will deal only with the U.S. I do not yet know India well enough to make a similar analysis, but I will be surprised if there are not similarities.

there is no reason for them to have any stake in U.S. society, because Whites will not consider the possibility of the illegitimacy of their own rule.

A dominant majority does not need to consider how its actions make it be perceived from outside or below. It also need not take responsibility for the actions of its politicians towards the subjugated—nothing prevents each dominant group member from believing either that the politicians act independently or that they act at the behest of the powerful, the majority of the dominant group, or the majority of society.<sup>33</sup> For most American Whites, the situation never arises when one must be personally accountable for actions and attitudes towards Blacks. There is always some intermediary, or one is always observing a convention, or one always has others on one's side who think the same way. Whites do not make racism an issue for other Whites, and they rally round, covertly if not overtly, when Blacks make it an issue. So the dominant group is protected from perceptions of themselves contrary to those they desire.

When Whites find, then, that Blacks believe they are personally guilty because they share in the benefits procured by the guiltier, or even because they were complicit, the White reaction is that this attribution of group guilt is quite insane. Whites do not feel this because they lack negative feelings and attitudes towards Blacks, but because they believe they have not visibly acted upon them differently from other Whites, and so should not be singled out. And the question of sharing in the spoils does not arise for them because they believe all legal money is good money.

Yet for inner city Blacks, the rationality of rioting is becoming and more plausible. Whites own nearly everything in the ghetto. White owners charge exorbitant prices for poor goods and services. When the ghetto burns down, White administrators hold hearings, change administrative

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<sup>33</sup> The most that has ever been achieved in the best governments is some accountability of officials to voters. But what has ever made *a voter* accountable (as opposed to being *intimidated*)?

procedures, and find emergency housing. When the ghetto doesn't burn, White administrators tell themselves the Blacks are happy. For these circumstances, everyone holds "the system" responsible. So a growing proportion of Blacks come to regard "the system" as illegitimate.

Thesis 8: *International Law has no answer to the grievances of the victims of prejudicial exploitation.* In negotiations for the ICCPR and CERD the Indian delegation stated the relevant facts more clearly than any other. It offered the reservation system as a model for resolution of the problems created by exploitative racism—and India has gone further legally in this effort than any other country. But it has become apparent that India's version of affirmative action is little more successful than the American version. Resolution of Black and Scheduled Caste grievances would take a much greater expenditure of social, economic, and political energy than either government is willing to consider. I know of no nation that has resolved the issues of a history of exploitative racism.<sup>34</sup> Because no nation has accomplished the feat<sup>35</sup>, there is no international model for how it can be done. Because there is no international model, there is no nation able to advocate one, and no convention built on such a model. All the existing conventions are designed on assumptions that misrepresent the grievances of exploitative racism. Customary law, of course, is even worse than the conventions. Under the traditional structure of international law, peoples have no rights whatsoever because they are not subjects of international law and have no legal personality; they are only illegitimate competitors of states, hence groups of potential traitors.

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<sup>34</sup> The closest to a model of resolution is Canada's policy toward the Quebecois. British Canadians exploited French speakers for cheap labor for over 200 years, though the bases of the exploitation were linguistic and ethnic rather than racial, and the degree of exploitation was never as severe as exploitation under slavery, sharecropping, or confinement to the rules of the Scheduled Castes. The problems the history of exploitation created, however, seem to be nearing solution now that the Quebecois control Quebec. Quebec is Canada's wealthiest state, and it came to the verge of withdrawing from the Canadian federation altogether by referendum. Neither India nor the United States seem close to relinquishing a large and wealthy state to the Scheduled Castes or Blacks.

<sup>35</sup> The largest transfers of money for injuries to members of a racially victimized group have been required by the settlements of the civil suits following in the wake of the Nuremberg Trials; the governments of former East and West Germany--and Swiss banks--have delivered billions of dollars to the descendants to Jews killed in concentration camps. But those settlements followed from defeats in war. No government has ever attempted such a resolution of

Thesis 9: *Domestic provisions of U.S. and Indian law, being logically and morally inadequate as responses to the ultimate grievance of prejudicial exploitation, can only be judged adequate as political compromises that temporarily keep the peace.*

A) *The American Position*: In the U.S.A. since 1860 there have been two aborted movements to improve the actual position of Blacks. Both resulted in substantial legal changes but had little social and less economic impact than their initiators had projected. Emancipation, begun in 1862, completed legally in 1865, made permanent through the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments and implemented through the Civil Rights Acts, by 1875 was already being subverted by the abandonment of Reconstruction and the institution of sharecropping and the Jim Crow laws—the basis of segregation which Plessy v. Ferguson in 1897 made constitutionally secure. The Civil Rights Movement, which arose in response to the N.A.A.C.P. Legal Defense Fund’s strategic litigation triumphing in 1954 in Brown v. Board of Education of Topeka, Kansas, and peaked in the passing of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, has failed to reach its original goal of desegregation over the last thirty years for several reasons. First, selective enforcement of the 1974 mandatory sentencing requirements for drug-related crimes resulted in legal stigma attaching to the families of newly criminalized young black men. Second, local zoning ordinances and White litigation prevented the building of low-income housing near White middle class neighborhoods. Third, increasingly drastic court restrictions on affirmative action programs have prevented such programs from having any effect on the great majority of Blacks. Fourth, the use of property tax to fund education<sup>36</sup> and the requirement that

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its own volition, and no international court has ever ordered such compensation by a government which has not acceded to the guilty government. See section II D 4 below.

<sup>36</sup> The impetus of *Brown v. Board of Education* for equalization was first broken in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, (1973.) The Supreme Court ruled that the equalization of *funding* of schools was purely a creature of state, not national law. This made other issues of equality relatively trivial, and it set a limit on the equalization of schooling that was determined by allowable inequality of housing, and the inequality of taxation which could be based on it. Most Americans failed to perceive the racial significance of the case because in the

public education follow political divisions have maintained segregated education on the basis of segregated housing. U.S. courts have always been so impressed by property rights that their most fervent attempts to fulfill the promises of *Brown vs. Board of Education* stopped dead in their tracks whenever a property issue arose. Despite the much-acclaimed legal victory of the Black community, its economic position vis-a-vis Whites peaked in the late 1960's and has steadily deteriorated since then. Consequently U.S. Whites are now in a position to claim that institutional racism has been abolished, that Blacks are now on an equal footing with Whites, that they have received all they are entitled to, and that any injury they claim is their own fault. This has become the official position of the Supreme Court with its current Republican appointees, of the U.S. Congress with its Republican majorities in both houses, of the U.S. executive, with its compromising President, and of the dominant power structure of nearly all U.S. institutions below them. There is some residual affirmative action, most notably in liberal universities and some inner city public schools, but since the *Bakke* decision in 1977, the Civil Rights Movement has been fighting a losing rear-guard action.

Why has the Civil Rights Movement twice failed to produce permanent actual improvement in the social, economic, and political lot of the Black community despite notable legal victories? This experience is so bitter that some of the finest minds of the movement now believe that racism is a permanent and ineradicable feature of American life: Derek Bell took this position in the early '80's, at the very moment when the Supreme Court and the conservative establishment were proclaiming that racism had been eliminated in the U.S.. Regarding the

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district where it arose was the relevant minority was Hispanic, not Black. Hispanics did not and do not have the claims under federal law that Blacks have because they were never enslaved in the U.S., and thus have a status analogous to the Other Backward Classes in India. Hence it was politically astute for the Supreme Court to announce the economic limitations on its idea of equality in a case involving Hispanic children, on whom its overall effect is actually somewhat less than is the effect on Black children. Whenever the courts have been able to assign a group injury to the effects of poverty rather than race, they have done so because poverty is not a constitutionally protected category, as race is.

quality of the nation's racism, the current divergence of opinion between influential Blacks and Whites could not be more extreme. Intellectually the country is as polarized on the issue as it was at the outbreak of the Civil War. But in the Civil War, for economic reasons, Blacks had the military and economic power of the North temporarily on their side. Now there is no prospect of any improvement by violent means because Blacks are a small and scattered minority, unable to control more than a few inner city areas, and sure to be wiped out in a rebellion, as the Move incident in Philadelphia in 1985 demonstrated. And if Blacks have no hope for change by violent means, they have also lost hope for change by non-violent means. The White establishment has made it clear that it has "given" all it will "give;" Blacks, it says, are entitled to the legal rights of Whites, not to any economic amelioration of their circumstances, not to any political power except that gained by its own dogged assertion of its limited and fragmented electorate, and not any social power having its basis in what the state defines as private relations.

This is the predictable consequence of the liberal conception of rights: they are purely formal rights, rights based on hypothetical entities, not rights to actual things and actions.<sup>37</sup> But Marx imagined that the proletariat would be able to establish a new regime of actual rights because it would become progressively larger, more powerful, and more unified as capital accumulation fell into fewer and fewer hands. Blacks have no comparable hope of eventual dominance. To them their choices seem to be to "make it in Whitey's world," with inevitable compromise and inequity, to "return" to Africa, or to die fighting. The Black majority seethe resentfully but revert to the private sphere, where they pointlessly take out their frustrations on each other. One minority specializes in rallying discontent around outworn slogans which now get

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<sup>37</sup> In this context I find this Marxist position completely convincing. A formal right to property, for instance, means that if you can obtain or have obtained property, you have the right to remain in possession unless certain events occur. Under slavery and the rule of untouchability, Blacks and the Scheduled Castes never had any property, so their rights to property upon abolition of the disabilities under which they had suffered were purely formal.

only patent responses; another specializes in being, in Black parlance, “Oreos”—a name taken from a Nabisco cookie that is black on the outside but white on the inside—hoping to get as much as possible from the White world by assimilating themselves to White manners, a tactic the Black majority resents as the custom of traitors. Black separatism is on the rise, but it has nowhere to go. The prospects for most are not materially better than they were a hundred years ago; for those with historical sense, they seem worse, because once again apparent victory has turned sour.

B) *The Indian Position*: The legal history of the struggle of the Scheduled Castes has been different, but the actual results have been similar. If Indian officials were accountable and efficient, if funding were allotted in proportion to the legal rights involved, if funds were not siphoned off from public programs, and if the more general welfare programs had succeeded, then India’s affirmative action programs, the first and strongest of their type, may have sufficed to compensate the Scheduled Castes. A constitutional lawyer comparing the U.S. and Indian constitutions, their amendments, and relevant statutes, would have to say that Indian law is far superior for the prejudicially exploited. But the law in that sense exists only in a world of paper. In its *effective* sense, law is only and purely an *instrument* of human action. Sociologists and economists comparing the facts of the lives of the prejudicially exploited in the U.S. and India from 1865 to the present, or from 1900 to the present, or even from 1949 or 1954 until now, could not claim that their lot has improved more quickly in India than in the U.S. To attempt to reason from law to action is a *category mistake*: it’s like inferring from a carpenter’s well-equipped tool box that he lives in a stately mansion.

But one cannot infer from the existence of programs to benefit the Scheduled Castes that Indian law as a whole operates to benefit the Scheduled Castes. Such an inference indulges in the fallacy of composition—the assumption that what is true of a part is true of the whole. For what is

true of a part to be true of a whole, the proportions of the relevant aspects of the other parts would have to be commensurate with the qualities of the first part, or the proportion of the whole must be the same as the proportions of the part. Neither of these proportionalities exists. For instance, in 1976 the sociologists reported from Harayana,

A majority of the 500 household heads we interviewed for our study complained that they were excluded from the general aid programme of the government. Many asserted that their applications were either not accepted or they were rejected mainly on the plea that there were special provisions for them. Some said that they were clearly told to go to the "Harijan department." We learned that the general impression among the people, including the government officials, was that "the Harijans were lucky to have all these special provisions."

Most of our high caste informants, too, shared the same view. They said that Harijans should feel satisfied with the special privileges. In fact there was complete ignorance about the smallness of the budget and the myriad administrative problems. People who normally evince sympathy for the weaker sections and support the idea of special privileges know very little about the programme and feel complacent...

In order to get some idea of what this exclusion means for the Harijans, we may compare just one set of figures...only Rs. 200,000 was provided in the 1973-74 budget of the Welfare Deptment for the Scheduled Castes and Backward Classes, for business loans. Compared to this the Harayana Government allocated over 220 million rupees in the year 1972-73 as *takavi* and crop loans to the farmers. As we can see, this figure is a thousand times the amount provided for the Harijans. Had there been no special provisions for the Harijans and they were given a proportionate share of the bigger amount they would have got 44 million rupees. That would have been 240 times the amount they now get.<sup>38</sup>

Shocking as this is, by now the Critical Legal Studies Movement and Postmodernism should have alerted us to the power of legal and administrative distinctions to shape perception. The U.S. government and U.S. politicians, dealing with a public far better informed in finance and mathematics, routinely misrepresents similar discrepancies in comparison of Welfare programs to other portions of the budget.<sup>39</sup>

The Indian constitution contains numerous mandates for egalitarian programs which, if well administered and funded might have produced great benefits for the Scheduled Castes, though they are not on an order of magnitude to compensate for generations of exploitation. Upon the Constitution rest the world's first and broadest affirmative action programs. But the

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<sup>38</sup> Partap C. Aggarwal and Mohammed Siddiq Ashraf, Equality through Privilege: A Study of Special Privileges of Scheduled Castes in Haryana, (New Delhi: Shri Ram Centre for Industial Relations and Human Resources, 1976) quoted in Marc Galanter, Competing Equalities: Law and the Backward Classes in India, (Delhi: Oxford, 1984) at 66-67.

actual impact of a governmental program depends upon the totality of the forces acting on each individual—and this totality includes other governmental programs. The plight of the Scheduled Castes was not solely to be alleviated by programs at the Scheduled Castes; other aspects of their oppression (such as landlessness, ignorance, and bondage), shared by overlapping groups, were also to be addressed. When those programs are misconceived, underfunded, mismanaged, or otherwise unsuccessful, the relevant aspects of S.C. oppression have remained in place. Worse, and perhaps as commonly, as the previous quotation indicates, when the Scheduled Castes are denied access to more substantial programs offered to other parts of the population, the Scheduled Caste reservations become a sop thrown to them to divert them from the real resources of the society. The non-justiciability of statutory programs legislated under the auspices of the Directive Principles makes the administration of such programs liable to inequitable uses unaccountable to courts. Thus the very programs which are billed as egalitarian can increase or reinforce inequalities.

1) The funding level of programs for the Scheduled Castes is so low per capita that it is impossible to distribute benefits evenly:

Annual Per Capita Expenditure on Scheduled Castes and Scheduled Tribes for the Five Five-Year Plans [in Rupees]:  
Scheduled Castes

	1951-56 1 <sup>st</sup>	1956-61 2 <sup>nd</sup>	1961-66 3 <sup>rd</sup>	1968-74 4 <sup>th</sup>	1974-79 5 <sup>th</sup>
Education	0.20	0.66	0.98	0.85	1.44
Economic Uplift	0.01	0.15	0.17	0.20	0.51
Health, Housing, etc.	0.10	0.39	0.25	0.33	0.52
Totals	0.31	1.20	1.40	1.38	2.59 <sup>40</sup>

Though India is poor, such a level of funding must be compared with funding of other programs, such as the Harayana business loans just discussed. Rajiv Gandhi once claimed, moreover, that

<sup>39</sup> Noam Chomsky and Edward Herman analyze similar misperceptions in Manufacturing Consent: The Political Economy of the Mass Media, (London: Vintage, 1994). In 1992 William Greider analyzed the politics of the U.S. budget in Who Will Tell the People?

<sup>40</sup> Galanter, Competing Inequalities, p. 57.

only 9% of the money allotted for the average program ever got to its intended recipients. The general and justified belief that Scheduled Caste programs benefit only a small proportion of the Scheduled Castes seems to reflect the fact that, the programs being so underfunded, only individuals knowledgeable about administrative matters can gain access to them. This creates dissatisfaction and resentment on all sides and totally defeats egalitarian purposes.

It should be clear that such a funding level is not seriously intended to represent compensation for past injuries.

2) Article 31 mandates land reform. When the first land reform cases were brought, however, nearly all Indian judges were landlords and, trained in British traditions, paid far more attention to British property law than to the Constitution. Electioneering being expensive, most legislators were landlords also. The Congress Agrarian Reform Committee's 1949 program of "land to the tiller" never materialized. After a long series of reductions in scope, and widening of the definition of "tiller," requiring market value compensation to the landlord made the program impossible. Most of the Scheduled Castes remain landless day laborers. As in the American South at the termination of Reconstruction, the ruling agrarian class made the constitutional principles void in practice. When the basis and consequences of prejudicial exploitation were framed within the parameters of land issues, property law trumped them, as it did in the U.S. where Blacks did not get the "40 acres and a mule" promised them in 1865.

3) Article 45 provides that within 10 years (e.g., by 26 November, 1959) all children through the age of 14 shall have free and compulsory education. In 1958 the High Court of Kerala ruled that because Article 45 was a non-justiciable Directive Principle of State Policy, primary schools had no enforceable right to receive grants-in-aid.<sup>41</sup> That ruling stopped

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<sup>41</sup> *Joseph v. State of Kerala*, AIR 1958 Ker. 290 at 297 quoted in Durga Das Basu, *Shorter Constitution of India*, 12<sup>th</sup> ed., (Delhi: Prentice-Hall, 1996) at 305.

litigation for 35 years. Then the Supreme Court acknowledged that the time limit had passed.<sup>42</sup> India reported in 1995 to the UNDP that 38% of Indian children still do not reach the fifth grade.<sup>43</sup> A highly disproportionate number of those children are Scheduled Caste. The reservation system for higher education and government posts perpetually has a shortage of qualified Scheduled Caste candidates because primary and secondary schools are so inadequate.<sup>44</sup> This contributes to the division of the Scheduled Castes into a small elite which has access to programs and an “underclass” which remains in conditions similar to those of centuries ago.

Terrible primary education for U.S. Blacks, well documented by such writers as John Holt and Jonathan Kozol, has had a similar effect. During the 1970’s state universities in the U.S., on the basis of affirmative action court orders, received large influxes of Black students reading at the first to sixth grade levels. This enabled administrators to claim they had ended discrimination, but the only result for most of the Blacks was that they dropped out and faced the shame of having failed when having been “given the opportunity.” Of course, they had not been given the opportunity—for that to have been done would have required at least twelve years of decent education. “Equality of opportunity” arguments, in both countries, seem always to begin with the assumption that an ‘opportunity’ can be said to exist starting arbitrarily at any odd moment, and to ignore the prerequisites that enable one to take advantage of an opportunity.

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<sup>42</sup> *Unnikrishnan v. State of A.P.*, AIR 1993 S.C. 2178 asked “Can the state flout the said direction? Does not the passage of 44 years convert the obligation into an enforceable right?” Basu, 306.

<sup>43</sup> UNDP, *Human Development Report 1998*, (Delhi: Oxford, 1998) p. 147.

<sup>44</sup> This results in the complaint that reservations are cornered by an S.C. elite, a complaint Marc Galanter believes is not based on intentional behavior. “Such redistribution is not spread evenly throughout the beneficiary groups. There is evidence for substantial clustering in the utilization of these opportunities. The clustering appears to reflect structural factors (e.g., the greater urbanization of some groups) more than deliberate group aggrandizement, as is often charged. The better situated among the beneficiaries enjoy a disproportionate share of program benefits. This tendency, inherent in all government programs—quite independently of compensatory discrimination—is aggravated here by passive administration and by the concentration of higher-echelon benefits.” *Competing Equalities: Law and the Backward Classes in India*, (Delhi: Oxford, 1984) at 548.

Primary and secondary education<sup>45</sup> on a par with elite education is a prerequisite for such later opportunities.

4) The U.S. experience has demonstrated that segregation can be almost as effectively based on property law, zoning, and economic disparity as on legislation. Segregation by caste has not abated in rural areas of India; the Scheduled Castes still live on the fringes of villages, or in separate villages or ghettos. The assimilationist trend in Indian administrative thinking since Independence has imagined the time when reservations would become unnecessary because caste would not be a distinctive marker, but (as with racial segregation in the U.S.), the funding has never been available to change the material bases of castism, in this case, by residence. Property law again trumps compensatory laws, so the *practices* of segregation that created the physical design of villages can still perpetuate themselves on the basis of a set of conveniences and inconveniences the physical design in turn created.

5) Bonded labor is unconstitutional but still exists. A large plurality of bonded laborers are Scheduled Caste and in many areas most members of the Scheduled Caste are bonded. This prevents a large portion of the Scheduled Castes from changing professions, from migrating to cities, from challenging traditional rules, from accumulating capital and becoming independent, often from sending children to school, and keeps them in fealty to their traditional superiors. Article 23's right against exploitation remains unenforced because the plaintiffs and victims are of lower caste and class than the defendants. The bonded labor system is substantially the same as

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<sup>45</sup> James S. Coleman in Equality of Opportunity, (Washington DC: Government Printing Office, 1966) indicated that the achievement-correlated variables are actually the levels of education of a student's parents and friends' parents. If this is so, to become effective, a system of reservations has to include all levels of education and remain stable for several generations. This suggests that when a Black or Scheduled Caste child has *parents* who have achieved the average level of education, the reservation or affirmative action system *for that child* may be regarded as having accomplished its purpose. It seems more appropriate, therefore, to legislate such a phasing-out limitation on access to affirmative action programs in education than to persist in deciding whether the entirety of a program shall or shall not be renewed every ten years. The administrative thinking behind the Indian schemes suffers from the fallacy of division—assuming that what is true of the whole is true of the parts.

the sharecropper system that dominated the American South from 1875 until at least 1965. Nominally contractual, it has some of the features of slavery and some of serfdom. In both countries, because the exploited could never tell a judge, “I’m bonded *because* I’m S.C. or Black,” the judge could always claim there was no untouchability or racial offense. In both countries by fiat the law has proclaimed that economic condition is unrelated to ethnic background and, in order to keep the government out of the way of the interests of its ruling class, declined to act on economic injury. The Indian Constitution, again, is far superior to U.S. constitutional law, but in practice it doesn’t matter.

6) Child labor is tolerated in India. Although Article 24 bans children under the age of 14 from working in factories, mines, and any other hazardous employment, only its implementation through the Factories Act has ever had any impact on child labor. Most of that impact has been in limiting the most onerous working conditions and removing children from the most hazardous tasks. But the Factories Act affects the situation of only 15% of child laborers in any case; the other 85% have no protection. The majority of that 85% are agricultural, and in most places a majority of that group are children of Scheduled Castes. Child labor locks them in to futures no better than their parents’.

7) Benefits which, at the time of the Constitution, seem to have been intended primarily for the Scheduled Castes and Scheduled Tribes have increasingly been diverted to the Other Backward Classes, a group which has continuously grown. In Tamil Nadu two thirds of the population received reservations until the Supreme Court set a limit of 50%.<sup>46</sup> Marc Galanter contends that the chief failure of the reservation system for the Scheduled Castes is its dilution<sup>47</sup> by reservations for the O.B.C., whose constitutional mandate is much weaker.

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<sup>46</sup> *Indra v. Union of India*, AIR 1993 S.C. 477.

<sup>47</sup> Hence the title of his major work, Competing Equalities.

8) The traditions of Indian government were formed under colonial rule. Police were given authority which in European countries is reserved for prosecutors and judges. Actual administration of the country goes through the IAS and IPS, both elite and authoritarian services not publicly accountable. On the level of day to day interactions with the Scheduled Castes, the most significant representative of the government is the local police officer. Most police officers convey authoritarian attitudes towards the Scheduled Castes and assume the credibility of higher status people against them. Because most members of the Scheduled Castes are illiterate, their standard route of access to courts is through the written police complaint. Police frequently refuse to write out complaints on behalf of the poor, and the poor know of no recourse. As in American cities, the exploited are afraid to report crimes against them for fear they will be harassed by police. In the U.S. there is much talk about the “internal colonialism” of inner cities; in India, the police adopt the same role toward citizens that the British once had.

In sum, India too has not attempted the “uncharted plunge into comprehensive individualized justice,” in Marc Galanter’s words, because it, like the U.S., is a “diverse society with limited consensus.”<sup>48</sup> The waters of ‘comprehensive individualized justice’ will remain uncharted until Whites and the Upper Castes can admit how they have benefited from injuries to Black and the Scheduled Castes. That would constitute the necessary consensus.

**Thesis 10: *The logical and moral inadequacy of legal responses will remain in any society that does not adopt egalitarian principles. Hierarchical societies whose dominant groups have practiced prejudicial exploitation are therefore inherently unstable, perpetually entrapped in legal and moral battles over the injustice of their present order.***

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<sup>48</sup> Both quotations are from the last paragraph of Galanter’s Competing Equalities, p. 567.

Individuals can affect, but cannot control ideologies. “There is no army so powerful as an idea whose time has come,” as R.W. Emerson put it, and the time of Equality is arriving.<sup>49</sup> Every attempt to prevent its development leads only to tragedy or stagnation. Once a nation—or the world—has announced the ideal of equality, increases in the productivity and happiness of a polity can only occur by progressive assertion by the excluded that their capacities and rights should be advanced. The dominant never wish to relinquish control, for power is a visceral joy to nearly everyone, certainly to those who, raised under the willfully powerful, came to prize power as the only route to autonomy. But they can only keep their control either by withdrawing the promise—by saying, “Oh, no, justice and equality were only intended for a few people like us, we only meant that we would treat our friends and families as our equals, and we are fundamentally different from you”—or by trying to distort people’s perceptions, to keep them so ignorant or irrational that they cannot perceive the discrepancies between the announced ideal and the reality. The ruling group always tries both tactics. When they equivocate on the ideal of justice, however, they destroy the basis of their internal relationships, so that the elite cannot trust even their own families. They need their ideal to lead decent lives. So empires, like the Roman Empire, eat themselves out from the inside because the ruling elite refuses to subordinate its greed and arrogance to any general principle. When they try to make everyone stupid and

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<sup>49</sup> In 1869 John Stuart Mill wrote, “We are entering into an order of things in which justice will again be the primary virtue; grounded as before on equal, but now also on sympathetic association; having its root no longer in the instinct of equals for self-protection, but in a cultivated sympathy between them; and no one being now left out, but an equal measure being extended to all. It is no novelty that mankind do not distinctly foresee their own changes, and that their sentiments are adapted to the past, not to coming ages. To see the futurity of the species has always been the privilege of the intellectual elite, or of those who have learnt from them; to have the feelings of that futurity has been the distinction, and usually the martyrdom, of a still rarer elite. Institutions, books, education, society, all go on training human beings for the old, long after the new has come; much more when it is only coming. But the true virtue of human beings is fitness to live together as equals; claiming nothing for themselves but what they as freely concede to every one else; regarding command of any kind as an exceptional necessity, and in all cases a temporary one; and preferring, whenever possible, the society of those whom leading and following can be alternate and reciprocal.” From The Subjection of Women in On Liberty, Representative Government, The Subjection of Women, Three Essays by John Stuart Mill, (London: Oxford, 1969) pp. 478-479. I do not doubt that his prophecy will be increasingly actualized.

ignorant by pretending there is some essential human difference between the elite and the rest, or that equality really has been achieved, or that people really are developing and using their best capacities, all that happens is that they alienate the most earnest and intelligent, make everyone despair of learning and developing, and force the shrinkage of the productive capacities of the world. So there really is no way out for the elites except the expansion of equality. Like the Afrikaners, they can prepare to go to war with everyone and can try to contract their world to their own backyards. They can inflict enormous misery and waste their nations resources and the lives of their people decades and centuries. But unless the elites unite to get the entire world under their oppression, and squeeze it harder and harder, they cannot keep their power. And if they do manage to keep their power in this way, the waste of life can only increase exponentially. Like the Afrikaners, they will see that those who will not share their power must lose it, either by revolution or by destroying what they control.

The grievance of prejudicial exploitation will not go away because the perception of it is unavoidable in the psychological maturation of freedom. I cannot assert my moral freedom without believing I am free. My moral freedom is meaningless if I do not believe I assert it against other free moral agents. If those I assert it against are also free, so too were those who oppressed me, those who oppressed them, those who oppressed their ancestors and mine. All of these people made choices, limited and conditioned in myriad ways, but choices nonetheless. I cannot understand them without understanding that. I cannot imaginatively enter their company, and do not belong in it otherwise. Whatever philosophical plausibility I might find in determinism of one sort or another, freedom is an imaginative and intentional necessity.

If I deny that Blacks and Dalits were *intentionally* exploited, I kill the past and, in doing so, kill the future. I say, "Oh no, humans are solely creatures of convention. They cannot form

their own norms or values; their conventions came on them from the outside, and they were controlled by their culture, their economic position, their laws.” If that is so, how can we work our way out of the morass we are now in? Our culture, our economic positions, our laws have given us weapons of mass destruction, global warming, ozone depletion, overpopulation, mass extinction of thousands of species, pollution of the air, water and earth, surplus for the rich and starvation for the poor with yearly widening of the difference between them, epidemics of new diseases, and on and on. We must accept all these things? This passive view of the world’s activities will destroy us. We cannot adopt it. And if we refuse to, for large portions of humanity, the group grievance of prejudicial exploitation extending far into the past must rouse itself from conventional complacency. It is a concomitant of growth. Room had better be made for it, for the attempt to get the genie back into the bottle will only worsen all the other problems we have now. The door has closed behind us. In this new world, we will be increasingly responsible for our own acts. That we are observing conventions or following orders will not suffice.

### **Recommendations:**

#### **A) Interlude**

Lawyers are frequently misled by their profession-centeredness into the magical belief that merely passing laws can cure social ills, particularly where the laws confer only formal rights. This legalistic assumption prevents them from examining social life in sufficient detail and comprehensiveness to discover the actual causes of events. It will not help the causes either of clarity of thought or the creation of equality to begin with the legalistic fallacy of believing that whatever arises in legal expression must have a purely legal solution, or that if no immediate legal solution can be found, that one’s obligations therefore lapse.

In the case of invidious discrimination against oppressed groups, jurists believe that equality can (or ought to be—the distinction is often not drawn) achieved by eliminating legal distinctions between groups, or by making some types of discrimination illegal, or again by mandating reverse discrimination in some contexts. Such actions generally do not have the effects prospectively claimed for them. Changes in law are generally not sufficient to change social structures; political, social, economic, and psychological changes are required *in combination* with each other. Too often intimations of this need are used to defeat change: the argument that a second element is needed is used to deny the access to the first. The conventional order is not merely *legal*, it functions in all dimension of society, and when challenged legally, it is not passive but reasserts its traditional prerogatives by any social means available. When a law that has supported a hierarchical social structure is altered, the response of the dominant group within a decade or so is normally to find a new legal context in which to renew the supports and justifications of the former social hierarchy.<sup>50</sup>

### **B) Conditions of Policy Recommendations:**

In the face of this, what sorts of policies are needed to eliminate prejudicial exploitation and redress the grievances it has caused? As a member of one of the most dominant groups on earth, it is not my place to design a policy for everyone—especially not those my group has oppressed--but rather to design a way to take responsibility for myself in my concrete historical

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<sup>50</sup> Thus when American Southern Whites lost their right to enslave Blacks, they reestablished their conveniences on the basis of sharecropping, Jim Crow laws, and the institutionalized terrorism of the Ku Klux Klan. This Northern Whites allowed because they did not want to spend money on Reconstruction. When American Whites as a whole lost their right to segregate Blacks in ghettos and to prevent their participation in politics, they reasserted their ability to exclude and degrade Blacks by increasing the level of criminalization, raising the financial requirements for owning property through zoning laws, by refusing to alter locally variable property tax as the basis for education, and by defeating affirmative action and integrated housing plans.

The Indian pattern is somewhat different because of the practice Upendra Baxi calls “rule liberalism:” the law simply isn’t taken seriously. That practice seems to have two main sources, first the sense under British rule that law was merely an instrument of oppression, and so not to be obeyed; second the feudal practice of responding in all situations according to the rank of the actor in relation to those acted upon, rather than to the quality or effect of the

position, and then to follow it. Since the problem is inequality, what I want is a method of equalization.

First, because prejudicial exploitation occurs politically, socially, economically, and psychologically as well as legally, policies to eliminate it must address all those aspects of life. But if one attempts to address them all aspects *legally*, all one can do is to build a larger bureaucracy, which will *increase*, not decrease, the control of the dominant group. One can try to get around this by staffing the bureaucracy with members of the exploited groups. India and the U.S. have both tried this. The exploited groups end up on the bottom of the bureaucracy. So it is wise to be chary of recommending a lawyerly solution.

Second, it is important to recognize that exploitation is an activity of the dominant group, not the exploited group. So members of the dominant group, who have benefited from it, have more obligation than members of the exploited group. In the U.S., there is not a Black problem, but a White problem: *Whites* created, maintained, condoned, revised, and refused to give up the advantages of racism. In India, there's not an S.C. problem, but an upper caste problem: it was the pietism, the obsessive rigidities, the self-concern, the self-interest of the upper castes that created Untouchability. So one part of the puzzle is how to find better ways of addressing racism, castism, and exploitation.

Third, prejudicial exploitation is institutionalized. Lawyers and policy makers are institutionalized people. So it is first necessary to deinstitutionalize oneself. I write in the tradition of American Abolitionism.<sup>51</sup> The first ten theses of this paper explain why I believe the institutionalized responses—which are always responses of the dominant groups—are totally

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action. Bureaucracy, moreover, is so unaccountable and courts so slow that complaints about transgressed rights and suits regarding them become meaningless and exhausting rituals. Consequently many laws have little effect.

<sup>51</sup> I admire John Woolman, an American Quaker born in 1720, who was the first American to campaign against slavery. Moved only by his own religious reflections, for several decades he traveled through the American colonies

inadequate to create the peace that can only come from justice. When the institutions in which one lives and works—beginning with the legislature and courts--are dominated by the prejudicial group, one must begin by not accepting their solutions.

### **C) A Parable**

Our family is highly esteemed. For many decades we have given advice. We have told a poor family how to live. But one day a member of that family came to us with a paper charging us with crimes and torts against them. All the facts were correct. They are substantial. They imply that much of our wealth was extorted from the poor family. More disturbing, we not only knew the facts; the actions they indicated had been quite intentional. We had never seen them that way, not because we did not have those intentions, but because we believed everyone had gone on respecting us in spite of them, perhaps even *because* of them. We'd even been proud of them.

The poor family says they are going to court. We know the judge is a family friend. We do not need to bribe him. We do not even need to talk to him. We know he already knows the facts in the paper and holds us in high esteem anyway. His own family behaves the same way. In fact, we are in a position to appear to help the poor family. We can even call the judge and ask him to be polite to them, not to accuse them of a frivolous suit or contempt of court, and to give them good advice, and something for their troubles. People will praise our generosity. The judge will hold them up in court for decades and give a small settlement on drastically reduced grounds. Our children, grandchildren, and cousins will pay the settlement—better, it will come from a community award, no one will be individually obligated.

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successfully persuading slave owners in face-to-face conversation that manumission was the only moral course open to them. India, of course, has numerous similar traditions.

*What must we do?* First, the criminal should not advise the victim. The tortfeasor should stop advising the plaintiff. We must lay aside our claim to that role. Next, to take responsibility for ourselves, we should admit our guilt and start to make amends. We must change our lives, live on what we can earn without exploitation, and return much of our wealth to those who created it.

But these are only personal obligations designed to return us to a position more like the one we would have been in had we not acted unjustly. We know the charges are extensive, that similar charges will be brought by many other poor families against many other rich ones, and that even if we begin to act with some justice ourselves, the court will be unjust in our case because the judge will not set a precedent that will turn our community against him. We must deal with our community because they were the model for our injustice; they allowed it, encouraged it, in turn imitated it, praised it. And we must deal with the judge. He will rule in our favor even if we relinquish our defense and argue on behalf of the plaintiffs and victims. If we were sincere in our first step, we cannot allow the judge to vindicate us; we can't go back to our seats and say, "Well, if you say so, yes, it's true, they don't have much of a case." We must organize our community to deliver justice if the judge will not; then, when he begins to perceive that he will not be alone if he begins to change his rulings, he may begin to change.

Finally, we know we need new laws so that all the rich families like ours will not go on doing what we have done, and so that the poor families will be able to enjoy the fruits of their labor, and be able to labor more productively. But it is no longer our place to make the laws. The laws should, of course, be made by those who do the work and must obey them, but this principle, though clear as far back as 420 B.C. in the writings of Democritus has always been evaded in practice.

## **D) Four Planes of Responsibility**

### **1) Individual Responsibilities**

One cannot wait on institutions to act. If one intends to contribute to the solution of social problems the law had not solved, one must recognize an individual moral responsibility to dissociate oneself from the policies of oppressive institutions. It is insincere and self-deceptive to believe that by abiding by the norms of the dominant group and merely talking about the problems of oppressed groups, one can improve anything. Therefore I cannot separate the need for novelty in individual morality and ethics from the need to restructure society by instituting new policies. No one should ask another person to do what he is unwilling to do himself, nor should anyone respond to a request or demand that comes from a person who does not act consistently with it.

For members of dominant groups, I recommend the following rules of individual behavior designed to make one capable of being an agent of change:

1) Never live above the world average income, but always live in a way that everyone on earth could afford to live if other people with a surplus gave their surplus to those with a deficit.<sup>52</sup> Give any excess to those who have less.

2) Do not work for an institution benefiting the dominant group. Form ties with an exploited group and pursue their interests.<sup>53</sup>

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<sup>52</sup> This rule needs to be adjusted for purchasing power parity and rates of exchange. The UNDP claims that in 1998 the world average income was \$5,990 adjusted for purchasing power parity but that the dollar purchased 4.27 times as much in India as in the U.S. because the rupee is undervalued. The world average income in India thus turns out to be \$1431, or almost exactly Rs. 5000 per month per person. As an expatriot American who advocates world citizenship, I do not feel obliged to live on less, but an egalitarian Indian patriot might well feel that the Indian average income, about Rs. 1200 a month per person, (e.g., Rs. 6000 for a family of five) is appropriate. Because I do not believe that is enough money for anyone to pursue a profession that can benefit others, I cannot recommend it.

<sup>53</sup> For myself, I concluded that the problem was not simply White American exploitation of such groups as Blacks and Hispanics, but of the majority of the peoples of the world the U.S. now exploits—and excludes and denigrates. So I live and work in India.

3) Use the advantages you have obtained because of your group's dominance to equip the exploited to increase their independence and to confront the powerful with the effects of their callous use of power.

4) If possible,<sup>54</sup> do not marry a member of your own group.

5) Live among the exploited group, at least for a sufficient number of years to share some basic features of their sensibility.

People who have adopted such rules, and who follow them, can recommend changes in conventions to others—and prejudicial exploitation cannot be affected without serious intentional changes in settled conventions. Once one is secure in the ability to act independently in these ways, it is important to learn to organize one's own dominant group: after individual responsibilities come group responsibilities.

## 2) Responsibilities of Members of the Dominant Group<sup>55</sup>

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<sup>54</sup> I do not believe in resisting the affliction of love, which I think should guide the will and be reinforced by it. But I do believe in resisting social (an economic, political and religious) pressure, so the "if possible" means "if your heart allows it," not "if society allows." In making this recommendation, I do not, of course, advocate a marriage such as the following: A Scheduled Caste man, after taking the civil service exam to qualify for the IAS, was told by the examining officer, an upper caste man, that his grade would qualify him for the IAS if he would promise to marry the examining officer's daughter. Charging the examining officer under IPC 166 seems preferable.

<sup>55</sup> Following the principles of the Parable and the previous subsection, it is my place to take responsibility for myself, not to enunciate principles groups my ancestors have oppressed. The question continually arises, however, of whether there are any special responsibilities of minority elites, particularly whether those who have received reservations or other affirmative action benefits have obligations to other members of their group. If affirmative action is supposed to be partial compensation for the effects on oneself of injuries sustained by one's predecessors, it is to be understood as designed to put one in the position one would have been in had one not been injured, much as tort or contract recoveries are designed. So if affirmative action is compensatory, the recipient of affirmative action owes nothing. Instead, the dominant group still has obligations to those members of the injured group who have received nothing. The argument that the recipient of affirmative action has special obligations therefore does not follow from the logic of compensation, but from some other source. The most likely source of such a conviction is group solidarity: the successful Black or Scheduled Caste person is held to be obligated *by membership* to aid other members of the group. This is an argument with great *emotional* appeal, and it does in fact motivate a large proportion of the more successful of oppressed groups. But notice that its necessarily correlated argument for Whites and the Upper Castes is not that they should assist the exploited, but that they should assist other members of the dominant group—a consequence that reinforces, rather than alleviates, the original problem of exclusion and in-group preference. Counter-intuitive as it may at first seem, the morality of solidarity does not assist in the logic of compensation. This is because our intuitions have been formed by injustice: we know quite well that if the exploited community does not unite, it can make no political progress, so we convert that need into an obligation. But when we extend the obligation to say that the successful Black is more obligated towards Blacks than a White, we are again indulging in an unconscious implication

In the seventh book of Plato's Republic one who has escaped the bonds that kept him entranced with the images on the cave wall, and sees they are but shadows, returns to release other prisoners, and meets with their repudiation and aggression. Race and caste are unreal in the moral sense because they refer to nothing essential in one's character. Therefore actions based upon the conventional misperceptions of caste and race are inherently unjust because they imply that one believes it is proper to treat another not on the basis of his or her character, but that there is some other, more important basis for treatment. Recognition that this is so, that racism and castism are inherent moral evils, put a member of the dominant group in the position of Socrates' returnee to the cave. So the role of the returnee is to risk the rage of the dominant group.

It is not possible to simply formulate a policy to deliver justice to the exploited because the justice would have to be delivered by the exploiters, who will persistently look for ways to circumvent the central issues. Accustomed to exploitation, they are incapable of immediately relinquishing it. This doesn't make their inability just—on the contrary, the more they sense the discrepancy between their actions and just actions, the more their guilt increases. It means that initially they are capable of partially relinquishing their injustice only if compelled by superior force. But who has the force to compel them? Without a revolution, the original dominant group remains in power, and the exploited lack the force to compel recognition of their rights. So members of the dominant group who have recognized the conventional injustice need to confront the exploitativeness, exclusiveness, and derogatoriness of their own group in order to create the situation in which just solutions can be sought.

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of racism—that one is most obligated to one's "own kind." The White conception of this supposed Black obligation merely serves to relieve the White of his own obligation. The same is true, of course, of the Indian counterparts.

### 3) Legal Issues

A) *International Issues*: The issues raised by the criteria of Article 27 do not go to the core of the grievances of either group, which range through a wide variety of other issues in the ICCPR and ICESCR. The range and gravity of these issues demonstrates that the protection of minorities contemplated by the ICCPR is grossly inadequate. The ICCPR considers only deprivations of individual rights injuries that both groups feel as injuries to the group as a whole inflicted on members of the group solely because of their membership in the group. Article 27 of the ICCPR, conceives of minorities as independent, cohesive—and, implicitly, “proud”—groups intent on maintaining their independence in an alien environment. Article 27 does not address the issues of minorities that were largely created by the dominant culture in order to serve the convenience of dominant groups. The issue of group identity for such a group has very different meanings than the ICCPR appears to assume.

The Convention on the Elimination of All Forms of Racial Discrimination, CERD, is supposed to address these issues, but fails. First, its concept of race is false; it memorializes a careless and exploded theory of White physical anthropology formed at the height of racism. Second, it focuses on the injured rather than the group that commits the injuries. Third, it does not make the action of exploitation basic; it fails to see that the accoutrements of exclusion and denigration serve a purpose for the dominant group. Fourth, it still treats injuries as discrete individual injuries, and does not address the collective features of either group. Fifth, it receives no individual complaints; only states have access to it, and it is dependent on the reports of the offending states. Sixth, its enforcement mechanisms are pathetic.

The functioning of CERD is of a piece with its structural flaws. The U.S. signed it only in 1994, and has not yet submitted a report. CERD is ineffective as a forum for the problems of

the Scheduled Castes also. India submitted no report for ten years, then in 1996 submitted reports ten to fourteen, but the reports contained no information on the conditions of the Scheduled Castes. India held the Scheduled Castes were not a race<sup>56</sup> despite the fact that the relevant feature of CERD's definition of race was offered by the Indian delegate specifically in order to include caste. In the Third Committee of the General Assembly,<sup>57</sup> India had recommended the insertion of the word "descent" in the definition on the grounds that it was different from "national origin" or "ethnic origin," and met unanimous consent.<sup>58</sup>

The International Covenant of Economic, Social, and Cultural Rights has provisions overlapping with those of CERD. It has no significance for Blacks in the U.S. because the U.S. has never ratified it. It has virtually no impact on the Scheduled Castes because its Committee rarely meets, its enforcement is nil, and all its provisions are subject to the financial abilities of the state, which in India's case are held to be slight.

Part of the gravamen of the complaint of Blacks and the Scheduled Castes is that there is a clear sense in which their *identity* has been damaged by the dominant powers of their society: that is, for a victim of prejudicial exploitation, rebellion is required to assert the dignity which is granted gratis to members of the dominant group.<sup>59</sup> The ruling powers have succeeded in

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<sup>56</sup> Human Rights Watch on the Internet at <http://www.hrw.org/reports/1999/india>.

<sup>57</sup> UN Doc A/C.3/L.1216, and L.1238; UN Doc A/6181, paras. 33, 37, 41(a), cited in Patrick Thornberry, International Law and the Rights of Minorities, (Oxford: Oxford U.P., 1991) p. 262.

<sup>58</sup> Thornberry, p. 262 text and note 21 citing E. Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination," *ICLQ*, 15 (1966), 996.

<sup>59</sup> This does not necessarily imply that members of exploited groups have lower self esteem than members of dominant groups: see Jennifer Crocker and Diane Quinn's study, "Racism and Self-Esteem" in Jennifer L. Eberhardt and Susan Y. Fiste, eds., Confronting Racism: The Problem and the Response, (Delhi: Sage, 1998), p. 169-187. Blacks aware of the probability of discrimination are more successful at preventing deterioration in functioning caused by insults than are Whites who cannot account for insults by prejudice. But that does not mean that the social identity of an exploited group is not injurious. On the contrary, a positive racial identity is an intentional achievement that can only be won through a series of trials and transformations. See Audrey J. Murrell, "To Identify or Not to Identify: Preserving, Ignoring, and Sometimes Destroying Racial (Social) Identity," in the same volume, pp. 188-201. Using social identity theory, Murrell identifies a sequence of five stages for which overlapping substantiation has been found in four studies. The compliant social identity that the dominant group offers to exploited groups prevents maturation and normal adult functioning. Members of exploited groups must each perform a kind of psychological labor the

mobilizing majority sentiment against them so ubiquitously and for so long that it has been impossible for the minorities not to accommodate their behavior and self-concepts to that pressure. Blacks and the Scheduled Castes are *not* minorities merely trying to defend their culture, language, and religion, as the ICCPR would allow. **They are *oppressed minorities systematically denied the individual rights of the ICCPR and ICESCR, traditionally forced to live as if they deserve to be denied those rights, and forced to distort their culture, language, religion and self-concepts to misrepresent this injustice as justice because for centuries all places to which they could appeal would punish them even for stating their grievance.*** The essence of the complaint of both groups is that no polity has acknowledged that they should be given the means<sup>60</sup> to recover from this treatment.<sup>61</sup>

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dominant groups do not know. Failures to perform that *extra* mental and emotional labor contribute to the higher rates of drug abuse, unemployment, school failure, suicide, mental illness, criminality, and dependency usually found in exploited groups.

<sup>60</sup> India's systems of reservations is a far more extensive explicit effort to give such means than U.S. affirmative action programs. But the Indian effort is vitiated by its complete failure to provide the education its constitution mandates in Article 45.

<sup>61</sup> The web of rationalizations that held their mistreatment together was the tactic of blaming the victim. If a White landlord cheated a sharecropper, he claimed the reason was that the sharecropper had been lazy. If the sharecropper disputed this, he could be lynched, his shack could be burnt, his wife could be raped. He could not leave because he lacked the money. If he got drunk to forget the injury, he disgraced himself. If he let out his rage, it had better be at another Black, or the KKK would kill him. His only viable option was to indoctrinate himself. He had to convince himself that there was nothing he could have done to avoid that injury, that there was nothing he could try to do to redress it, and he had thus to make his self-regarding moral feelings stagnate. This involved also accepting the image of himself in others' eyes as a helpless man, a man who *was acting as if he deserved what he got*. The public image he had to present was a continuous menace to his sense of his own reality, and it attracted from the depths of his being all the fragments of self-hatred, self-disgust, shame, embarrassment, humiliation, and despair he had imagined through his life. He lived in a state of internal war against believing what he believed others believed about him—what he often had to *encourage* others to believe about him. This war had a shifting battle line. He had always lost *some* ground.

Everyone in the Black community knew this psychological sequence. It was considered irresponsible not to prepare one's children for it. The training began in infancy. If a Black infant reached out to touch an object he had never seen before, a toy whirligig or balloon, he was instantaneously punished for rudeness. These restrictions spilled over into home life. Curiosity was punishable in most families; in some, where despair had sunk deeply, it was simply regarded as meaningless, for there was nothing to be curious about: it was foreknown that all efforts came to nothing. It was unforgivably rude—"uppity"—to look superiors in the eye; one must accept whatever they said. The appearance of ignorance and stupidity were not always sufficient to placate Whites; Black mothers worried the most over the prospects of their brightest children. In many families dullness was rewarded and subtly created.

The Black Panther Party and the Black Muslims in the U.S.A. and the Dalit Panthers in Maharashtra set themselves the task of undoing this psychic conditioning. The way out of it is not a straight road and is fraught with dangers.

B) *Domestic Issues:*

It is not possible here to review, reiterate, or criticize the thousands of relevant studies on U.S. and Indian constitutional provisions, statutes, and case law. I do not intend, as most of those studies do, to examine the adequacy with which the law serves its purposes because my most basic assertion is that the purposes themselves are inadequate to the situation they address. But I will mention a few laws which only aggravate prejudicial exploitation.

In the U.S. the legal factors affecting the actual condition of Blacks are as much a function of economic rulings, the balance of state and corporate vs. individual rights, criminal law, and the justiciability of rights under government programs as of civil rights following on the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> amendments, the Civil Rights Act of 1964 and the Voting Rights Act of 1965. As the discussion under Thesis 9 showed above, the legal factors affecting the Scheduled Castes are also spread over a number of areas of law—exclusion from other government programs, funding issues, land reform, provision of basic education, bonded labor, child labor, administrative procedure, administration of justice—rather than just the statutes governing reservations for elective office, government jobs, seats in educational institutions, economic programs, and the Atrocities Act, which are held to form the mainstay of law for the Scheduled Castes. Policy can only advance by studying the impact of laws, and their impact can only be understood from the point of view of the affected, not the administrators. The affected do not feel the effects of one law at a time, but of all laws together. So it is the entire legal regime as it affects each individual that must be reviewed.

The sensible way to do this is to ask, of an individual in a certain situation, what the law compels, forbids, allows, and facilitates in his efforts to improve his life. For a young Black man in the Bronx, the law appears primarily in the guise of a policeman intent on discovering whether

he possesses drugs or weapons, without either of which he is unlikely to have any money because for his group unemployment is over 50%. If he does possess drugs or weapons, the prominent instrumentality of law becomes criminal procedure, the practices of prosecutors and judges, plea bargaining, prison administration, probation, parole. If his friends are in trouble, he is likely to be charged with conspiracy. He is likely to do time in the place of someone else more powerful or better connected. If he tries to stay on the good side of the law, he may get some education which would make a department store manager believe he could be trusted in the check-out line. If he is legal, he will not be able to earn enough to marry and support an apartment, a wife or child, so his girl friend will want him to stay away so that she can receive the welfare checks she needs to raise their child. So rather than becoming a man he feels others respect, he becomes a kind of extra person who belongs neither inside nor outside his group. Put dozens of sketches like this together and you begin to get some picture of the impact of law. The question of how the laws which do this to him should be changed can be asked from different points of view—from that of the legislator, the administrator, or the lawyer.

I favor the activist lawyer's view. The American Civil Rights Movement did not spring up on its own. It was planned. Charles Hamilton Houston, the lawyer the N.A.A.C.P. Legal Defense Fund appointed to create their program, began planning the Civil Rights Movement in 1932. In law school he had learned how corporate lawyers strategized legal changes in the interests of their corporations, and he thought if White lawyers could do that for wealthy corporations, he could do it for poor Blacks. He targeted the Plessy v. Ferguson decision of 1897 that approved "separate but equal facilities" for Blacks and Whites, and decided that by selecting the proper sequence of cases, he would compel the Supreme Court to construct a series of precedents which would lead eventually to the conclusion that Plessy must be overturned because "separate" in itself implied

“unequal.” It took him 22 years; his best student, Thurgood Marshall, argued the final case in his series, *Brown v. Board of Education of Topeka, Kansas*. That victory sparked the Civil Rights Movement: if the Supreme Court could make that ruling, the whole apparatus of segregation could be dismantled. A few years later the movement found its leader in Martin Luther King when the Blacks of Birmingham, Alabama, en masse refused to use the segregated bus system. Throughout the movement King worked with Marshall, always choosing strategies that violated state laws, but never a federal law so that there would be no obstacles when their cases ascended through the Federal Court system. Not once did King violate a federal court order. The strategy succeeded in virtually all of its legal goals.

That co-ordination between a social movement and strategic litigation is what can change society. Neither alone is enough. In the U.S. at this point, the position of Blacks cannot be further advanced without a new social and political coalition as its basis. The power of corporations, the fragmentation of the society according to residential zones, the deterioration of social life because of the atomization of individuals need to be addressed by a movement seeking to overcome them. Appropriate legal targets for such a movement should include the status of the corporation as a person protected by the Bill of Rights, the doctrine of the “freedom of contract” which has always been used to favor contracts of adhesion, and the evidentiary requirement that discriminatory intent, not discriminatory effect, must be proven. There are attempts to form such a movement—Ralph Nader, Barry Commoner, Common Cause, and so on. But since the end of the Vietnam War there has been no single rallying point. And the Reagan and Bush federal court appointees are so certain to take every opportunity to increase state and corporate rights that litigation on behalf of the poor, or the “minorities” (which in the conventional media-made usage includes

everyone except corporate power) is bound to backfire. Defendants in any suit brought in the interests of social change are sure to appeal because they know the result will favor them.<sup>62</sup>

Houston began under Roosevelt's rule, which included a massive assault on the conservative court. Expansion of rights in the U.S. will probably have to wait until the political pendulum again swings leftward.

In India strategic litigation has never been attempted. Nearly all lawyers are in general practice, and the practice is almost entirely ad hoc. Even Gandhi and Ambedkar practiced movement law in an ad hoc fashion. Legal actions were a response to events in the social and political movements. India also lacked the strong professional organizations of the U.S., which form the platform on which such legal organizations rest. But if Dalit lawyers now formed an organization like the N.A.A.C.P. Legal Defense Fund (which won more Supreme Court cases than any other law firm in U.S. history) they might substantially advance the rights of the Scheduled Castes, particularly if they coordinated their litigation with the plans of a social movement.

#### **4) Reparations:**

A small movement among American Blacks seeks reparations for unremunerated labor done by slaves. A relevant precedent exists: Holocaust survivors have successfully sued the governments of former East and West Germany and banks in Switzerland for compensation for property stolen from relatives who died in concentration camps. It could be built upon: for instance, Krupp could be sued by relatives of slave laborers who died in its factories. But the time span is under 60 years. It is possible to argue under such treaties as the Kellogg-Briand Pact that

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<sup>62</sup> In 1992 the Westchester Legal Services Corporation, trying to enforce welfare recipients' statutory right to heating allowances in winter, hired me to analyze the prospects of a suit seeking to augment *Cort v. Ash*'s precedent that a right under federal law could be presumed to imply justiciability. After reading even the most tangentially related decisions of the Reagan and Bush appointees, I concluded that such a suit would be denied by 7 to 2 or 8 to 1 votes, and that the clients would end up with fewer rights than they then had. From 1980 on, more and more civil rights and civil liberties lawyers came to similar conclusions. The dominant tactic now is never to initiate suits, but only to try to hold the line against the further contraction of rights.

German law had not actually been abrogated by the Nazis. And the successor governments of East and West Germany were quite happy to show their differences with the Nazis. These basic circumstances are quite at odds with those in India and the U.S. The Indian government is not likely to grant reparations to the Scheduled Castes for injuries sustained prior to Independence because it cannot argue that those injuries were caused only by British rule, and that Untouchability really did violate Indian law before 1949. The U.S. government is unable to argue that it will give compensation for damages caused by the irregularities of eleven Southern states when the Constitution refers to slavery in ten clauses. If the Southerners really knew better, as the Kellogg-Briand Pact indicated the Germans did, why did George Washington and Thomas Jefferson have slaves? So there is no present legal hope for reparations, and there will be none unless international human rights law manages to break free of the institutional barriers that always put the workings of private international law first.<sup>63</sup> As a political organizing device, the theme may be useful. But it is not for its immediate usefulness that it is important. It is important because it is unavoidable and ineradicable, and therefore forms a standard against which efforts at social justice will be measured. That prejudicial exploitation is not a legally cognizable injury creates a barrier between the claims of natural justice and those of positive law. Positive law cannot retrieve its dignity without crossing that barrier.

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<sup>63</sup> The Bretton Woods Institutions were created prior to the U.N. because their founding fathers wanted to be certain that no institution affected by a popular majority could influence the bases of international finance. The U.N. has a budget smaller than New York City's, less than a hundredth the budgets of the IMF, World Bank, GATT and WTO, and only 79 full time human rights lawyers. One half-time lawyer per country is likely to have less effect on human rights than structural adjustment programs, devaluation of Third World currencies, and increases in drug prices to satisfy WTO intellectual property rights strictures. In this schizoid international legal regime, everything the internationally influential are handsomely paid to do have effects that are said to injure human rights. The enforcement mechanisms for human rights are pathetic and no vote of the U.N. can effect the gigantic Bretton Woods

### III. Conclusion: with Hypothesis

The nature of White racism changes as its circumstances change. The psychoanalyst Joel Kovel argues that in the U.S. it has followed a dialectic through three phases: hostile domination, sullen withdrawal, and institutionalization.<sup>64</sup> The character of castism is changing also. The psychological bases of prejudicial exploitation may contain an unconscious recognition that the exploited group is *not* inferior, and this may add anxiety and guilt to the dominant group's perception. Purported proof that the exploited are *innately* inferior<sup>65</sup> and even that racism no longer exists<sup>66</sup> have wide popularity. I submit that the reason for this is the growing need of the dominant group to avoid the implication that, if the exploited are not and never were inferior, then the centuries of exploitation, denigration, and exclusion cannot be justified as it traditionally was, on the analogy of treatment of animals. The image of the equality of the exploited thus rouses a new image of the ancestors of the dominant: that they had the moral character of criminals, and that they deceived themselves into believing their behavior was justifiable by lying about the character of their victims. Dominant groups frequently indulge in different versions of ancestor worship because they believe their position in life was secured by their

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Institutions hiding under its fragile wings. On such a basis, human rights is permanently "NATO"—"No Action, Talk Only"—or, worse, only a rhetorical device for rich countries to extort even more concessions from poor ones.

<sup>64</sup> In *White Racism*, (New York: Vintage, 1976.) Kovel's claim about the third phase is that White institutions have now 'normalized' racism so that Whites need not admit any personal responsibility for it. Whereas the first phase is keenly conscious of a proud self-assertion and the second still overtly arrogant though paranoid, the third is increasingly furtive, manipulative, and unconscious.

<sup>65</sup> Richard Herrnstein and Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life*, (New York: Free Press, 1994.) Irrefutable arguments against its conceptual basis—that there is a single entity which can be called intelligence, and that I.Q. tests measure its innate condition—had already been made, however, by the biologist Steven Jay Gould in *The Mismeasure of Man*, (New York: W.W. Norton, 1981). Herrnstein and Murray ignore the fact that their assumptions have been disproved. Their readers, unfamiliar with matters of scientific methodology, ignore it too.

<sup>66</sup> Dinesh D'Souza, *The End of Racism*, (New York: Free Press, 1995.) D'Souza successfully portrays himself to the American public, as a man who cannot possibly be biased because, as an Indian who went to Jesuit schools, came to the U.S. when he was 17, and married a White American of mixed ethnicity, he has the neutrality of a multicultural and multiethnic background. Conventional American society, entirely ignorant of India, is delighted to accept these claims because he is acquitting the U.S. of the charge of racism. Mr. D'Souza is Brahman. Because racism and castism share prejudicial exploitation, and because,

elders, and the hierarchy of the present order is maintained by keeping respect for the graduated members, as it were, who stand above the hierarchy, pulling it up, maintaining its verticality. If the exploited were basically the victims of criminal conduct, the entire psychology of hierarchy is threatened. ***I submit that this issue is more fundamental than issues of the legal order, or even of the political, social, and economic orders, in maintaining prejudicial exploitation.***<sup>67</sup> If it is the psychological basis of hierarchy that is at stake, individual and group change and action are just as important as legislation, and litigation cannot be expected to change society unless it is attached to a social movement.

This paper has constructed this conclusion from two sides. Part I argued that salient facts of the circumstances and history of both Blacks and the Scheduled Castes indicate that the basic phenomenon can be designated “prejudicial exploitation,” that the structure of law makes full compensation for injury by prejudicial exploitation impossible in a hierarchical society, but that the demand for full compensation cannot be given up without even worse consequences. Part II argued that recommendations for the amelioration of prejudicial exploitation are fruitless if they do not demand individual initiatives from members of the dominant groups, and that they must build from personal to group to legal and collective obligations. The conclusion supplies an hypothesis to explain the necessity for individual change and action: the ultimate barrier to dominant group acknowledgement of the claims of the exploited is that recognition of them requires alteration of unconscious features of the self-concepts of the dominant group which have rested upon false and partial images of their ancestors. I welcome the liberation. Do you?

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in any case, there is a strong component of racism in upper caste conceptions of the Scheduled Castes, D’Souza’s elaborate claims to neutrality in his Preface, pp. vii-ix, are suspect.

<sup>67</sup> This is the hypothesis to which the earlier theses lead. See note 5, page 5. Arguing for it and testing it is not an issue of policy, but of social science, and cannot be broached here. Suffice it to say that the body of theory which I would apply to the hypothesis draws from T.W. Adorno, Else Frenkel-Brunswik, Daniel Levinson and R. Nevitt Sanford, The Authoritarian Personality, (New York: Harper and Row, 1950) and

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