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What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics

Steven A. Ramirez

The pseudo-science of race appears recently to have suffered some fatal blows. For example, in 2003 PBS broadcast a three-part documentary, *Race: The Power of an Illusion*, that debunked virtually all elements of racial mythology. It demonstrated that race has no genetic or biological basis; that gross morphological features which traditionally have defined races (like skin color) are determined by insignificant and superficial genetic alleles with no link to any characteristics that matter, such as intelligence, musical talent, or athletic ability; and that race has been socially and legally constructed, despite the lack of any scientific basis for dividing humanity into any set of racial baskets with any generalized genetic meaning.¹ Although PBS doesn't have the audience numbers of CNN or Fox News, the truth is out and spreading beyond academic journals and into the public's consciousness. Today it is generally accepted science that race cannot be genetically defined and that there is virtually zero genetic significance to skin color or other racial markers.² Indeed, some have said that people who believe in race as anything other than a social construct might as well believe in the Easter bunny or think that the sun revolves around the earth.³ Unfortunately, the law school curriculum

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1. *Race: The Power of an Illusion* (PBS television broadcasts Apr. 24, May 1, 8, 2003). There is a companion Web site at <http://www.pbs.org/race/000_General/000_00-Home.htm>.
2. Recently leading professional societies in physical anthropology and anthropology have released statements debunking the idea that there is any scientific basis to race and emphasizing its social construction. See Am. Anthropological Ass'n, Statement on "Race" (May 17, 1998), available at <<http://www.aaanet.org/stmts/racepp.htm>>; Am. Ass'n of Physical Anthropologists, Statement on Biological Aspects of Race, 101 *Am. J. Phys. Anthropology* 569 (1996), available at <<http://www.physanth.org/positions/race.html>>. For a recent analysis of evidence from genetics, archeology, and linguistics, showing that race is socially constructed, see Steve Olson, *Mapping Human History: Discovering the Past Through Our Genes* (Boston, 2002). For a comprehensive analysis of the law's role in the social construction of race, see Ian Haney López, *White by Law: The Legal Construction of Race* (New York, 1996).
3. See Steven A. Ramirez, A General Theory of Cultural Diversity, 7 *Mich. J. Race & L.* 33, 40 n.35, 45 n.72 (2001) (citing such statements).

seems to be a laggard, and one must generally scour the traditional courses to find an intelligent and scientifically based discussion of race. This means that the role of the law in fostering and perpetuating a socially significant racial hierarchy is generally dealt with in a superficial and ill-founded manner. Law and economics is certainly no exception.

On the contrary, law and economics as currently taught seems to ignore the compelling economics of race (its 'macroeconomic effects in particular) or, alternatively, to teach a truncated microeconomic analysis of race that is founded on what can only be termed pseudo-economics. This article seeks a broader economic analysis of race, one that recognizes the limitations of the neoclassical model of law and economics and makes use of recent economic science that demonstrates that race is a macroeconomic catastrophe for America. The first part of the article demonstrates law and economics' narrow and obsolete teaching about race, even from an exclusively microeconomic perspective. The second attempts to forge a more comprehensive economic analysis of race, one with fundamentally different normative implications, and one that seeks to express the macroeconomic catastrophe that is race in America. The third applies these normative implications in an attempt to show how the law can be transformed from its historical and contemporary role as perpetrator and preserver of a racial hierarchy to an instrument of deracialization and true diversification. I conclude that legal education in the context of law and economics suffers from a failure to teach about the economics of race in a comprehensive and balanced fashion; indeed, this article suggests that law and economics may be too narrowly focused in general.⁴

Race and Neoclassical Law and Economics

Kenneth J. Arrow, a Nobel laureate in economics, recently exposed the weak foundations of the neoclassical view of racial discrimination.⁵ Under the neoclassical, market-based analysis, rational market participants responding to market forces should essentially eliminate irrational racial discrimination. Competitive markets would punish those market actors indulging in racism (or having a "taste" for racial discrimination) because economically motivated, perfectly informed actors would seize arbitrage opportunities and profit advantages left behind by racist participants. Arrow recognizes that markets rarely operate under perfectly competitive ideals. Still, virtually all analyses of the intersection of race and economics are founded upon the neoclassical

4. I have previously argued that the traditional law and economics curriculum is too narrowly focused and fails to account for the law's impact upon macroeconomic performance (output, productivity, employment, inflation, growth, etc.) in the specific contexts of financial regulation, the Great Depression, and globalization. Steven A. Ramirez, *Fear and Social Capitalism: The Law and Macroeconomics of Investor Confidence*, 42 *Washburn L.J.* 31 (2002); Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 *Md. L. Rev.* 515 (2003) [hereinafter *New Deal at 70*]; Steven A. Ramirez, *Market Fundamentalism's New Fiasco: Globalization as Exhibit B in the Case for a New Law and Economics*, 24 *Mich. J. Int'l L.* 831 (2003) (book review).
5. What Has Economics to Say About Racial Discrimination? 12 *J. Econ. Persp.* 91, 94-95 (1998).

microeconomic approach, and all of what is taught in the typical law school curriculum is narrowly focused upon the neoclassical model.⁶

For example, Richard A. Posner, in his influential *Economic Analysis of Law*, posits that there is “nothing inefficient” about racial discrimination, and that “there are economic forces in competitive markets that tend to minimize discrimination.” Posner claims that because those market participants with less prejudice will have competitive advantages, markets will tend to be dominated by the least prejudiced market participants.⁷ Thus, market action should eliminate most racial prejudice and leave only “efficient” racial discrimination. Posner argues, for instance, that employers indulging the prejudices of their workers may be efficiently discriminating; otherwise it would be beneficial to stop such discrimination. Finally, Posner is deeply skeptical of government efforts to intervene in markets to prevent discrimination, on the ground that the costs to market participants of being forced to associate with those they don’t want to associate with are likely to exceed the benefits to those who benefit from such transactions.⁸

The first problem with this rather sanguine explanation is that it is highly ahistorical. As Arrow said in 1972, the neoclassical model of racial discrimination “predicts the absence of the phenomenon it was designed to explain.”⁹ Market discrimination in labor, credit, residential, and other markets persisted for decades under free markets, and it continues to persist into the twenty-first century even after the imposition of an antidiscrimination legal regime. With or without market intervention free markets continue to yield fundamentally racist outcomes.¹⁰ Arrow describes the empirical record compiled by economists as “decisive” in showing that irrational discrimination persists today. “Especially striking are the audit studies on differential treatment in the housing and automobile markets . . .”¹¹ Economics provides no

6. See John J. Donohue III, *Discrimination in Employment*, in 1 *The New Palgrave Dictionary of Economics and the Law* 615–24 (London, 1998). An exception argues that markets are an inappropriate lens for understanding racism at all; instead, racism is a response that reflects dark human motivations toward subordination and domination. Richard Delgado, *Rodrigo’s Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?* 93 *Nw. U. L. Rev.* 215 (1998) (book review); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral Visions of Franz Kafka and Richard Posner*, 99 *Harv. L. Rev.* 384 (1985); see also Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 *Yale L.J.* 1757, 1763–64 (2003) (book review).
7. 6th ed., 681–82 (New York, 2003). Other texts manage to completely avoid any discussion of the economics of race in America. See, e.g., Jeffrey L. Harrison, *Law and Economics: Cases, Materials and Behavioral Perspectives*, at xi–xvii, 773–76 (St. Paul, 2002).
8. *The Efficiency and the Efficacy of Title VII*, 136 *U. Pa. L. Rev.* 513, 515–17 (1987). Other scholars have disagreed with Posner about whether Title VII is efficient. See John J. Donohue III, *Is Title VII Efficient?* 134 *U. Pa. L. Rev.* 1411, 1431 (1986).
9. Kenneth J. Arrow, *Some Mathematical Models of Race Discrimination in the Labor Market*, in *Racial Discrimination in Economic Life*, ed. Anthony H. Pascal, 187, 192 (Lexington, Mass., 1972).
10. E.g., Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 *Mich. L. Rev.* 109 (1995). See also Ian Ayres, *Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination* (Chicago, 2001).
11. Arrow, *supra* note 5, at 92–93, 96 (citing William A. Darity Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 *J. Econ. Persp.* 63 (1998); John Yinger, *Evidence on Discrimination in Consumer Markets*, 12 *J. Econ. Persp.* 23 (1998)).

ready explanation why any rational seller would allow race to impede market transactions like the sale of cars. Arrow concludes that the market-based approach to discrimination squares with neither the clear historic record nor current reality.

Next Arrow demonstrates that the market-based analysis of race discrimination cannot square with a host of observable economic facts. There is, for example, no evidence that discriminatory firms are being driven out of the market. Moreover, discrimination seems to persist even though corporations are sensitive only to profits and capital markets should punish firms indulging the discriminatory tastes of employees. Instead, discriminatory cultures may persist for decades within corporate America with little financial detriment. In addition, employees who are more tolerant of racial integration ought to be paid more, but Arrow finds the evidence supporting this proposition “dubious.” In short, any attempt to explain discrimination as a taste that will be eliminated by free markets fails.¹²

Many economists have theorized instead that the relationship between race and economic behavior is more complex than simple rational choice theory suggests. For example, statistical perceptions may influence behavior as well as reflect behavior. As Arrow says:

Suppose blacks and whites do in fact differ in productivity, at least on the average. This is in turn due to some cause, perhaps quality of education, perhaps cultural differences; but the cause is not itself observable. Then the experience of employers over time will cause them to use the observable characteristic, race, as a surrogate for the unobservable characteristics which in fact cause the productivity differences.¹³

Black workers would then react to this by forgoing investment in work skills, which in turn would reinforce the statistical difference in productivity that initially set off this entire behavioral dynamic. Discrimination thereby becomes entrenched. Simply stated, the dynamic results in black workers’ facing diminished market incentives for developing their stock of human capital.

Economist Glenn C. Loury uses the term “self-confirming stereotypes” to explain this dynamic in *The Anatomy of Racial Inequality*.¹⁴ He defines a self-confirming stereotype as

a statistical generalization about some class of persons regarding what is taken with reason to be true about them as a class, but cannot be readily determined as true or false for a given member of a class. Furthermore, this generalization is “reasonable” in the specific sense that it is self-confirming: Observers, by acting on the generalization, set in motion a sequence of events that has the effect of reinforcing their initial judgement.¹⁵

Loury provides the following example. Suppose taxi drivers are unlikely to stop for African-American males because they fear being robbed. Eventually the African-American males seeking transportation will forgo taxis and use

12. Arrow, *supra* note 5, at 93–96.

13. *Id.* at 96 (citation omitted).

14. *The Anatomy of Racial Inequality* 26–27 (Cambridge, Mass., 2002).

15. *Id.* at 23.

alternatives such as public transportation. Of course, robbers will be more difficult to deter; and most robbers would be pleased if just one victim stopped per evening. This creates a classic adverse selection problem. The pool of African-American males seeking cabs will be disproportionately composed of criminals, as the honest African-Americans adversely select themselves out of the pool. This in turn confirms the original suspicions of the taxi drivers.¹⁶

Self-confirming stereotypes do not just suppress economic activity in the labor markets or the taxi industry, but operate across society to create a wide range of economic costs and disincentives. Loury draws examples from the credit markets, higher education, and retail auto sales to support his self-confirming-stereotypes thesis. It is noteworthy that his theory squares much more with the evidence than the neoclassical theory of market discrimination.

Self-confirming stereotypes are not the only mechanism Loury identifies that operates to suppress market action and to distort the allocation of resources. He also identifies a dynamic he terms “racial stigma.” Racial stigma, according to Loury, refers to the consequences of the social meaning (as opposed to individual attitudes) attached to race. In particular, Loury refers to “unexamined beliefs” that drive public perceptions, influence public opinion, and dominate public policy.¹⁷ For instance, he cites the reception granted *The Bell Curve* in 1994. Since its publication, virtually every element of its thesis regarding race and intelligence has been thoroughly debunked.¹⁸ Nevertheless, Loury argues that its thesis of race-based differences in intelligence still holds sway in the American consciousness. Otherwise, how could our population not find our racial nightmare “disquieting”?¹⁹ Why is there no public angst when African-American males are incarcerated at seven times the rate of white males?²⁰ What explains the very low frequency of white/African-American marriages relative to the frequency of white/Latino or white/Asian-American marriages?²¹ Loury posits that racial stigma explains how public opinion reacts to facts and accounts for our highly racialized society. Racial stigma provides easy comfort for those indulging the societal attitudes about race that permeate each person’s socialization.²²

From an economic perspective, racial stigma permits a massive distortion of the allocation of resources. First, America tolerates the systematic destruction of human capital implicit in the excess incarceration rates that are inherent in a racialized society. People cannot produce to their maximum extent when they are imprisoned (obviously), or even afterwards; yet America tolerates an incarceration rate for African-American males that can only be termed uncon-

16. *Id.* at 30–31.

17. *Id.* at 70–71.

18. E.g., Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 *Mich. J. Race & L.* 127, 151–54 (2000).

19. Loury, *supra* note 14, at 70–71.

20. *Id.* at 201 fig.19.

21. *Id.* at 179 tbl.5.

22. *Id.* at 85–91.

scionable. Second, racial stigma permits the massive disinvestment that occurs in our education system in the children of racially stigmatized groups, relative to the resources made available to white children.²³ Instead of its highest and best use, capital is allocated in accordance with racial stigma. Third, infant mortality and life expectancy are influenced by race.²⁴ All of these racial disparities lead to depleted human capital, in an economy that is today more than ever driven by human knowledge.

Noneconomists have also identified mechanisms of racialization that have economic implications. Most notably, psychologists have identified and demonstrated the operation of stereotype threat. Stereotype threat results in subpar performance on high-stakes tests. African-American college students will perform worse on an exam if they are told it is an intelligence test than they will if they are told that the same test is a problem-solving test.²⁵ At some levels, stereotype threat resembles racial stigma, internalized by the individual. From an economic point of view, it has all of the deleterious economic effect that racial stigma has: a massive distortion of resources, insofar as individual performance is compromised by high-stakes testing that has the potential of stereotype threat. Obviously, self-confirming stereotypes, racial stigma, and stereotype threat are highly disruptive to economic activity. Each permits racial identification to have a deep and abiding impact upon a person's life chances, and they lead naturally to a less sanguine and more activist outlook than the *laissez-faire*, market-based approach to racial discrimination. At the core of each concept is some cognitive flaw that profoundly influences behavior in the context of a racialized society.

Race disrupts markets in other ways. Arrow concludes his exposition of the problems plaguing the market-based approach by highlighting recent work showing the importance of social interactions and networks in the labor markets. He posits that hiring preferences frequently are the product of social networks, unmediated by markets.²⁶ Scholars have studied the economic value of dense social networks.²⁷ If jobs are allocated through such networks, instead of cold and impersonal markets, then discriminating in favor of those with access to important and rich networks and against those with more limited and less powerful social networks no longer has any costs to discriminating agents—it has social payoffs. “Profit maximization is overcome by the values inherent in the maintenance of the network or other social interaction.”²⁸ Implicit in the importance of social networks is yet another nonmarket force

23. Mildred Robinson, Fulfilling *Brown's* Legacy: Bearing the Costs of Realizing Equality, 44 Washburn L.J. 1 (forthcoming 2004).

24. See Loury, *supra* note 14, at 178 tbl.4; *id.* at 204 fig.22; *id.* at 182 tbl.8.

25. Claude M. Steele & Joshua Aronson, Stereotype Threat and the Intellectual Test Performance of African Americans, 69 J. Personality & Soc. Psychol. 797, 808 (1995).

26. Arrow, *supra* note 9, at 97–98.

27. E.g., Glenn C. Loury, A Dynamic Theory of Racial Income Differences, in *Women, Minorities, and Employment Discrimination*, eds. Phyllis A. Wallace & Annette M. LaMond (Lexington, Mass., 1977); George J. Borjas, Ethnic Capital and Intergenerational Mobility, 107 Q.J. Econ. 123 (1992).

28. Arrow, *supra* note 9, at 98.

that perpetuates racial inequality and robs markets of the ability to allocate resources strictly in accordance with the production of the highest wealth.

Arrow suspects these social interactions are at work not only in the labor market, but also in the credit market, the housing market, and virtually any other market that involves a personal or social element. His suspicions seem well founded. Racism is a fundamentally social convention. Any Southern storekeeper who hired a black manager in the 1930s risked not only diminished custom but social ostracism and violence as well. Under such threat to self and family, it is unlikely that the store owner would ever seek to exploit any economic advantage that might be gained by hiring from underutilized labor pools. Moreover, the store owner probably had a vested social interest in maintaining the racial hierarchy and the social status that all whites, regardless of all other educational and economic factors, are heirs to.²⁹ In each transaction “transactors bring . . . a whole set of social attitudes that would be irrelevant [to a] market model,” Arrow points out. “Models of racial discrimination in which all racial attitudes are expressed through the market will get at only part of the story. At each stage, direct social transactions unmediated by a market play a role. Even the market manifestations will be altered by these direct social influences.”³⁰

Unfortunately, law and economics as currently conceived teaches, at best, only part of the story. The neoclassical market-based theory of discrimination is too simplistic and reductionist to be helpful in resolving racial issues in America—much less to be the exclusive pedagogical approach in law and economics. Discriminatory behavior is far more complex and multifaceted than neoclassical theory can support. It is not driven simply by actors seeking to maximize profits, utility, or wealth; it is instead driven by infirmities in human cognition, widespread imperfections in information, the desperate need for those at the bottom rungs of society to achieve some semblance of status, and destructive human impulses. It is driven also by social convention, societal inertia, and racial stigma. No doubt this list is incomplete; many more imponderables may cause market misanthropy.³¹

What is not imponderable, however, is this: race causes suppressed and distorted market action. It results in forgone taxi trips and ill-founded hiring decisions. It results in forgone investments in human capital as well as in suppressed productivity. It results in underdeveloped human capital on a massive scale throughout society. Economists and other social scientists have recently demonstrated some of the mechanisms underlying discriminatory behavior. Cataloging all such mechanisms and quantifying their economic

29. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 *Harv. L. Rev.* 1003 (1995).

30. Arrow, *supra* note 9, at 98.

31. In a forthcoming article I show that board directors are chosen as a result of homosocial reproduction; cautious CEOs seek to populate boards with those most similar to themselves—usually white males. Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It*, 61 *Wash. & Lee L. Rev.*__ (forthcoming 2004).

impact from a microeconomic perspective may well be impossible, but a more complete economic explanation is available from a macroeconomic point of view, and economists are beginning to assess race and economics from that perspective. Macroeconomics may be able to give us some degree of insight into the magnitude of the problem, while microeconomics may help explain the dynamics that cause it. Together they make possible a more complete understanding of race and economics.

The Law and Macroeconomics of Race

The other part of the story is the macroeconomic catastrophe implicit in a racialized society. As Arrow says, race is pervasive in societies where it has taken hold. It affects housing, income, wages, the flow of capital, and the life chances of individuals. It would be natural for Arrow, as an economist, to focus primarily on these economic manifestations of a racialized society. But the perverseness of race is more pervasive than economics: it is manifest in incarceration rates, educational funding, life expectancy, medical care, standardized test scores, and even infant mortality. "Racial discrimination," says Arrow, "pervades every aspect of a society in which it is found."³²

All of this suggests severe macroeconomic harm. The impact is so huge that it is hard to quantify. Perhaps the best starting point is the work of Andrew F. Brimmer. In a landmark study of the economic costs of racial discrimination against African-Americans in the labor markets, Brimmer concluded that "[t]he disparate treatment of blacks cost the American economy about \$241 billion in 1993. This figure is equal to roughly 3.8 percent of that year's gross domestic product (GDP)."³³ Brimmer's analysis focuses on two sources of diminished output: first, the lost economic output from the failure to exploit the existing education of African-Americans; and second, the lost output from a failure to improve the education of African-Americans. With respect to the first, he notes that even today, after the promulgation of equal employment laws, "many blacks are still concentrated in positions which do not make full use of their talents. If . . . blacks could migrate more freely from low to high productivity occupations . . . [,] total production would be increased."³⁴ With

32. Arrow, *supra* note 9, at 91.

33. The Economic Cost of Discrimination Against Black Americans, *in* *Economic Perspectives on Affirmative Action*, ed. Margaret C. Simms, 11, 11 (Washington, 1995). More recent evidence has emerged that this underutilization of labor factors continues to harm American macroeconomic performance today. In the legal profession, for example, people of color are chronically underrepresented in the ranks of corporate law firms, particularly at the partnership level. See Leonard M. Baynes, *Falling Through the Cracks: Race and Corporate Law Firms*, 77 *St. John's L. Rev.* 785, 791 (2003). Similarly, at the apex of corporate America people of color are still largely excluded from senior management positions and directorships. Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?* 77 *St. John's L. Rev.* 837, 838 (2003). The underutilization of labor factors is not limited to people of color; women also are far too often excluded from full participation in the economy. *Id.* Nevertheless, although many of this article's fundamental points apply equally to gender issues, its primary focus is limited to the economic costs of race in America.

34. Brimmer, *supra* note 33, at 13.

respect to the second, he assesses the degree to which the underinvestment in African-American education compromises American economic performance. In 1990, 24 percent of all workers but only 14.7 percent of African-American workers had four or more years of postsecondary education; in other words, African-Americans lagged behind all other workers by nearly 40 percent.³⁵ This underinvestment represents undeveloped human capital and thus restricted output. Brimmer's analysis concludes that as of 1993 the American economy suffered about \$140 billion in losses as a result of underutilization of the existing African-American labor force, and an additional \$100 billion in losses from the underinvestment in African-American human capital.³⁶

Although Brimmer's analysis is more than ten years old, there is little reason to think the picture has brightened significantly. First, Brimmer has used the same methodology for a number of years to analyze the economic consequence of continued racial discrimination in the labor markets, and the trends are discouraging. He found the economic costs of discrimination against African-Americans in 1963 to amount to 3.5 percent of output.³⁷ In 1967 the costs declined to 2.85 percent of GDP. But in 1973 and 1979 the costs rose again to 3.13 and 3.38 respectively.³⁸ Except for the slight dip from 1963 to 1967 (coinciding with the passage of the Civil Rights Act of 1964) the costs of American racial disparities in employment patterns and educational attainment have been remarkably durable and constant at around 3.5 percent of GDP. If anything, the costs of these disparities seem to be on the rise, at least as of 1993, when the costs hit a post-civil-rights-era peak of 3.79 percent.³⁹ So it is fair to assume that the lost output to the economy for the suppressed labor productivity of African-Americans is about 3.8 to 4 percent. In today's \$10 trillion economy this represents about \$400 billion in forgone GDP.⁴⁰

Second, contemporary employment and educational data do not give any cause for optimism. Basing his analysis on two elements, relative earnings for equally educated whites and African-Americans and relative educational attainment, Brimmer finds a large "income deficit" with a corresponding loss of GDP.⁴¹ The deficit arises from differentials in mean earnings. It is clear that today such earnings differentials are as gaping as ever. Whites with an advanced degree enjoy mean earnings of \$67,940 while blacks at the same level of education can expect to earn only \$47,699 and Hispanics only \$58,299. Over the span of an entire career, blacks with advanced degrees can expect to

35. *Id.* at 20 tbl.2.

36. *Id.* at 12-13.

37. *Id.* at 12.

38. *Id.* at 19 tbl.1.

39. *Id.* at 12, 19 tbl.1; see also 28-29 tbl.A2. In fact, Brimmer himself projected that costs in the year 2000 would be "essentially unchanged in percentage terms compared with what they were in 1993." *Id.* at 16.

40. See Lawrence B. Morse, Teaching Macroeconomics as if Race Mattered 7, at <<http://www.ncat.edu/~econdept/wp/morse-race.pdf>> (last visited June 23, 2004).

41. Brimmer, *supra* note 33, at 11.

earn only about 81 percent of what similarly educated whites earn; Hispanics can expect only 84 percent.⁴² The disparity creates a disincentive to investment in education within communities of color.

The disincentive is exacerbated by considerations of wealth. In 2002 per capita income of African-Americans was just over \$15,000 per year and for whites it was over \$26,000.⁴³ Per capita income disparities exceed earnings disparities because per capita income includes payoffs from rents, dividends, and other forms of income from capital. It also reflects the burdens of chronic unemployment, incarceration, and other forms of labor nonparticipation. Much of this disparity in per capita income relates to durable disparities in wealth that themselves are rooted in our racially segregated past. For present purposes, the point is that the lessened payoffs from higher education for communities of color, combined with diminished resources, as reflected in per capita income, mean that there are powerful reasons for continued lack of human capital formation. In fact, 28 percent of whites earn a bachelor's degree; for blacks and Hispanics, respectively, the figures are only 17 percent and 11 percent.⁴⁴ This suggests not only that Brimmer's estimate of the costs of race as manifest in labor markets is still generally valid today, but that it is not likely to lessen appreciably any time soon.

Notably, Brimmer's estimate does not include other racialized groups such as Native Americans and Latinos. There are now 39 million Latinos in the U.S. compared to 37 million African-Americans.⁴⁵ To the extent that Brimmer's computation is limited to African-Americans, it states only a portion of the problem. Based upon difference in earnings among persons holding advanced degrees, and the lower percentages holding such degrees, it is clear that Latinos alone account for costs approaching those that Brimmer has demonstrated for African-Americans. His analysis also is limited to economic impact manifest in the labor market. Infant mortality, excess incarceration rates, life expectancy, and a host of other social maladies that disproportionately affect communities of color all take a macroeconomic toll that has not yet been quantified.⁴⁶ Based upon the best economic studies and data avail-

42. Jennifer Cheeseman Day & Eric C. Newburger, U.S. Census Bureau, *The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings*, Current Population Reports P23-210, at 12-13 tbl.3, 7 fig.7 (Washington, 2002, available at <<http://www.census.gov/prod/2002pubs/p23-210.pdf>> [hereinafter *The Big Payoff*].

43. Carmen DeNavas-Walt et al., U.S. Census Bureau, *Income in the United States: 2002*, Current Population Reports P60-221, at 11 tbl.4 (Washington, 2003), available at <<http://www.census.gov/prod/2003pubs/p60-221.pdf>>. In 2002 the per capita income for Latinos was even less than for African-Americans: about \$13,000. *Id.* With a Latino population of about 40 million, this translates into an income deficit of over \$400 billion. But issues of language facility and immigrant status cloud how much of this income deficit is attributable to race.

44. *The Big Payoff*, *supra* note 42, at 6.

45. DeNavas-Walt, *supra* note 43, at 11 tbl.4.

46. To some extent, these costs are captured in disparities in per capita income; but even per capita income does not reflect lost output due to excess infant mortality and diminished life expectancy. See *id.* at 9 tbl.3, 11 tbl.4.

able, it is certain that race is costing our economy hundreds of billions of dollars annually. Indeed, there is good reason to think that the cost of race approaches \$1 trillion per annum.

Some are tempted to think that any gains to African-Americans necessarily mean economic costs to other groups. Americans have been programed to think of race as a zero-sum game, fundamentally misunderstanding the nature of human capital and the wanton destruction of human capital that is central to race. Investment in human capital invariably pays for itself and historically seems not subject to the law of diminishing marginal returns.⁴⁷ The production possibility curve illustrates the opportunity costs associated with less than full utilization of resources. The full and efficient use of workers moves an economy toward its production possibility curve. Upgrading an economy's human capital—its education and skills—necessarily moves its production possibility curve outward.⁴⁸

A similar red herring is the so-called efficiency/equity tradeoff. An efficient economy is one that allows markets to allocate resources. In general, free market action will not bring about an equitable distribution of resources. Nevertheless, efficiency has its limits in terms of assuring maximum economic output. One such limit that is becoming increasingly clear to mainstream economists is that inequality can diminish growth and productivity. Inequality itself can be costly in terms of macroeconomic performance, and reducing it can generate additional economic growth.⁴⁹

It is true that some period of adjustment may be necessary for transition into a less racialized economy, and this period of adjustment may be accompanied by some economic displacement as the utilization and development of human capital surmounts racial barriers.⁵⁰ Investments in human capital are a long-range undertaking: no immediate and rapid adjustment is inherent in their gradual but steady increase. But the transition can be both accelerated and steadied through legal structures and frameworks that allow full economic exploitation of the nation's diverse human resources. That is in essence the challenge that race poses to law and economics. The next section explores these challenges as a means of illustrating the divergent normative implications of the expanded model of race and law and economics that I propose.

The Challenge Race Poses to Law and Economics

Law and economics is not the only discipline whose pedagogy needs rethinking. Economics itself is dealing with the new challenges posed by new insights about race in America. There is growing consensus that "to teach economics as if economic discrimination does not exist undermines the

47. See Ramirez, *New Deal* at 70, *supra* note 4, at 557–59 (discussing the effect of the GI Bill after World War II).

48. Morse, *supra* note 40, at 3, 6.

49. *Id.* at 6–7 (citing *Paying for Inequality: The Economic Cost of Social Injustice*, eds. Andrew Glyn & David Miliband (London, 1994)).

50. Brimmer, *supra* note 33, at 12.

objectives of economics education, namely, to observe, explain, and improve economic behavior and performance as ways of maximizing social benefits and minimizing social costs.⁵¹ In the end, law and economics must focus upon these same goals through a deeper understanding of the impact of law on economics as well as the impact of economics on law.⁵² Presumably the very nature of the undertaking is to achieve greater insight into how the law can maximize social benefits and minimize social costs. If so, it seems clear that law and economics must begin to address race and its economic implications, and ask how the law can operate in this context to maximize social benefits and minimize social costs. For many race-related problems it is virtually impossible for lawmakers and lawyers to pursue solutions without a firm understanding of the problem's macroeconomic dimensions.

For example, in *Grutter v. Bollinger* the Supreme Court held that certain measures seeking to enhance racial diversity in education furthered a compelling state interest and were constitutionally permissible.⁵³ At the same time the Court held in *Gratz v. Bollinger* that certain other measures seeking diversity in education violate the Equal Protection Clause because they are not narrowly tailored to meet the compelling state interest in educational diversity.⁵⁴ Apparently the distinction between those measures that are acceptable and those that are unacceptable is whether each applicant to an educational institution receives a "holistic" and "individualized consideration"⁵⁵—an approach that will necessarily raise the transaction costs for elite state universities that wish to diversify.

In the course of these holdings the Court articulated some of the stakes at issue in assessing the importance of diversity. It recognized that the business community needed more diversity to cope with an increasingly diverse business environment, that the military required diversity as a matter of national security, and that society in general needed visible diversity within its leadership as a matter of political legitimacy.⁵⁶ In many ways, this narrow view of the economic stakes of race is emblematic of a racialized society. As Arrow points out, a racialized society is necessarily pervaded by racialized thinking. Race inherently involves the massive destruction of human capital on a scale so vast as to impose severe macroeconomic costs societywide, but a racialized society will naturally not see these costs. In other words, Justice O'Connor's analysis of the stakes of diversity was severely truncated. She recognized only those costs that would be likely to be manifest in the briefs of those at the cutting edge of a society in transition from fully racialized to one that has overcome race. But she can hardly be held accountable for her blind spot: there is virtually no

51. Elias H. Tuma, *Macroeconomics and Discrimination in Teaching*, 85 *Am. Econ. R.* 352, 353 (1995).

52. See Harrison, *supra* note 7, at 1.

53. 539 U.S. 806, 325 (2003).

54. 539 U.S. 244, 275–76 (2003).

55. *Grutter*, 539 U.S. at 336–37; see also *Gratz*, 539 U.S. at 276–77 (O'Connor, J., concurring).

56. *Grutter*, 539 U.S. at 330–32.

comprehensive accounting of the wages of race in America. To see fully and clearly the costs of race, one must fully comprehend the nature of race as a social construct. One wonders if the balance struck in *Grutter* and *Gratz* would have been fundamentally more indulgent of the efforts of states to contain the costs of the past years' racial hierarchy if Justice O'Connor had been fully cognizant of the wages of race in America.

Similarly, O'Connor seems to impose a time limit on the *Grutter* opinion: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."⁵⁷ The evidence of the continuing power of race in our society, despite the imposition of a so-called colorblind legal regime over the past fifty years, suggests that an attempt to limit the ability of state educational institutions to achieve greater diversity is fundamentally misguided from a macroeconomic perspective. The best evidence available strongly suggests that a colorblind legal regime with limited affirmative action measures is highly unlikely to mitigate the costs our society bears as a result of American apartheid. Affirmative action dates to 1963. State law has been stripped of its power to impose a racial hierarchy since 1967.⁵⁸ Yet the costs of race in America are today as high as ever—or higher. It seems anomalous that the law could be complicit in American apartheid for centuries, and could affirmatively operate to entrench a racial hierarchy even after a so-called colorblind legal framework had been imposed for decades, but is given a rigid deadline for unwinding the macroeconomic catastrophe that we face today and into the foreseeable future. At some point, one hopes, the law will comprehend the depths of race in our society and the macroeconomic costs of allowing it to fester. Such comprehension should support a policy foundation for greater state affirmative action to mitigate the costs of race, free of arbitrary and baseless time limits.

A further equal protection idea that must be reexamined in light of the macroeconomic reality of race is the power to change conduct that perpetuates racial privilege. Recently, legacy preferences in university admissions have come under attack as a mechanism for preserving a racial privilege that carries over from yesteryear's apartheid. The beneficiaries of legacy admissions are "overwhelmingly white." The power of legacy status in our society is well illustrated by the fact that 40 percent of the legacy pool at Harvard University gains admission, but only 11 percent of the remainder.⁵⁹ White privilege often benefits from stealth and subtlety; if we are serious about mitigating the macroeconomic costs of race in our society, equal protection must be retooled to prohibit more than express racism.⁶⁰ Instead, unjustified racial privileges must be prohibited even in the absence of a showing that race is a motivating factor in behavior with adverse racial impact. I have previously argued that

57. *Id.* at 343. Justice Ginsburg seems far more cognizant of the reality of race in our society: "we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools." *Gratz*, 539 U.S. at 298–99.

58. See *Loving v. Virginia*, 388 U.S. 1 (1967) (holding miscegenation statutes unconstitutional).

59. *The Curse of Nepotism*, *The Economist*, Jan. 10, 2004, at 27.

60. See *Washington v. Davis*, 426 U.S. 229, 246–48 (1976).

reckless discrimination should be prohibited under the Fourteenth Amendment even in the absence of proof of an intent to discriminate.⁶¹ In addition, the Equal Protection Clause must reach conduct that perpetuates the old system of racial privilege and hierarchy, such as legacy admission policies that disproportionately benefit whites who attended elite universities during the period of de jure discrimination. The macroeconomic perspective of race in our society, in any event, shows that the austere equal protection doctrine (colorblindness) that has essentially prevailed for fifty years is not at all likely to allow our society to overcome race.

Another area where the macroeconomics of race looms large is a growing body of law that seeks to facilitate cultural diversity without racial classifications. Studies have shown that in the world of business a variety of social and cultural backgrounds can give rise to greater creativity, broader communication skills, and better decision making within the enterprise, without regard to any specific racial identity. Alternatively, a police force may wish to hire persons with specific cultural facilities such as familiarity with gang membership and customs, experience with living in high crime areas, or otherwise superior understanding of criminal mores.⁶² Latinos, African-Americans, minorities, or women of all races may broaden the cultural pool that an organization can draw upon in pursuit of its institutional mission. Nevertheless, businesses or other entities that look for valuable skills are simply focusing on the merit that a job applicant offers an organization—that person's ability to further the institutional mission—rather than engaging in any racial preference. The benefits sought do not arise from gross morphological features associated with race, but from experience, insight, and cultural skills.⁶³ Consequently, a number of scholars have sought to articulate various means by which the quest for cultural diversity can operate to ameliorate the costs of race in our society.⁶⁴ Certainly the macroeconomic perspective on the wages of race supports these proposals and highlights their urgency.

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There is an additional lesson to be learned from the economics of race. Often the most complete understanding of economic dynamics and the intersection of law and economics may require both microeconomic and macroeconomic perspectives. Macroeconomics is well suited to providing insights on the magnitude of problems facing policymakers and lawyers, and to illuminating the efficacy of market theory in specific contexts. Microeconomics seems well suited to providing a foundation for understanding market behavior and determining whether specific policies are available

61. Ramirez, *supra* note 3, at 75–77.

62. Deborah Ramirez & Jana Rumminger, Race, Culture, and the New Diversity in the New Millennium, 31 *Cumb. L. Rev.* 481, 518–21 (2001).

63. Ramirez, *supra* note 18.

64. Steven A. Ramirez, Diversity and the Boardroom, 6 *Stan. J.L. Bus. & Fin.* 85 (2000); See, e.g., Cheryl L. Wade, Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure, 63 *U. Pitt. L. Rev.* 389 (2002).

for facilitating market action. It may be some time before this relationship is fully understood. Race suggests that law would benefit from greater understanding of it.

There is a final lesson from the law and economics of race. Like efficiency itself, the law (and by extension the law school curriculum) will generally serve to entrench the power of the social and economic status quo and to ossify outdated values and structures. While this may be inherent in lawmaking, it is not inherent to macroeconomics. This article illustrates that a fuller economic analysis, including macroeconomics, can stem these tendencies. I certainly do not mean to imply that macroeconomic growth is also a just result. I only posit that macroeconomics, focusing as it does on the determinants of growth and stability, has no inherent bias toward the status quo. Macroeconomic analysis is therefore remarkably consistent with a more egalitarian distribution of wealth and opportunity. There is no reason why today's law students should not be exposed to this branch of economic analysis and its interplay with law.