

Legal Education and the Legitimation of Racial Power

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Thank you for your invitation to talk with you today about how the recent uproar about police killings of African-Americans in Ferguson, Missouri, and across the country might connect to your experience in elite legal education—what might Harvard Law School have to do with what is going on? I will talk about the way that racial justice is ordinarily understood in law schools, and the shortcomings of that dominant conception.

My thesis is that Harvard Law School is one of those mainstream institutions of power in America that defends a universalist rule-of-law ideology as a way to comprehend racial justice, and a bankrupt ideology of “meritocracy” to justify the distribution of wealth, power, and prestige in American society.

Deans Minow of Harvard and Post of Yale recently published an op-ed in *THE BOSTON GLOBE* making explicit the connection between the events after Ferguson and law school’s rule-of-law mission:

The justification for violence must be established through full, fair, and open legal procedures. If these procedures are sidestepped or avoided, the legitimacy of the legal system is endangered If African-American communities come to perceive police as alien and violent oppressors, there can be no hope of establishing a common and viable rule of law We must constantly ask how we can narrow the gaping distance between our legal ideals and the practices we countenance.

Now, Deans Minow and Post are each indisputably progressive—they have been friends to the cause for racial justice in many ways, including their consistent and explicit defense of the constitutionality of affirmative action and its actual practice at the institutions they head. They are allies, not adversaries. And their op-ed itself contains many ideas I agree with—better police training, accountability to citizen review boards, and regular outside review of police practices are all sensible suggestions. The “truth and reconciliation” process

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they propose would be a particularly important way to begin to open up communication between police and the community.

But, nevertheless, I think that the liberal view of the relationship between law and power that they take as an ideal is misguided—in my view, the problem about Ferguson is not that the Black community might lose faith in the rule of law; the remedy for the social ills of police violence that have been so vividly demonstrated are not to be found in additional procedures to ensure racial neutrality. This way of conceiving of our situation is false, because the issues are substantive and political. It is not a matter of re-establishing the neutral norms of the rational rule of law; that universalist ideology is part of the problem in that it obscures the fact that power, not reason, is at stake. And to the extent that your law school is committed to this particular way of interpreting and regulating race, it helps to constitute and reproduce an ideology of legitimation that should be resisted, not celebrated. How is it that progressive white administrations of law schools committed to being perceived as liberal and diverse can end up defending a conservative and apologetic racial ideology? That's one strand of what I want to focus on.

I also want to talk about another idea that I think is linked up with the ideology of a neutral, apolitical rule of law I just described, and that is the parallel ideology of a neutral, apolitical meritocracy for admission to the hierarchy of educational institutions. I want to address the particular role that committed, progressive law students *at elite institutions* have—the particular responsibility of being a progressive person who wants to transform the system when you find yourself in the belly of the beast of American legitimation. And I guess I could summarize my thoughts on this by a little slogan I came up with. I hope you like it. “*The point is not to **integrate** the ruling class, but to **abolish** the ruling class.*” I need to work on catchiness, but that is the basic idea.

I think there is a particular responsibility and challenge that progressive students, particularly those from disempowered communities, face in elite institutions. You must maintain what W.E.B. DuBois called a “double consciousness.” As you learn the discourse of the ruling class, the discourse of the powerful, the discourse of the elite, one of the dangers is that that discourse will come to infiltrate you—like the invasion of the body snatchers; it will kind of “podify” you; it will get inside of you and become part of you. You will be using these standards as the standards by which to judge yourself, your own value, your own worth, your family and friends. You will become *an elitist*. That's a real danger. Not becoming an elitist means having the ability to disassociate yourself from the seductive rewards that are bestowed upon you by your admission to this elite institution. You have received some insularity from the deprivations that otherwise could befall you. Your ticket is punched to that extent; but that carries a political and existential responsibility with respect to those whose tickets have not been punched in American society.

So those are the two issues I want to address, and these are the frames: the conceptualization of the issues surrounding Ferguson as a failure of the

“rule of law,” and the meritocratic conception of admission to elite schools like Harvard.

Racial justice has been understood in dominant consciousness in America according to the paradigm I call “integrationism”—an ideology about race that has come to define racial enlightenment, but one that I think is an impoverished and deeply conservative way to understand the issues. In order to put its assumptions in relief, I want to contrast integrationism with a different paradigm: “nationalism.”

Integrationism is a mindset about race that understands “racism” as rooted in *consciousness*, in people making the mental mistake of prejudging someone else based on the irrational attribute of skin color. Those prejudices are then institutionalized in social practices—discrimination in education, employment, and other areas of social life—and together these practices constitute the more general social system of segregation. From this perspective, overcoming racism means achieving colorblindness about race in order to erase prejudice, establishing unbiased, neutral treatment in the distribution of jobs and other opportunities, and eventually achieving the systematic integration of social institutions—the opposite of segregation. The historic focus on the integration of public schools over all other institutions tracked this conceptualization of racism; since racism was rooted in ignorance, it made sense to think that integration of schoolchildren would eventually cure it, as children learned the universalist message that we are all the same regardless of race. School integration would ensure that a new generation of Black children would have an equal educational opportunity that segregated education denied. Race-conscious school integration was understood as a necessary but temporary evil, necessary to compensate for past denials of equal opportunity but only for a short time, until equal education would render race consciousness unnecessary.

I believe this “integrationist” view is the dominant way that race is still understood in “enlightened” mainstream discourse. There is disagreement between liberals and conservatives about specifics within the framework: how much discrimination continues to exist; whether temporary affirmative action is still necessary to enable Black people to catch up; whether racial integration’s apparent failures are attributable to the conservative backlash that prevented full implementation, to the Supreme Court’s eventual limitation of the school integration remedy, or to the failure of “civil rights” to comprehend economic as well as legal subordination, etc. But the underlying structure for understanding race is shared by conservatives and liberals: racism consists of a mental mistake in utilizing race consciousness to interpret the world. Since, properly understood, race doesn’t make a difference, it is problematic to think in terms of race at all. Such prejudiced thinking is contrasted with objective, neutral, unbiased, rational thought at the level of consciousness, with equal, meritocratic treatment at the level of social practice, and with the systematic racial integration of social institutions. This integrationist view of race has been, for the most part, the virtually exclusive way racial justice has been

understood in the liberal and progressive white community,¹ within which its universalist premises counter the white supremacy ideology of racists and segregationists.

In my view, the integrationist model serves as an apology for all the standards—in educational institutions or employment and job decisions—that were developed during a period of apartheid and continue to be used. The conception is that, once the “whites only” policies of exclusion are ended, racism has been conquered. All the other institutional practices—like using the LSAT as a selection criterion, for example—are taken as themselves aracial and neutral. That is, I think the Black nationalists of the 1960s and early 1970s, such as Malcolm X and the Black Panthers, were right: Integrationist ideology allowed American culture to claim an aracial enlightenment without any critical examination of all the institutional practices that had been created during American apartheid. In legal education, that included the vast legal rationalization of Jim Crow segregation (and even slavery, of course) as *legal*, as consistent with the rule of law.

In the African-American community, however, the integrationist view has consistently been contested, not by racial supremacists, but rather by a long tradition of “Black nationalist” thought that denies the central, universalist message of liberal integrationism—that we are all the same, regardless of race—in favor of a historicist account of the significance of racial identity. Black nationalists dating back to the 19th century rejected integrationism on the ground that Black racial identity is the marker of a distinct community and culture, a source of positive meaning and not merely the negative byproduct of oppression. The core idea is that African-Americans constitute a “people,” a “nation,” built on generations of common experiences that establish a common history and spiritual connection among its members. Rather than understanding integrationism to mean the achievement of equality with whites in a neutral space of integrated American institutions, nationalists equated integrationism with *assimilation* into the culturally distinct white community, with its own particularistic social practices, a “painless genocide.”² In contrast to purveyors of the integrationist program, Black nationalists demanded reparations and advocated that the Black community engage in self-help to build and strengthen institutions in their own independent communities.

In the late 1960s and early 1970s, Black nationalists developed a sophisticated critique of the premises of integrationism, including the assumption that “objectivity” and “neutrality” to race were even possible or desirable. Nationalists located “racism,” not in consciousness, but in external

1. This original, pure version of liberal integrationism has been mediated by the rise of a limited form of multiculturalism in which diverse cultures, including African-American culture, are celebrated for their differences in quasi-public ways, while governmental power itself follows traditional colorblind interpretations of integrationism on the ground that it is the only neutral way to follow a “rule of law.”
2. Robert S. Browne, *A Case for Separation*, in *SEPARATISM OR INTEGRATION: WHICH WAY FOR AMERICA: A DIALOGUE* 7-15 (R. Browne & B. Rustin eds. 1968).

power relations in which Blacks were subordinate to whites. Racism does not exist in the mind, and it's not a mental or consciousness error. Racism exists out there in the world, in the maldistribution of power by race, not in what people are carrying around out there in their heads. Thinking about people in terms of race is not a sign of prejudice or stereotype; it's a sign of the recognition of the particularity of communities and people of the United States. The evocation of an African-American community is not a vestige of segregation that should be abolished once we really achieve integration. From this nationalist view, racism's systematic form was not segregation—shutting out Blacks—but *colonialism*, the domination relationship between separate nations. And the remedy was not the achievement of colorblindness or equal treatment or integration, but rather the redistribution of power and wealth. Black nationalists in the Black Power movement of the late 1960s and early 1970s, predating contemporary postmodern critiques of claims to objectivity and neutrality, challenged the deep epistemological assumptions of liberal integrationism; they asserted a historicist, contextualized, and political understanding of racial power, rejecting the “colorblind” reference point of liberal neutrality claims. The Black Nationalist position focuses on the question, “What is the effect of this on the African-American community?” That, I submit, should be the key question in the current climate, not, “What is the effect on the rule of law?”

This way to understand racial justice denies the possibility of a universalist, neutral reason or rationality, or, say, in the Ferguson context, the impossibility of an objective, racially neutral definition of reasonableness or “probable cause.” Such assertions of universality are seen as illusions and fantasies of the Euro culture that presented itself as universal as it colonized all the other peoples of the world.

I want to apply these contrasting models to the questions I said I wanted to talk specifically about—the particular role of students from disempowered communities and progressive students at an elite law school, and the connection with post-Ferguson events. I want to start this out by saying that one perk of getting admitted here is that you can turn and question the standards of meritocracy that keep so many out without the accusation of “sour grapes.” So that's cool, and that's a form of power that I urge you to use. But those of us from disempowered communities all understand, I think, that our admission here, our achievement, is not because we're so smart. We stand on the shoulders of our grandmothers and grandfathers and uncles and aunts and brothers and sisters, many of whom are *not* here, or not in medical school, or anywhere else that will grant them access to the ruling classes.

When I arrived at Harvard, I was completely freaked out and alienated. I thought, Oh my God, they're going to figure out I'm a fraud. I can imagine that many people can identify with what I'm talking about. “They've made a mistake.” My wife and I pull up to Peabody Terrace, married student housing, and we've got our old rusty station wagon loaded up with all our stuff, and I'm embarrassed. I think (mistakenly, it turns out) that Peabody Terrace is

where the married prep school graduates live. They will immediately see us as country hillbillies. We pull up in the car and we open the door, and my wife's mother had given us jars of pickled zucchini—you know, homemade Mason pickling jars—and we open the door and one of them rolls out and shatters on the pavement. I'm humiliated because, you know, I feel, looking at the shattered glass and vegetables, so exposed. I'd internalized a social ideology in which I was unworthy . . . very harmful, and a very insidious way that power might work.

On the first day of class, I'm very nervous. The class starts, and somebody talks, in this deep, resonant, perfectly articulated pitch. And he talks with such authority and clarity. I think, well, first of all, they're all geniuses, I'm screwed. But tied together with that diction that I heard was the presumption of power and authority. (I was happy to learn—and some of you first-years, I know are discovering this—that diction doesn't necessarily match up with analytic skill. I hope that's reassuring!) A few weeks go by, and I start hearing some of my classmates talk in this deep, authoritative, articulated way about this or that argument in some opinion of the Supreme Court, *what I suspect Justice Rehnquist was really concerned about was . . . blah blah blah*—and admitting I'm a little bit alienated generally, I'm thinking, "Who the f--- cares what you say about the Supreme Court, who do you think you are?" So what I'm talking about is a sense of entitlement and privilege that is embodied in the idea "yes, we will be running the world, and it really matters what we say; *are you taking this down?*" That's what I really heard, but it wasn't spoken: *Are you taking this down?* Said to an invisible, future subordinate of the important people these classmates imagined themselves soon becoming.

There were some other incidents. How many people know what jodhpurs are? Jodhpurs, I think—I'm about to expose my own ignorance, I was just hoping you all knew—jodhpurs, I think, are the very distinctive little pants you wear when you go horse poloing? OK, now, I'm sure this doesn't happen anymore, but in my time, the self-consciousness of the ruling class was at such a low ebb that one of its members showed up in my Torts class *in his jodhpurs!* I know I should celebrate the diversity of such cultural expression but it pissed me off! I'm telling you, I took it as a class affront.

Now, in this position you're faced with a really serious self-identity question: *Should I start talking like that?* Is that what being "educated" is? And then I will be like them and I will be powerful and I will be an elite? Do I want to be entitled? *Or*, will that be forgetting the people I went to high school with who are smart enough to be here but are in jail instead (many of them)? Should you forget those who are cut out by the system of meritocracy—including for many of us our parents and grandparents and siblings and friends?

So linking integrationism, nationalism, meritocracy, law school, and the *LSAT*: The *LSAT* has a disproportionate racial impact. It is purported to predict well the performance of students in the first year. Institutions continue to use the *LSAT* as the main selection criterion for legal education. Because it accurately measures performance in the first year, that seems to be a functional,

neutral justification: It's not racist to use the LSAT. It has some correlation with first-year performance. Then you start thinking, well, they've been using it for years, so the first year—before there were Black people in law schools, the first year was just a white enterprise, right? And before *Brown v. Board*, legal education in general was almost exclusively a whites-only enterprise that rationalized segregation as consistent with the rule of law. And this culture, of the first-year curriculum, was, I think, developed in the 1800s—you have the pictures all over the hallway walls of the white guys who developed all this stuff—this is going way back. So what kind of consciousness could think that the way we teach the first year and performance in the first year could be any kind of neutral, aracial baseline to measure meritocracy—to actually measure something besides the way we've been doing this during racial subordination?

Well, then you might say, the reason we teach the first year the way we do is that it's got to match up with legal practice. That's what legal practice demands. That's what it takes for legal practice; you've got to do it this way.

And then you might say, Do you mean the same legal practice that was developed during racial apartheid, and that legitimated Jim Crow? And that developed various customs and norms about how courts should operate and how legal arguments should proceed? Is that what you mean by *the legal profession* that's going to provide the baseline to tell you that your meritocracy is something different than hidden white supremacy ideology?

The answer should be to critically examine all the institutional practices that were constructed during American apartheid, and not to smugly assume that racism was exhausted by exclusion from otherwise racially neutral institutions. When such an institution uses a selection criterion like the LSAT, one that has a clear racially disproportionate effect, critical scrutiny should be the greatest. If Harvard Law School wants to stand on the side of ending the false social structures associated with racial power, it should start by abolishing the LSAT. *Abolish the LSAT!* Harvard's in a great position. Harvard doesn't have to worry. There's no excuse for this institution to use a racially biased test, because there's no justification for it that doesn't depend on another baseline tainted by its complicity in a history of racial subordination.

Do you want to be part of this and reproduce all the norms and cloak yourself in the authority of the privileged? Or is it based on false premises? Will you be invested in the legitimacy of a "meritocracy" that selected you, or will you turn on this social structure of legitimation? I just gave a very quick analysis of the LSAT to suggest that the claim to objectivity is false: In a transformed law school, in a transformed legal practice, the ones who are successful, and the ones who are not successful, will be vastly different. I hope that you all transform that legal practice.

When I first started law school, I really thought it was going to be a Socratic thing where you talk about justice in a very good-faith way. But that was before I started the classes, and so I had a quick sense of frustration. Then I realized, OK (this was before the boycott movement, it was a very depoliticized time),

what I'm going to do here is to try to learn and dissect the ideology of the ruling class. I want to know what they say justifies the system that has been so unfair to my family and just about everybody I love. That is a very difficult project, to try as a student to keep what you are learning at a distance and yet still learn it to succeed in the courses. And that project often depends on the presence in some of these elite institutions of some members of the elite class to help guide us into the confusing hallways and corridors of the mansion of apology and justification. And so I just want to mention Duncan Kennedy as, in my mind, a great model of a class "traitor" who has been such a guide for many progressive students here at Harvard.

Turning back to Ferguson. "Black lives matter," I want to assert, embodies a critique of integrationism as applied to Ferguson and recent "police misconduct" similar to the critique of the LSAT for admission to law school.

One way to see the Ferguson situation is as a failure of the rule of law, and the appropriate response is to vindicate the rule of law. The integrationist way implies it doesn't matter who the police are, what color they are, or what communities they inhabit; they are just going to apply these neutral roles of reason, the same rules anyone in that position is expected to apply evenhandedly to "citizens"—and that makes sense if a neutral, universal rule of reason is possible. That's a way to understand what happened in Ferguson. Part of the reason the outrage has been so widespread is that that conceptualization pulls in white liberals, civil libertarians, and a wide range of people who are worried about state power. It's a broad coalition that you get with that analysis.

But there's another way to understand the situation: the nationalist way.

To my mind, the context of Ferguson and policing generally in the United States is better described according to the colonialist analogy that was lodged by the Black nationalists: The mass incarceration of so many members of the African-American community looks as if a colonial power came in and dealt with the disruptive elements of the population by imprisoning them. That's what the colonialists used to do. It's worth noting that the white police officers sent to police Black neighborhoods are themselves working-class—they're sent to do the worst work of regulating and tamping down the "bad elements" of the African-American community. They're sent to patrol neighborhoods that are alien to them, sealed up in squad cars to protect them, and they are likely themselves scared. It looks like a colonized community kept in order by outsiders who are paid to go in and keep things quiet, but who are themselves just hired guns with no hope for advancement themselves.

So what should an elite law school do in this situation? Should it embrace a false universalist rule of law that says it doesn't matter who you send in that community (as long as they put on the rationality helmet, they're going to be able to be fair and just to the community)—or, do you examine the colonial relationship that exists between the administering white world and that African-American community and call for it to be disrupted and transformed—to not divorce the rule of law from the context of racial disparate power in which the police are patrolling, but to

include the whole context. And when you include the whole context, the idea that the rule of law could be a solution is, I think, impoverished.

So I'm returning to a thematic that I'm pulling again from the Panthers in the late 1960s. One way to understand Ferguson is the failure of the rule of law. Another way to understand Ferguson is as demonstrating the need for *community control* over institutions, such as the police. That's what I believe. It's not only the "fault" of the particular anxious white police officer who pulls the trigger, but the system of power relations—class and race and gender and symbolic authority, the whole bag—in which the African-American community is patrolled by those who have no connection with or understanding of the community. The "colonialist" metaphor is not perfect, but it is a better way to understand what needs to be done than the false universalizing of the "rule of law" interpretation. More important, it depends on seeing that there are particular and distinct communities involved, with their own aspirations for self-determination and a future ... an understanding that is categorically excluded by perceiving the issue in terms of the rule of law and probable cause between government and citizens.

The particular ideologies of meritocracy and the rule of law also overlap with respect to the selection of police officers. Just as elite law schools continue to use the LSAT, despite its racial effect, the ideology of integrationism holds that there are neutral and objective ways to choose police officers without regard to any of these issues of culture, power, and context. The standardized written tests at issue in *Washington v. Davis* were upheld over an equal protection challenge based on disparate racial impact. They were used to select police officers for the District of Columbia. And the "objective" tests, used throughout the federal civil service to test "communication skills," purported to demonstrate, on neutral, aracial grounds, that white police applicants were generally better able to communicate with the predominantly Black population of D.C. than Black applicants. This is, I believe, a clear window into the myopia of integrationism.

And that is, in sum, how Harvard and Yale law schools can end up defending the rule of law in our current racial context—the Minow/Post perspective is liberal and progressive, but ultimately apologetic about a range of ways that power is exercised, and blind to the social context of power and subordination in which it is all situated.

I want to urge you, as progressive students in an elite law institution, to resist—keep your double-consciousness; learn the consciousness of the ruling class and how to deploy it, but resist—don't define yourself by it. Please don't adopt the "are you writing this down" sense of entitlement and authority that a purportedly neutral "meritocracy" says you've earned. Actually, please deploy this false authority strategically when necessary, but ultimately resist it. Resist, but resistance personally is not enough because things keep on going, even without you. So you must disrupt and then transform: Resist, disrupt and transform.

Thank you.