

## **Colorblind Racism! Mapping Strategies for Social Change**

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Draft: Sept. 28, 2003

Presentation: EJS Oct. 4, 2003

Plenary: Think Tanks

### I. INTRODUCTION

Let me start with a bit of history about the urgent present-day need for progressive legal think tanks (and indeed about part of the impetus for the founding of the Equal Justice Society). Then I'll get specific and discuss the kind of focused intellectual/political and strategic work a small progressive legal think tank can do – it will be about the beginnings of a small think tank I've helped to start and its current work aiming to take down the nefarious court-created so-called “intent” doctrine. That intent doctrine, rooted in existing constitutional interpretation, makes it exceedingly hard for people of color and women to prove unlawful discrimination while facilitating “reverse discrimination” claims that undermine affirmative action.

### II. HISTORY

First, the bit of overly-simplified history. At the turn of the century race, just a few years ago, there existed a “gap of chasmic proportions”

separating front line civil rights lawyers and activists from progressive scholars and big picture thinkers. Both the front-liners and the scholars sought the same general goal: to eliminate for people the real-world conditions of social injustice, and particularly racial discrimination, in America (I'll use racial justice for the rest of my talk as short-hand for social justice). Yet, those progressives tended to work in separate legal realms.

The front-line civil rights people operated under the daily pressure of the 20-year conservative dismantling of traditional civil rights: restrictive court rulings, conservative media pundits shaping public opinion, organized right-wing community groups, fund-raising survival, all undergirded by growing numbers of conservative judges. Progressive scholars, on the other hand, developed a sharp critiques of the conservative turn in civil rights – for instance, the neoconservative co-optation of liberal concepts of equality to advance inequality (recall Prop 209, and anti-affirmative action initiative was billed as promoting civil rights and equality). Those scholars developed potent critiques of the politics of law and showed that there was no inevitable march toward enlightenment and justice – but rather only a constant battle for progress. This battle, although highlighted by challenges in courts and legislatures, was also a fight about culture, perception and media images. Yet, those progressive scholars lacked the institutional

resources, connections, opportunities and indeed expertise to translate their critical analyses into the kind of powerful concepts, language and strategies, backed by empirical research and bolstered by media experts, needed on the front-lines. That is what think tanks can do.

That is what conservative think tanks have been doing for over twenty years. It is no exaggeration to say that numerous hugely-funded conservative think tanks have helped orchestrate the 20-year conservative effort to dismantle the civil rights edifice erected in the 1960s. Lee Corcorinos has just spoken of several and described their potent political-legal web. Every major legal attack by conservatives in recent years has been supported and often inspired by long-term think tank research, publications, presentations, strategic roadmaps – generating, testing and translating cutting edge ideas for the conservative frontlines. Think about the attacks on abortion, affirmative action, gays and lesbians, immigrants, welfare and more. The book by Richard Delgado and Jean Stephancic, “No Mercy,” shows the immense think tank funding from dozens of corporations and foundations to launch and sustain these attacks. It’s a scary picture.

And it’s a picture made all the more scary by the stark void of progressive counterparts. There are a few fantastic progressive research/think tank organizations, like the Institute for Democracy, whose

work has been invaluable. But they are few and far between. And there's a huge need for what we might call "legal think tanks" -- those that help telescope media polling, social science research and critical legal analysis into specific legal strategies, not only to "win" in court, but also to use the courts and law to draw upon and then help galvanize larger political movements for justice (as was the case in *Brown v. Board of Education*).

### III. JUSTICE COLLECTIVE

Let's make this more concrete. I'll tell you a bit about a small, some might say boutique, progressive legal think tank that's in its early stages but that has done some of the kind of work we've been talking about. It's the Justice Collective, and I've had a hand in its formation and work to date.

History. Briefly, the Justice collective is a multiracial think tank that is responding to heightened political conservatism fueling a "retreat from racial justice". The Collective's emphasis is on generating and translating new progressive theories into action strategies. This emphasis on "praxis" aims to bridge the "gap of chasmic proportions" in progressive work, integrating race scholars, civil rights lawyers and community activists.

Methods. The Justice Collective's approach has four parts.

One, generating cutting-edge research on new approaches to human and civil rights issues.

Two, strategically translating this critical theoretical and empirical research into practical legal and policy proposals and arguments as well as supporting media images for use in concrete situations – in schools, courts, government agencies, legislatures, and workplaces. I'll talk more about one example in a second.

Three, engaging in selective collaborative legal advocacy (the Collective recently helped author an amicus brief to the U.S. Supreme Court in the Grutter affirmative action case, urging a novel approach to constitutional review).

And four, operating a resource center, to assist others.

### Intent Doctrine

To get down to nitty-gritty. We have here a packet prepared by researchers of the Justice Collective on the so-called intent doctrine. It starts with a critical analysis of the doctrine, incorporating the best of legal scholars and social science empiricists -- how the doctrine operates in practice, what's at stake, and why this supposed antidiscrimination doctrine fails to reflect how discrimination actually occurs in the real world and how

it inhibits legitimate institutional discrimination claims by people of color while encouraging “reverse discrimination” claims against affirmative action programs. The packet then draws upon multifaceted research and offers a better doctrine and provides wide-ranging multidisciplinary support for it. In doing so, it provides a sample legal brief for frontline civil rights advocates (still a work in progress) and also outlines a larger political-media strategy to help generate a larger legal and political movement to change federal antidiscrimination law so that it better reflects how harmful discrimination actually happens.

The packet is not the be all, end all. It’s still a work in progress. But it was presented by Susan Serrano the Lawyers Committee’s 30<sup>th</sup> anniversary civil rights conference in D.C. in July, and received a strong response from civil rights advocates. It’s an early example of what a small, early-stages, largely volunteer staffed think tank can do.

Briefly, here’s a more specific description of the packet.

*DESCRIBE*

#### IV. CLOSING

In closing, I believe that progressive think tanks, particularly legal think tanks, are essential to close the gap of chasmic proportions in

progressive work. The conservatives have long had them, to great benefit.

Our time is now. Right now.

My final thought is that what's needed is one or more major think tanks, which will come to have the same stature of the major conservative think tanks in terms of media access, ability to attract talent research fellows, etc. But what's also needed are small, quick-reacting, focused think tanks, with special expertise, that can take on specific issues, do the targeted research needed to support the work of the major think tanks – the kind of work the Justice Collective is doing.

There's much to be done. And we're really doing it.