But I suggest that there might be some surprises for us. It is my suspicion that strengthening the family and providing quality education for sons and daughters would be enormous priorities. A simple example of a surprise is of note here. Robert Higgs in a book that has become recently popular with economists called *Competition and Coercion: Blacks and the American Economy 1865-1914*,[40] asserted that after Emancipation the first priority of blacks was an extended celebration and vacation from labor. I think Mr. Higgs is sorely wrong. The evidence is that the first thing that blacks attempted to do after Emancipation was to bring their families together,[41] especially if they had been scattered as a consequence of slavery. Reformation of the family unit was the first priority, not vacation, comfort or food.

VII. CONCLUSION

It was with the black family that we started this investigation; it is with the black family that we have to begin the hardest phase of our fight as a race. Both black economists as theorists and black officers of the court as activists must redirect our energies on behalf of the underclass with the underclass defining our assignments rather than our assignments being defined externally to the black community. We are faced with a choice between permanent dictatorship by the experts, which sounds remarkably like fascism, versus the building of genuine socialism. It has been said that each time the United States comes to a fork in the road it goes both ways. That is no longer possible. The choice confronts us with a clear challenge in terms of what direction we are going to take in changing the fate of the black community in the United States.

THE ROLE OF THE BLACK LAWYER: A MARXIST VIEW

Harold McDougall

I. INTRODUCTION

In the following discussion of the role of the black lawyer as an agent of social change, a Marxist analysis will be employed to examine, initially, the place of law in the progress of black people. This analysis will focus upon two great upheavals in American history, termed here as the First and Second Reconstructions.

The First Reconstruction, from 1865 to 1877, sprang out of the Civil War and the Abolitionist Movement, and took liberty as its ideology; it was

40. R. HIGGS, COMPETITION AND COERCION: BLACKS IN THE AMERICAN ECONOMY, 1865-1914 (1977).

41. *See* H. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM 1750-1925 (1976).

a struggle fought principally to free persons of African descent from slavery, its badges and incidents. The Second Reconstruction, from 1954 to the present, includes the Civil Rights, Black Power and Affirmative Action Movements, and has had two phases: the first phase, beginning in 1954, was a struggle to finish the agenda of the First Reconstruction, *i.e.*, the struggle for *liberty*, nearly one hundred years after it began; the second phase, beginning around 1966, was a struggle for *equality*, a material position (including, *inter alia*, training, education, cultural development and employment), for persons of African descent commensurate with that achieved by members of the majority.

According to Robert Carter, currently a black judge and formerly a member of the *Brown v. Board of Education*[1] litigation team, "because white America likes to regard itself as a society ruled by law, its values, morality and conscience are under constant pressure when the black man's rights are declared in law but disregarded in fact."[2]

It is to this distinction between rights in law and rights in fact that attention will now be directed.

A. *Commodity Form and Legal Form*

In Marxist theory, money functions as a "universal equivalent," a medium through which different commodities are rendered interchangeable with one another; we ask ourselves "how much do they cost" rather than what are the political and economic circumstances of the people who produce them. In the sense that these commodities can be readily exchanged one for another through the monetary system, they have become what they are not—equal.[3]

Similarly, it is possible to argue that law, a part of the superstructure of society and, more specifically, a part of the apparatus of the state, is a universal equivalent in the political sphere, a medium through which different citizens of the polity are rendered interchangeable. Thus, they become what they were not, *i.e.*, equal.[4] All persons are equal before the law, but only if we ignore their social, political, economic and historical circumstances, and most particularly, their relation to the means of production.[5] The law that imposes this type of false equality[6] upon citizens of the polity is termed here

1. Brown v. Board of Education, 347 U.S. 483 (1956).

2. Carter, *The Black Lawyer*, 29 HUMANIST 12 (1969).

3. This phase of my analysis draws heavily upon the seminal work of Isaac Balbus. *See* I. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW AND SOCIETY REV. 571 (1977).

4. Citizens are the "commodities" of the political market. Balbus *supra* note 1, at 575. Law, "with the development of capitalism, becomes the *universal political equivalent* . . . (ignoring the distinct human needs, concrete interests, social position and class relations of discrete individuals) so that any one individual can represent any other." *Id.* at 576.

5. *Id.*

6. Perhaps the best known advocate of the "commodified" form of law is Professor Wechsler. *See* H. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (arguing that the decision in Brown v. Board of Education, 347 U.S. 483 (1956) did not weigh equally the right of white children to freedom of association equally with the right of black children not to be forced to attend segregated schools). *Compare with* J. Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. OF CHICAGO L. REV. 213 (1980): "A version of equality which permits the continuation, indeed the exacerbation, of grave disparities in the opportunities and advantages available to persons of different races, ignores the context in which the problem of

as "commodified law."[7] The law's role of preserving the social system is facilitated when it takes a commodified form, projecting a false equality between oppressor and oppressed, between black and white, inhibiting the formation of the class or group[8] consciousness necessary to change society in a fundamental way.[9] The existence of commodified law makes it appear that the law is relatively autonomous from the will of social actors,[10] that no one controls the state and that we are "all equal". As stated in the famous quotation from Anatole France, "[t]he law, in its majestic equality forbids both the rich as well as the poor to sleep under bridges."[11]

On the other hand, when law takes a decommodified form, it is a signal that the basic norms of society have been challenged successfully by an organized group of people who have forced the entire system to respond to their particular will.[12] The existence of decommodified law is thus evidence of the extent to which the law is *not* autonomous from the will of social actors and evidence that the law can be used for instrumental purposes by organized groups within the polity.[13] Decommodified law speaks to the social, political, economic and historical characteristics of the people whose

inequality has persisted in this country, and ultimately endangers our democratic institutions." *Id.* at 214.

7. Balbus seems to be arguing that all law functions in this way. Balbus, *supra* note 1 at 575-577. (In the spectrum of theories regarding the degree to which law is or is not autonomous of the will of social actors, Balbus' theory would be called *structuralism*). This approach appears to be too narrow, although there are important elements of it which are acceptable. A form of law is not always "determined" by systemic imperatives, rather it can, as the result of struggle along one of the "axes of social change" (*see* note 8, *infra*), respond to the will of social actors and can recognize the concrete needs and interests of socially differentiated individuals as well. This distinguishes "commodified law" from "decommodified law". *See* notes 12 and 15, *infra*.

8. This article explores both the class consciousness, as well as the political development of certain groups and movements whose struggles lie along the "axis of social change". It is also inclusive of those who hold a potential for social change which is not reproductive of capitalist social relations (such as urban social movements and the struggles of minorities for democratic rights). These are generally called "nonworkplace" struggles. *Compare with*, M. Castells, *The Urban Question* 453 (1977) and A. Gorz, *Reproduction of Labour Power*, in J. Cowley, A. Kaye, M. Mayo, M. Thompson, COMMUNITY OR CLASS STRUGGLE? 27 (1977). (hereinafter cited as Cowley). The struggles of community organizing (and minority struggles for democratic rights) are really the other face of the struggles that take place at the point of production (that is, struggles between bourgeoisie and proletariat at the workplace)." Cowley, *supra*, at 246. But Castells states that if no revolutionary party exists, solidly established among the masses, "then urban issues are relatively secondary in relation to the workers' struggle and to direct political conflicts." Castells, *supra*, at 464-65.

9. *See* Balbus, *supra* note 3, at 577.

10. *Id.* at 572.

11. COURNUS, MODERN PLUTARCH: MARK TWAIN, 27 (1928).

12. Marxists who argue that law always functions in response to the will of social actors among the ruling class are called *instrumentalists*. Although this theory is to the left on a spectrum, which also includes structuralism (*see* note 7, *supra*), this theory, though useful, is not entirely acceptable. In the absence of successful struggle along one of the "axes of social change," (*see* note 8, *supra*), systemic imperatives tend to assert themselves. Law, for example, would appear in commodified form unless a major struggle had been waged for decommodified law along one of the "axes of social change." A summary of the debate among Marxist structuralists and Marxist instrumentalists can be found in G. Esping-Anderson, R. Friedland, E. Wright, *Modes of Class Struggle and the Capitalist State*, 4-5 KAPITALISTATE 186-90 (1979). (hereinafter cited as Esping-Anderson).

13. Some liberal theorists would agree with this point in the very general way it is stated. *See* Esping-Anderson, *supra* note 12, at 187 (citing J. Weinstein, *The Corporate Ideal in the Liberal State* (1968). Marxist instrumentalists would argue that the state is responsive to the will of only one class of social actors, the bourgeoisie. *See* Esping-Anderson, *supra* note 12, at 187 (citing K.

lives are affected by it, revealing them to be what, in fact, they are, unequal.[14] As such, decommodified law represents a threat to the system's legitimacy, dispelling the illusion of equality before the law, exposing group and class distinctions, and, hence facilitating the growth of the group and class consciousness[15] necessary to change the system.

We now have a relatively simple statement defining two opposing forms of law, as well as outlining structural and political consequences. The concepts become more complex, however, when we examine, simultaneously the questions of content of legal structure and the questions of form. In attempting such an exercise, we approach a true dialectical analysis. We come even closer when we examine the interaction of form and content in the context of a concrete struggle over recognizable stakes.

B. *Contradictions in Form and Content*

In examining and contrasting the categories of form and content, we must recognize them as distinct, complementary, and contradictory. Law may exhibit a decommodified form simultaneously with a commodified content; conversely, it can be decommodified in content while demonstrably commodified in form.[16] Further, decommodified law is not necessarily progressive—when broadly defined, decommodified law could specifically address the conditions of blacks by repressing them (this would probably be fascist law). On the other hand, commodified law is not necessarily reactionary. Depending upon the historical moment, a vigorous assertion of commodified rights, in the fact of fascist decommodified law, for example, could have decidedly progressive consequences.

C. *Contradictions in Form and Content in Civil Rights Law*

The Civil Rights laws enacted during the First Reconstruction and the first phase of the Second Reconstruction were liberal, democratic promises, *commodified in form*; yet the struggle to have these promises realized was a struggle to give them *decommodified content*, to demonstrate that though the promise of freedom had been made, the specific condition of blacks in the United States revealed that neither promise had been kept. Black people's rights were "declared in law but disregarded in fact."[17] As blacks fought to force the specifics of their situation on the society and the state, their struggle

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Marx, THE COMMUNIST MANIFESTO 11-12 (S. Beer ed. 1955); R. Miliband, THE STATE IN CAPITALIST SOCIETY 67 (1969); and P. Sweezy, THE THEORY OF CAPITALIST DEVELOPMENT 243 (1942).

14. The concept of decommodified as opposed to commodified state activity originates with Esping-Andersen. *See* Esping-Andersen, *supra* note 12, at 199, 200-203. This phase of my model draws heavily on the theories expounded in Esping-Andersen's article, the key contribution of which is to strike a balance between instrumentalist (*see* note 12, *supra*) and structuralist (*see* note 12, *supra*) analysis, arguing that state activity (which, in my example, is law) is at once a "*product*, an *object*, and a *determinant* of class conflict." Esping-Andersen, *supra* note 12, at 191. To derive decommodified law, one inverts Balbus' definition of commodified law.

15. But, Balbus notes that, "[d]elegitimation thus presupposes a fundamental break with the values and (formal) mode of rationality of the legal form itself, a break which presupposes, in turn, at least an embryonic articulation of a qualitatively different set of values and mode of rationality." Balbus, *supra* note 1, at 582. *See also*, *id.*, at 577. For significance of "group" as well as "class" consciousness, *see* note 8, *supra*.

16. *See* Esping-Andersen, *supra* note 12, at 199, 204-205.

17. Carter, *supra* note 2.

exposed and heightened the contradiction between form and content in civil rights law. Their movement "birthed" a variety of other movements and the commodified content of the law was challenged as people, *en masse*, forced upon the system the specifics of their own situations, their political, economic and historical conditions.

These developments began to put great pressure on the commodified form of the law, exposing its limitations. Pressure built for progressive law which was decommodified in form as well as in content; law which in all respects was objectively in contradiction to the capitalist system and its structure, and which was thus a harbinger of the next phase in the movement once all the unkept promises of democracy were fulfilled. To the extent commodified law acted as a fetter, (forcing each individual into a position of false equality, regardless of his or her circumstances) there was a threat that it would be broken through in a massive overturning of concepts and political, social, economic, and historical relations.

In both historical periods, conservative forces countered this revolutionary threat. The business and ruling class interests, which had supported the First Reconstruction for their own limited ends, abandoned it.[18] The Supreme Court constructed the legal rationale which reflected that shift in the alignment of forces in society as a whole, providing the commodified form of civil rights law with a commodified content.

An example will illustrate the point. In 1877, the Civil War between North and South was over and the North decided to restore its original alliance with the South, to reunite the two wings of capital in the country. A rising labor movement threatened the North and Reconstruction governments threatened the South. Any coalition between the black congressmen, senators, governors and developing black community of the South with the labor movement of the North would have placed the entire system of American capitalism in grave danger. Not only did Hayes trade the freedom of Southern blacks, the electoral votes that won him the presidency in 1877, but also the North traded the Reconstruction governments for Southern votes granting anti-labor legislation, land for Northern railroads and a free hand in foreign policy.[19]

One of the chief techniques used by the Southern elite in their successful drive to reassert control of the local state apparatus after the Compromise, a process the Southerners called "Redemption", was the segregation of the races.[20] Segregation reminded blacks and whites daily, in their every function and gesture, of the "Southern way of life" and reminded them of the consequences of deviation from it. As history proved, segregation was a potent mechanism of social control, especially when backed up by "unoffi-

18. *See* A. Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 413 n.83 (1967) (quoting from K. Stampp, THE ERA OF RECONSTRUCTION, 1865-1877 207 (1965).

19. By the "Compromise of 1877," the Republican Presidential candidate in the election of 1876, Rutherford B. Hayes, was awarded the electoral college vote over the Democratic contender, Samuel J. Tilden, in exchange for a promise of "conciliation toward the South" exacted by Southern legislators who had filibustered to forestall the college from counting the votes. For a concise description of the Compromise and its various aspects, *see* Kinoy, *supra* note 18, at 396 n.31. Probably the most important feature of the Compromise for our purposes was the withdrawal of the last of the federal troops stationed in the South. *Id.*

20. *See generally*, C. Woodward, THE STRANGE CAREER OF JIM CROW (1957), Kinoy, *supra* note 18, at 411 n.82, 412.

cial" terrorism.[21] A more effective way of dividing the working class and repressing progressive opposition has yet to be formulated.

In the *Civil Rights Cases*,[22] the Supreme Court, facing a challenge which alleged that segregation was a violation of the Thirteenth Amendment,[23] approved one of the central features of segregation, the exclusion of blacks from certain public facilities. The Thirteenth Amendment provided that no person should be subjected to slavery or involuntary servitude. It was applicable to all citizens and was thus commodified in form. But in giving the amendment content, in determining what *was* slavery, and what conditions were remnants of slavery or rather "badges and indices of slavery," the specific conditions of blacks who had been enslaved would have to be taken into consideration. Segregation might not be a badge or incident of slavery for a white person, but it definitely was for a black. The contradiction between commodified form and decommodified content was thus present in the Thirteenth Amendment. The role of the Supreme Court was to repress that contradiction, to refuse to allow the law to recognize it.

There were four ways the contradiction could have been repressed: (1) recommodify the content of the Amendment by finding as a matter of fact that blacks no longer suffered from the effects of slavery; (2) recommodify the content by finding as a matter of fact that segregation was not connected to nor an extension of slavery; (3) reduce the power of the Amendment's commodified form by holding that even if as a fact segregation and slavery were connected, the protection of the Thirteenth Amendment as a matter of law reached only *fundamental* rights, and that not all civil rights reached that intensity; and (4) further commodify the *form* of the Amendment by holding as a matter of law that the Amendment was not self-executing.

The Supreme Court repressed the contradiction via the first three means. Most importantly for our purposes today, the majority in the *Civil Rights Cases* recommodified the content of the Thirteenth Amendment by declaring that the freedmen had already gained all the rights afforded citizens and hence needed no extraordinary protection from the Thirteenth Amendment.[24] Harlan, in dissent, felt constrained to argue against this sleight-of-hand:

> My brethren say, that when a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. It is, I submit, scarcely just to say that the colored race has been the special favorite of the law.[25]

21. *See* Kinoy, *supra* note 18, at 412 n.83. Judge J. Skelly Wright called the resulting segregation a "ghastly system of apartheid." J. Wright, *supra* note 6 at 213. *Color Blind Theories and Color-Conscious Remedies*, 47 U. OF CHI. L. REV.

22. 109 U.S. 3 (1883).

23. *Id.*

24. *Id.* at 4-5.

25. *Id.* at 22-25. Besides declaring that it was about time the freed slaves ceased to become "the special favorite of the laws," *id.* at 25, and that the slavery argument was being "run into the ground," *id.* at 24, the United States Supreme Court concluded that since segregation in public facilities had been imposed upon freedmen before general emancipation, it could not now be con-

The contention of the majority in the *Civil Rights Cases* that the Freedmen's liberty needed no protection or support greater than or different from that of citizens who had never been slaves apparently rested on a willful disregard of historical reality. The majority contended that the Freedmen were as developed and as free from oppression as members of the majority and that the majority population and the emancipated slaves were what they were not—equal. The majority argued that

> [t]he entire fabric of legal reasoning was spun out of an hypothesis of social and historical fact which was simply untrue. The elevation from the status of a slave race to the status of free men in an equal political community with white citizens had not occurred.[26]

That is how the law of the First Reconstruction met its untimely end. Without decommodified content, a recognition of the special circumstances of blacks, the commodified form of civil rights law was only a metaphor of freedom. Further, by repressing the contradiction between the commodified form of civil rights law and its necessarily decommodified content, the whole forward march of America's democratic revolution was halted. Not only were the rights of black Americans limited, but the same process also severely circumscribed the rights of all Americans contained in the "universal charter of freedom." Thus, by the historical process we have sketched, Americans as a whole were transported to a hostile legal and political environment where they were clothed only with the barest of democratic rights. One of the reasons why not one intervened in the brutalization of black Americans which continued for the next sixty years was a fear that those who went to the aid of the blacks could be forced to take their place.[27] In that sense an erosion of the rights of *all* Americans was the basis of Southern *apartheid*. And the rights of all Americans remained in that state until blacks themselves initiated a struggle against *apartheid* which rewrote history, revitalizing the commodified form of the Thirteenth Amendment[28] by once again decommodifying its content.

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sidered a badge of slavery. *Id.* at 25. *See also*, Kinoy, *supra* note 18, at 400, 402. In this respect, the Court directly contradicted a key thrust of the *Dred Scott* case, which held that no person of African descent, whether slave or free, was a part of the "political community" established by the Constitution, 60 U.S. (19 How.) 393, 404-405 (1856), and that the "badges and incidents" of slavery and inferiority—the denial of access to public facilities—were imposed upon Africans slave and free, to "keep them in their place." "A perpetual and impassable barrier was intended to be erected between the white race and the (inferior, degraded race) . . ." *Id.* at 409. *See also*, *id.*, at 416-417. Kinoy notes that "the system of chattel slavery and the theory of the 'inferiority' of the black race were thus wedding together in an inextricable embrace." Kinoy, *supra* note 18, at 392. *See generally*, *id.*, at 408-10.

26. 109 U.S. at 61 (Harlan, J., dissenting). Professor Kinoy calls it "legal legerdemain." Kinoy, *supra* note 18, at 401. Harlan's dissent stressed the purpose of the Wartime Amendments as reversing the *Dred Scott* case. 109 U.S. 30-36 (Harlan, J., dissenting). Arguably, the overruling of *Dred Scott* was a central purpose of the Amendments. *See* Kinoy, *supra* note 18, at 407-408 (analysis of forcefulness of Harlan's reasoning). *See also*, Wright, *supra* note 17, at 213 n.1 (slavery protected from the outset of the Republic, citing, for example, U.S. Const. art. IV, § 2, cl. 3 (fugitive slaves to be returned to their masters).

27. Kinoy, *supra* note 18, at 406.

28. Note, *The Thirteenth Amendment and Private Affirmative Action*, 89 YALE L.J. 399, 400-12 (1979).

II. THE SECOND RECONSTRUCTION[29]—AND THE SECOND BETRAYAL[30]: THE STRUGGLE OVER CONTENT RESURFACES

In a sense, the Civil Rights Movement was the beginning of a second "Civil War" for this country.[31] A century later, the members of the Student Nonviolent Coordinating Committee (SNCC) were referred to as the "New Abolitionists,"[32] and there was a central historical truth to that appellation. (However, the New Abolitionism of the Civil Rights Movement was much more firmly grounded in the black community than the old, a reflection of one hundred years' development of black people in the United States—even under the frightening regime of American *apartheid*.) There was also a strong element of the old confrontation between North and South simmering just below the surface. Just as *Scott v. Sanford*[33]—the *Dred Scott* decision—had served notice on the North that it could expect a confrontation over the issue of slavery, so *Brown v. Board of Education*[34] served notice on the South that the system of segregation was about to be challenged.

The coming confrontation was not a simple one for the highly advanced and developed ruling class of the Northeast. In the 1950's, the postwar international agenda of this class placed the United States at the head of the Free World.[35] Southern *apartheid* was an embarrassment with which it could not afford to be publicly associated on an international level. By the same token, the North and South had been partners in the development of America since the Revolutionary War. The contradictions between them had flared up even before the Civil War, have done so since and will again until the democratic revolution of the country, begun in the eighteenth century, is complete—the destinies of the North and South are inextricably related.

The ability to forge a consensus among the South's population was key to the power of the Southern ruling class. The basis of that consensus was the subjugation of blacks.[36] Subjugation was enforced by segregation law,

29. The "Second Reconstruction", a function of the growing Civil Rights movement in the South, which began with Brown v. Board of Education, 347 U.S. 483 (1954), was "A new era in which the emerging political characteristic was a growing rejection of the underlying premise of the 1877 Compromise." Kinoy, *supra* note 18, at 424. *See also*, *id.* at 432-33.

30. The "Second Redemption," a rejection of the "Second Reconstruction" which began with phenomenon known as "White Backlash," received a hearing in DeFunis v. Odegaard, 416 U.S. 312 (1974), and emerged full blown in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). According to Professor Kinoy, the effects of the "Second Redemption" had reached the courts by 1967. Kinoy, *supra* note 18, at 434, (citing, for example, City of Greenwood v. Peacock, 384 U.S. 808 (1966), and Georgia v. Rachel, 384 U.S. 780 (1966).

31. After the decision in Brown v. Board of Education, 347 U.S. 483 (1954), all the Congressmen from the southern states published a "Southern Manifesto" in the Congressional Record, declaring their intention to resist the new threat to the "Southern way of life." Kinoy, *supra* note 18, at 429 n.137 (citing 102 Cong. Rec. 3948 (1956)).

32. H. ZINN, SNCC: THE NEW ABOLITIONISTS (1964).

33. 60 U.S. (19 How.) 393 (1857).

34. *Supra*, note 1.

35. Address by Professor C. Clyde Ferguson entitled "Pax Americana," given at the S.I. Newhouse Law Center as part of the David Stoffer lecture series (February 27, 1980).

36. Justice Douglas, quoting Frederick Douglass, stated that "Without crime or offense against law or gospel, the colored man is the Jean Valjean of American Society. *He has escaped from the galleys and hence all presumptions are against him*." Jones v. Mayer Co., 392 U.S. 409, 447 (1968) (Douglas, J., concurring) (emphasis added). Could any more graphic statement of "badges and incidents" of slavery be found? *See also*, Kinoy, *supra* note 18, at 390 n.7; Bell v. Maryland, 378 U.S. 378 U.S. 226, 247-48 (1964).

which permeated every aspect of Southern existence.

> A state court judge in Alabama convicted a Negro woman of contempt of court because she refused to answer him when he addressed her as 'Mary', although she had made the simple request to be called 'Miss Hamilton'.[37]

Everywhere, one saw evidence of segregation and thus of the power of the Southern ruling class.

To digress here for a moment, it would be incorrect in terms of an analysis to describe the segregation law as "decommodified," since that term has been employed to denote law which results from a struggle to transcend or overturn commodified law. The better term for segregation law would be "precommodified," as it grew directly out of the slave codes, and out of the economic formation of slavery which in large measure was precapitalistic. However, this law, not unlike decommodified law, exposed group and class distinctions and, hence, contributed to the group and class consciousness necessary to alter the Southern system.[38] After *Brown v. Board of Education*[39] the political assault on that system brought the South to its knees. The effect of the Betrayal of 1877 was to repress, in the basis of society, the social forces which sought to bring the democratic revolution to fruition, and inevitably bring that revolution to the next historical plateau. The effect of the nineteenth-century Supreme Court cases which followed that repression in the base was to repress in the legal structure the contradiction between the commodified form of the rights which had been won and the decommodified content which was necessary to enforce these rights. By 1960, a movement resurged in the social base which threatened to undo the work of nearly one hundred years of repression.

This movement called Civil Rights Law out of its slumber, to insure the liberty of blacks fighting for their freedom in the South. But this movement posed a great danger to the system with its tendency to intensify and accelerate the contradictions in the structure of the state between the commodified form of "civil rights" law generally and its necessarily decommodified content. This is the dialectical center of the legal component of the democratic revolution: as the contradictions between commodified form and decommodified content accelerate, the commodified form of the rights themselves must eventually be transcended.

Thus, by 1960, the reality of mounting black protest arose to do the job that the Wartime Amendments promised and reneged upon and the job that *Brown* promised but reneged upon; the freedom of blacks and the completion of America's democratic revolution.

The momentum of the New Abolitionism could not be contained. The contradiction between the commodified form of the rights granted to blacks and their necessarily decommodified content, began to expose the shortcomings of the still commodified content of those rights as they pertained to other minorities, women and members of society at large. In other words, the contradiction presented by rights which are commodified in form, yet must be decommodified in content had been exposed, heightened, exacer-

37. Jones v. Mayer Co., 392 U.S. 409, 446 (1968) (Douglas, J. concurring) (citing Hamilton v. Alabama, 376 U.S. 650 (1964)).

38. *See, e.g.*, Zinn, *supra* note 32, at 2-3.

39. *Supra*, note 1.

bated, and accelerated. Everyone shared the liberal, democratic aspirations evoked by the commodified *form* of the Amendment; but to *transform* those aspirations into meaningful rights would require that each person be dealt with in the context of his or her own historical, political, economic and class circumstances in a way which transcended capitalist logic. Otherwise, the rights were meaningless. Thus, the path was cut for a frontal attack on bourgeois legal ideology and, accordingly, on bourgeois legal structure.

The paradox and contradiction is this: liberal democratic rights, presented in commodified form, present an idea which straddles capitalism and socialism. The idea is generated by the bourgeois democratic revolution, but to come to pass, that revolution must run its logical course to socialism. The first step on that logical course comes when someone points out that the Emperor has no clothes, that commodified liberal rights have no meaning without decommodified, pre-socialist content. And struggle begins as people seek to give commodified rights meaning in the only way they know how and in the only way possible: by seeking to have those rights applied concretely to themselves.

Where might the acceleration of this contradiction stop? The system, even in its most affluent condition, is incapable of concretely applying liberal democratic rights to everyone; the completion of the democratic revolution results in a political and economic system which is not capitalistic. This is even more true for the second phase of the Second Reconstruction, which calls for decommodified equality.

The first phase of this movement dealt primarily with items left over from the original Abolitionist agenda, *i.e.*, the federal guarantee of liberty for persons of African descent.[40] These liberties included the freedom to live, sit and eat where one could afford, and to work commensurate with one's skills and abilities. This struggle for *liberty* (one hundred years overdue) caught the popular imagination.[41] The black movement to complete the democratic revolution inspired many of the movements of the 1960's, the struggles of opposed minorities, women and many others.

There is more, which we can discuss here, but only in a cursory fashion: as legend has it, there was a point where someone in "the Movement" said, "What good is the right to eat at Woolworth's when you don't have the money to buy a hamburger?" The second phase of the Movement which then began went beyond a struggle for the abolition of slavery, its badges and incidents, and for federal guarantees that such abolition would be enforced and maintained. The second phase of the Movement was a drive for decommodified *equality* in form and content. This included an equality with whites which would reflect the development that the black community within the United States would have achieved in three hundred years had they not labored under the burden of slavery, its badges, incidents, or progeny. The second phase of the Movement was, in other words, for repara-

40. Such federal guarantees, even in the 1960's after the Civil Rights Movement was in full swing, were not readily forthcoming. *See, e.g.*, Kinoy, *supra* note 18, at 437; Zinn, *supra* note 32, at 191-92. *See also* Zinn, *supra* note 32, at 194-215.

41. For a brief discussion regarding liberty and equality in the struggle for equalitarianism in America, *see* Wright, *supra* note 6, at 214-215.

tions.[42] A demand that the system live up to its promises and for democratic rights commodified in form is one order of business; liberatarian ideas are still primary. But a drive for equality smacks of "levelling", of an order objectively in opposition to capitalism's very logic.[43]

The advocates of black Reparations were branded as dangerous radicals and were weaned away from public support, isolated[44] and in some instances, destroyed.[45] But a concession had to be made to the rising expectations of black Americans for some form of compensation for slavery, segregation and discrimination.[46] The concession was affirmative action, and it constituted a regime of decommodified law;[47] a regime of law objectively in contradiction to capitalism; a regime generally unreproductive of capitalist social relations. The regime of decommodified rights contained in affirmative action programs was also a reminder that the state could be used for instrumental purposes and as such was a lightening rod for the development of group and class consciousness antithetical to the prevailing ideology of the law as impartial.

The most militant of the New Abolitionists had forced the nation to deal with the specifics of the conditions of Americans of African descent, not only heightening and intensifying the contradiction between the commodified form and decommodified content of civil rights law, but also pointing the way to law decommodified in both form and content, law which could develop to its fullest only in a socialist state. Affirmative action is thus more than a contradiction to capitalism; it is a nucleus of pre-socialist reality in the heart of the capitalist system. Thus, a key indication of the progress of the democratic revolution would be the existence of affirmative action programs, decommodified in both form and content, models for many other instrumental state structures existing as reference points for a whole series of movements, all of them generally nonreproductive of capitalist social relations.

III. The Role of the Black Lawyer

A view of the law as operating only to reinforce the prevailing system[48] would give us little hope of deflecting the path of the state by struggle. Regardless of the dimension of the state's response to struggle, the fact that the response was "legal" would mean inevitably that the system would be reproduced, and the Movement's solidarity and struggle hindered, if not destroyed.

42. A demand specifically for black Reparations was made by James Forman, former executive secretary of the Student Nonviolent Coordinating Committee (hereinafter SNCC), to the National Council of Churches. Bell, Race, Racism and American Law 362-63 (1st ed. 1973).

43. *See, e.g.*, B. Bittker, The Case for Black Reparations 105-27 (1973) (concluding that black reparations would be impossible under present law).

44. *The Story of the Black Panther Party: From Revolution to Revolution*, 3 African Mirror 38 (1980).

45. *Id.* at 43.

46. Skelly Wright, *supra* note 6, at 215.

47. *Cf., e.g.*, J. Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*. 61 N.W. U.L. Rev. 363, 379 (1966) (legal classifications by race "weaken the government as an educative force").

48. The "system" itself is a product of historically specific struggles for class dominance. *See* Esping-Andersen, *supra* note 12, at 189.

On the contrary, legal rights for the oppressed can be brought into existence; but they are effective only to the extent that the regimes they create address themselves positively to the distinct human needs, concrete interests, social positions and class relations of those to be entitled with those rights. Further, these rights must be won in a struggle against systemic pressures which militate toward the creation of commodified rights.[49] Such regimes constitute decommodified law; their constituent rights cannot be created in individuals, but only in classes or significant groups of people,[50] in recognition of their collective identity[51] and as a result of the pressure they exert to bring the right into existence. Effective decommodified legal rights for the oppressed can only be sustained as a result of pressure from the collectively entitled group, to prevent the right from being ignored or interpreted away.[52] Under these conditions decommodified rights can be won as con-

49. The establishment and maintenance of a regime of decommodified rights is the result of an intense and far-range struggle, one which is along the axis of social change," *see* note 8, *supra*, and which is strong enough to counter—even temporarily—the systemic imperatives of the capitalist system which militate toward commodified rights. Systemic forces arise to *erase the memory* of instances in which the state has been used for instrumental purposes, or in which the state structure has been altered to create decommodified law, as the resulting structures serve to remind the different forces in society that the state is not "neutral" or "impartial."

50. For an argument against granting rights to groups, basically because it is against the "liberal tradition" of the United States, *see* P. Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 48-52 (1976) (citing various authorities for and against the argument). *Contra*, Balbus, *supra* note 3, at 578: "The juridical person . . . is merely the political persona of the individual whose social existence is instrumental, self-interested, and alienated; the individual, in short, who fails to act as a *social* individual aware of the inseparable relationship between his or her development and the development of every other individual."

The *Dred Scott* case (upholding slavery as constitutional and in some sense the wellspring of this entire debate; *see*, *e.g.*, Kinoy, *supra* note 18, at 393) recognized slavery as an institution designed to repress an entire race of people, not merely as individuals and not even merely as slaves. 60 U.S. (19 How.) 393, 409 (1857). The stigma of "degradation" was placed upon the entire African race, slave or free. *Id. See also*, Kinoy, *supra* note 18, at 410. *Compare with* N.A.A.C.P. v. Button, 371 U.S. 415 (1963). Litigation (for the constitutional rights of blacks) is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. 371 U.S. at 420. *See also*, A. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1291 (1976).

51. It is important to bear in mind that even when rights are collectively won, if they are defined as commodified rights, opportunism and conflict can result; the false equality of the legal system obliges its atomized actors to "treat each other as a mere means to their own purely 'private' ends. . ." Balbus, *supra* note 3, at 578. Balbus, quoting Karl Marx, notes that, "The individual leads, not only in thought, a life in the political community wherein he counts as a member of the community, and a life in civil society, where he is active as a private person, regarding other men as means, degrading himself . . . and becoming a plaything of alien powers." *Id.* at 579.

Thus, the final shape of rights won may weaken as well as strengthen a social movement aimed at securing those rights. Esping-Andersen, *supra* note 12, at 203. But proper functioning of liberal or bourgeois ideal of equality will be the internal inequality of the black community, so that "divisions of race and ethnicity cease to correspond, and begin to conflict, with divisions along economic, social and other shifting lines, (so that) racial politics (become subordinate). When there are large numbers of black doctors, shopkeepers, corporate executives, developers, engineers, shareholders, and so on, the problem will be solved." Wright, *supra* note 21, at 216.

52. The rights are "interpreted away" by casting them in commodified form, "masking and occluding" the differences that must be perceived for group consciousness to be formed. "A form that defines individuals as individuals only insofar as they are severed from the social ties and activities that constitute the real ground of their individuality necessarily fails to contribute to the recognition of genuine individuality." Balbus, *supra* note 3, at 578. Thus, the black person who asks to be judged "not as a member of his race, but as an individual" aspires to that sham, bour-

cessions from the dominant class and often from the capitalist system itself; decommodified rights, in other words, are born of class struggle.

We should bear this truth in mind particularly during this period in our history, when the entire Second Reconstruction, both first and second phases, is under a sustained attack. This attack takes two forms: (1) a counterthrust against Phase I, attempting to resolve the contradiction between the commodified form of civil rights law and its necessarily decommodified content by *repressing* that contradiction in the legal structure; and (2) a counterthrust against Phase II, which attempts to dismantle the decommodified law (form and content) of affirmative action, preventing its use as a stepping stone toward further confrontations with the system.[53] In this context, our strategy as black lawyers, students and legal workers must be to constantly force upon the system the specifics of the condition of black people. We should be unafraid and unashamed to speak up, speak out and fight back.

But what about tactics? What specifically, on a day to day and year to year basis, can we do? Judge Carter gives us guidance:

> A few black lawyers cannot adequately protect and advance the cause of black people. A few carefully selected test cases will not suffice. Scores of cases must be filed across the country to follow up every breakthrough in the law. The courts should be flooded with litigation . . . every court in this country should be faced daily with some lawsuit seeking redress against one of the aspects of discrimination existing in the jurisdiction it serves . . . [o]nly when this country is required to face on a daily basis . . . everywhere the distance between (the illusion of equality and the reality of its absence) is there hope that the law's sanctions of equality, presently evaded or avoided by various power enclaves, will be effectuated.
>
> Black lawyers have an overriding social, personal, and moral responsibility to utilize their talents to benefit the black community. In doing so, (they) work in their own interest as well . . . If nothing else, the visibility of black lawyers all over the country, engaged in some form of litigation designed to lighten the racial burden, will lift the morale of the black community and add to its courage and inner strength.[54]

The black lawyer's role as an agent of social change is one which requires black lawyers to be fully aware of the place of their people's struggle in American history; they should be in the vanguard of the democratic revolution, demanding that the system give black people freedom and equality and, in the process, awakening others in our society to demand their own.

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geois individuality which is used principally for repressive (oppressive) purposes in capitalist society. He thus truly aspires to become an "invisible man."

53. The question is whether persons of African descent in the United States need special measures (decommodified law, in form, as well as content) to insure their material equality with those citizens who have never had to struggle to throw off the badges and incidents of slavery. To argue that no special measures are legally possible, a commodification of the rights involved is necessary, couched in a projection of a false equality between former oppressed minority and the majority, presenting them as what they are not—equal. Thus, Alan Bakke has a right to be free from discrimination which is commodified in both form and content, and which is supposedly the "equal" of the right of an individual member of an oppressed minority to be free from discrimination. *See* Regents of the University of California v. Bakke, 438 U.S. 265, 320 (1978) (Powell, J., announcing the judgement of the Court). This commodified right of Alan Bakke is then used to attack affirmative action programs which are characterized "racism in reverse."

54. Carter, *supra* note 2, at 15-16.

It is extremely important that the techniques we use and the demands we make be considered in the context of and in coordination with the demands made by our brothers and sisters who are Latino, Asian, Native American, and progressive white, lest we end fighting each other for crumbs. Only a broad-based and persistent demand for full political, civil and economic rights for all of us can be a demand which will force the system to change. And we must be prepared to point the way toward a new system, which can meet the needs of all the people.

Our struggles must also be based on an articulated faith in the American people. Governor Reagan won the recent election because he told those Americans who voted (only 52.3% of those eligible, the lowest percentage since the 1948 Presidential elections) that he had faith in them to make it through the present crisis of the American system, while President Carter told his constituents they were naughty children, spending too much, not working hard enough. Reagan seeks to unify the country against a threat, either real or imaginary, and, undoubtedly, that threat includes all minorities and progressive people. Reagan's formula for uniting the country is an old and time-tested one: find a scapegoat.

We must devise a new and better formula for uniting the country, one better than the formula of American liberalism. The New Deal Coalition, the foundation of American liberalism, is in disarray. Its chief exponent, the Democratic Party, made the same mistake the British Labor Party made immediately before the victory of Margaret Thatcher, *i.e.*, they moved away from their natural constituency and attempted to appease big business rather than assert a vigorous program of workers' and minority rights. We must go far beyond liberalism and challenge the nation and the nation's people in a fundamental way. We must challenge America to continue its democratic revolution. Reagan asks America to complete that revolution by ending it, repressing those who have not partaken and who are bold enough to *demand* entry; Reagan asks America to declare that equality has arrived, though it clearly has not. This is the formula of the *Civil Rights Cases* of 1877, which threw blacks to the wolves of racism, declaring that blacks were "equal" to their former owners when they clearly were not.

IV. Conclusion

Black Americans must demand that America complete its democratic revolution by including all Americans. However, black Americans should not seek to be accepted merely as "commodified" citizens, who dare not articulate their differences, or as citizens without color or creed or family, who are without special contributions and special needs. Black Americans must demand that white America accept us as we are, not as we are depicted on television or in the newspapers, but as we are known in our communities and to our families, at our work places, at our churches, and yes, in our political organizations. But as we make these demands we must constantly

affirm our faith in America. For once America completes this democratic revolution, each American will be greater, more generous and more loving.

THE BLACK LAWYER*

Robert L. Carter

The judicial process has towered above all other institutions as the most important and powerful weapon available to blacks in the quest for equality. Until very recently, the political process was closed and the only avenue seemingly available, conducive to producing breaches in the barriers of discrimination, short of armed revolution, was the law. Here, because the constitutional adjudication process, which is the province of the judiciary, requires a sound intellectual basis for its determinations, reason can carry the day. And indeed it did, as the United States Supreme Court began to seek to give realistic effect to the equality safeguards of the fundamental law. The Court rejected sophistical rationale and arid legalisms in seeking to delineate the reach and scope of the Civil War Amendments (13th, 14th and 15th). This led to broad sweeping declarations of what the Constitution required in respect to equality for blacks. Indeed, the ratio descendendi on which *Brown v. Board of Education* was based was made fully applicable—all forms of discrimination or differentiation would be struck down, and there would be in reality equality under law. The law's promise would be kept.

Unfortunately, the judicial process has not been able to produce equality under law. Legal doctrines, many of them highly technical, have been interposed as roadblocks. Courts have been unwilling or unable to break the resilient resistence of state officials to segregation and discrimination, particularly in the critical areas of public education, employment, and housing. Moreover, power blocks—unions, parents, school personnel, politicians—have from time to time, singly or in combination, been able to blunt or subvert the law, striking down some form of discrimination because it appears to threaten their own interest. This has led blacks to distrust the law.

Another factor has been the cost and amount of time consumed in achieving victory through the courts. The result has been that litigation to secure basic rights for blacks has been painfully time-consuming just at the point in history when American blacks have become increasingly impatient. Moreover, when victory in the courts is achieved, it is often more in form than in substance.

Despite Brown, preciously few black children attend integrated or even educationally equivalent segregated black schools—North or South. The white suburban noose has been more tightly drawn around the black inner-

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