CIVIL RIGHTS IN TIMES OF ECONOMIC STRESS— JURISPRUDENTIAL AND PHILOSOPHIC ASPECTS†

*Charles L. Black, Jr.**

Though the program does not say so, I have to mention that, in the correspondence leading to my having the pleasure of being here tonight, I was asked to address myself in particular to the philosophic and jurisprudential aspects of our general subject. This topic—or, rather, this wide subject—might be thought an invitation to vagueness. I cannot claim that, in trying to get my thoughts together, I have altogether and firmly declined this invitation. I shall have to let you be the judges as to whether I have declined it at all; my hope will have to be that my vaguenesses will engender some more concrete ideas in your minds, and I console myself with the thought that I am to be followed by someone who may explore some of the more concrete legal problems.

I have been asked, I repeat, to talk on the jurisprudential and philosophic aspects of civil rights during periods of economic stress. That is one of those topics that seems quite promising when you are invited, in February, for October. All is not gold that glitters, but there must be a nugget or two, at least, in hills so resplendent. Along about Labor Day, or the autumnal equinox, as days sadly shorten, you begin slowly to realize that, after all, you are not a philosopher in any sense, not intellectually, not temperamentally, and are an expert in jurisprudence only by virtue of a Special Act of the Corporation of Yale University, which Act has recently been repealed by implication, and a new title conferred which does summary justice to the bald truth that you really are just a lawyer, and nothing but that. What I shall do is to take the "jurisprudence and philosophy" part of my subject as an invitation to general thought, without reference, except in far-off sorrow, to clear and present political possibility, or to fine-grained legal doctrine. That is the most I can make of it; I hope I shall not be judged to have given short weight.

---

† *These remarks were originally delivered at the University of Illinois College of Law, October 29, 1975, as the first 1975-76 lecture of the David C. Baum Lectures on Civil Rights and Civil Liberties.*

* *Sterling Professor of Law, Yale Law School. B.A., 1935; M.A., 1938, University of Texas; L.L.B., 1943, Yale Law School.*

I shall limit myself in another quite drastic and even arbitrary way. "Civil rights" has come to be a term of art, referring primarily to the right to be immune from all sorts of racial discrimination, or discrimination on some similarly irrational ground, analogous to race. I do not forget that there are in our society other groups than blacks who are subject to such discrimination, and I hope I shall not fall into the error of supposing, to cite two very important examples, that the problems of Chicanos or of American Indians are just the same as those of blacks. The Indians differ in that many of them remain, in residence or in feeling, more or less tribalized, as well as in ways not so easily pinpointed. The problems of the Chicanos may often contain and be complicated by a language problem, and in subtler shadings may also differ from the problems of black people seeking enjoyment of their civil rights. I have not forgotten, either, that the oldest, the most inveterate and ingrained injustice in all societies is the treatment of about half the population—women—a problem utterly unique. Tonight, however, I shall stay principally or entirely with the problem of black civil rights, partly because that is what I know best, and partly because some, though not all, of my thoughts seem to me applicable to these other fields—though as to this, I stand ready to be not so much corrected as instructed.

I am invited, however, to discuss something more specific than civil rights in general, even black civil rights. The assignment of topic assumes that this subject has special connections with periods of economic stress. It is not hard to see, in general, what this connection is. Most if not all goods of all kinds are always more or less scarce. But this scarcity is perceived and felt most sharply during times of economic difficulty—indeed, that is in a sense the defining character of such a time. And I suppose the question implicitly put by my subject is: "To what extent and in what manner, if at all, ought blacks to be specially treated with respect to the scarcities that pinch at such times?"

I find it quite impossible to disengage this question from the larger one of our obligation to black people at all times. Let me explore with you, by way, I am sure, of review, the source and nature of this obligation.

It is one of the most illuminating facts of history to me, though it can scarcely be to others, that I was taught to play the harmonica by a man who had been born into slavery and raised to middle adolescence as a slave. I received this instruction in the 1920's, when he was about 75 and I was about 10. Figure it out. I don't need to figure it; I remember the Confederate veterans in Austin. I carry this fact around with me, as I usually carry a harmonica of the same sort we used, to remind me that the wrong done to our black fellow-citizens is not a thing of ancient history, its effects dampened by long swirling ages, like the Roman destruction of Carthage, but a thing of historical yesterday,

even in its most horrible manifestation. I stand before you, a man who runs a couple of miles a day, who gets by as a law professor in this year of grace 1975, and who can even communicate to some extent with his own adolescent children. Yet I have talked of slavery with an alert man who knew it at first hand, from underneath.

I think it unnecessary to go into detail as to the effects of slavery on black people. The sequel to slavery was such as to preserve rather than to dissipate these effects. The segregation system, aside from all its baneful characteristics as a thing in itself, aside from its all-pervading function of stigmatizing and insulting blacks, day by day and hour by hour, had the further effect of ensuring that the people who had been so disadvantaged by slavery would remain in greatest part one people, self-known and identified by others, so that the chance of any rapid dissipation of the effects of slavery itself was minimal. Instead, the pertinacity of these effects was maximized, while at the same time new wrongs, also disabling, were being perpetrated—the wrong of segregation, a stigma in itself, a ritual of untouchability, and the wrong of virtual ineligibility for most of the good things in life—good jobs, good homes, good education. Of course some blacks broke through; talent and strength of character will once in a while break through any system, and black people have plenty of both. But if there ever was in history a visible chain linking cause and effect, over a rather short period, it is the chain linking our wantonly wicked treatment of black people, during slavery and after slavery, with their difficulties today. We are not talking about conditions under the Fourth Pharasnic Dynasty as they affect Mr. Sadat and his people.

I would like at this time to interpolate what is not so much a digression as a necessary caution. If what we were talking about were a *legal* liability to compensate black people for these wrongs and their effects, the problem of "state action," as it has been called, might enter in. The fourteenth amendment, we were told long ago, protects only against "state action." For quite a long time, with what now is seen as deceptive consistency, this rule of law was uttered but not applied. Quite correctly, I think, the Supreme Court always found the requisite governmental involvement. Recently, there has come down at least one decision[1] so amazingly reactionary on this score that it is hard to believe the Court really would generalize its doctrine. I shall not in this place elaborate on this, because our obligation to black people results, if it exists at all, from the actions of a whole society rather than merely from those of a governmental structure, and white people in overwhelming preponderance have, by their actions and by their acquiescences, during slavery and since slavery, contributed to build the structure of disadvantage and frustration within which black people have had to live. If the

1. Jackson v. Metropolitan Edison Co., 419 U.S. 435 (1974).

past can create moral obligations in the present, then it is the obligation of all of us to keep going until the last vestige of past wrong is eliminated, quite without reference to the niceties of the "state action" doctrine.

You may have noted that I have cast several of my assertions in the conditional mode: "if the past can create moral obligations"; "this obligation, if it exists at all. . . ." I think it quite legitimate to query the existence of this obligation, on the part of people now, to treat specially a race disadvantaged because of the action of others in the past, even the recent past. But in the end, of course, moral obligations are never provable, because they always rest on unprovable major premises, hidden or unhidden. After all considerations are canvassed, one must simply make up one's mind, on one's moral rather than on one's intellectual responsibility. All I can do here is to raise a few points which might tend to push the minds of doubters—to remove objections—and then leave the listener to consider.

I think most doubts revolve around the problem of guilt. Many people quite properly resent an attribution of guilt in themselves, inherited from others, when they themselves do not have any consciousness of having wronged black people, or of having contributed to their being at a disadvantage. One form of this objection is sometimes interposed by descendants of relatively recent immigration, who say (and one has both heard and read this),

> My ancestors were not here in the times of slavery, and had nothing to do with the trend of events immediately following slavery. When they came here, the wrong was already done; as recent immigrants, caught in their own struggles, they had no chance to revise what they found. How can I, the descendant of totally innocent people—innocent in the sense that they were not even around when this system was being put in place—be saddled with the guilt of others?

My answer would be that if the American people stand under an obligation generated by American history, then anyone who *joins* the American people, becoming one with and of the American people, has to assume, with the benefits of that total incorporation, whatever obligations rest on the American people. And although it is not logically relevant at the present juncture, it is emotionally necessary to me, as I inwardly call the roll of my companions-at-arms in the racial fight, to add just now that the children of recent immigration have in fact—at least among lawyers—borne a share of the battle overwhelmingly out of proportion to their numbers. Still, the objection as to obligation persists, and I think is entirely answered by the concept of naturalization as the equivalent for all purposes of citizenship by birth—a concept which, so far as it concerns benefits, I have elsewhere stated as radically as it can be stated, opposing every possible form of discrimination, for any

purpose, between the two kinds of citizenship which I believe the fourteenth amendment by implication to have made one.

One finds, watered down, much the same sort of thing among Northerners—and here I tread especially warily, for I imagine that in this part of Illinois there are in the audience a good many of what we in ancient Texas would have called Yankees. Here I think the answers are many. Perhaps the most important is that it is simply not true that the North has not directly contributed—massively contributed—to the disadvantaging of the blacks. On one day, the Territorial Legislature of Oregon voted that slavery should not be permitted in that Territory. A noble resolve, That! On the same legislative day, I believe, it was voted that no free blacks at all be admitted to the Territory. If you look at the meagerly reported explanations, you find that these two actions were quite rationally connected in the minds of those who took them. The Territorial Legislature was against slavery on the ground that it was rather feared that emancipation would sooner or later come, and then, if you had allowed slavery, there would be a lot of free blacks hanging about. In other words, the motive behind *both* votes—the seemingly anti-racist and the obviously racist—was the same. No blacks at all were to be allowed in an enormous section of the northern United States. School segregation started in the North, as the *Plessy*[2] Court gleefully stressed. All kinds of discrimination, except slavery, flourished in the North, before, during and long after the Civil War. This has somehow become more visible in relatively recent times. When I was in my salad days, I hung around bars in New York a good deal; I don't recommend such use of one's time, but truth is truth. I remember that, in those times, when a black person was in the bar, and when I spoke a few words and my speech made me manifest as coming from the South, there sometimes was a tension all but visible in the air, and, more than once, common friends had to take upon themselves the duty of a whispering explanation, to the black, that I was really all right. I don't hang around bars much anymore, finding it incompatible with the joint characters of *pater familias* and senior professor, but I do move around a good deal, and can rarely bring myself to keep quiet long enough for it not to become quickly obvious, to black and white alike, that the bear, growling yet of the hole wherein he was born, is of Southern prove nance. Yet I now find never a hint of stiffening or tension on the part of blacks, when this fact about my origin comes clear. I think they now know quite well that it was a mistake to see the enemy as located exclusively in places of lower latitude. Of course the southern treatment of blacks has been the more luridly wicked. But in what has been done to the American black, there is quite enough blame to go around, and much of it sticks like pitch to the North.

2. Plessy v. Ferguson, 163 U.S. 537 (1896).

Moreover, the historical relation of the North to Southern white racism itself has long been, by deliberate choice, one of relieved acquiescence. I leave aside the Northern tolerance of slavery, for that was doubtless inevitable. But broadly though accurately speaking, I think, it was the North at least as much as the South that made the decision, some dozen years after the Civil War, that the promises of the fourteenth and fifteenth amendments were to be broken.

In this connection, I remind you again that we are not talking about "state action," but about the actions of a whole society. West Point, theoretically, admitted blacks, but their lives were made intolerable by their fellow-cadets. Girard College was for whites only. The racially restrictive covenant was a northern quite as much as southern device. I myself remember that some 30 years ago it was a live question, on which people could actually take sides, whether the Stork Club did right in refusing to serve Josephine Baker. Jackie Robinson had to "break into" baseball—imagine our looking on the grudging tolerance that made that possible as though it were a virtue! Louis Armstrong, on whose death flags were half-masted in Europe, couldn't have gotten into a decent hotel in many northern as well as southern cities, until quite recent times; to cite an intangible—often more destructive of the spirit than tangible things—when Armstrong appeared as a guest-star on Bing Crosby's program, I seem to remember that the script had him say "Mr. Crosby" while Bing said "Louie"—a thing which, in all fairness, I must say probably hacked and embarrassed Crosby, who has never shown a trace of personal racism and who undoubtedly respected the great artist, more than it did anybody else.

The whole people of the United States bear the responsibility for the black past and for what it has meant and means to the black present. And I want to emphasize here still once more that I am not talking about the question of legal liability for reparations. My colleague, Boris Bittker, in a monograph[3] which should be widely read, has explored the latter narrower question, and quite rightly discerns many difficult technical problems, easier (or so I read him as asserting) to raise than to solve. What we have to do with here is something quite different. It is the responsibility of a whole people to take steps to right a great wrong. It is a responsibility not measurable by judicial judgment resting on the law of admeasured remedies, but by the *fact of dissipation of the consequences of that wrong*. It is, for that very reason, a responsibility not for money payment only—though money is abundantly needed—but for specific performance, not to any premeasured degree, but until the crooked is made straight.

As I think over the foregoing, and as I recollect conversations and readings through the years on this subject, I reiterate that the key to

3. *See* B. BITTKER, THE CASE FOR BLACK REPARATIONS (1973).

resistance to these ideas, on many levels of intellectualism, and with respect both to the specific points I have made and to the whole idea of national obligation in the premises, is reluctance to admit *guilt*. People who have themselves done nothing wrong, or little wrong, can hardly be brought to feel guilty. To this, let me say that I heartily agree. I do not feel particularly guilty on this subject. I imagine most of you people here are in my position; we haven't done as much as we would like to have done, and should have done, but we have done some things, and we have not knowingly contributed to the wrong. Of such stuff human *guilt* is not made—or at least not the sort of guilt for earthly expiation. But—and this distinction is, I think, absolutely crucial—we are not talking about guilt. We are talking about *responsibility*. Our national society—the only one we have, the only one from which we derive all the *benefits* of national social organization—has so acted as to place millions of black people in a situation of misfortune, and of vulnerability to misfortune, which is beyond honest question unfair and totally inconsonant with our professions of national principle. Our responsibility, which is not guilt and has really nothing to do with guilt, either on our own part or even on that of our forebears, seems to me to arise out of our accepting and keeping membership in the polity that has done this, with all its benefits, and out of the inconsonance between our present professions of principle and our acquiescence in the situation produced by a radical and long-continued breach of principle.

To talk in legal terms, we have been too unimaginative in our choice of analogies. Obligations are not all *ex delicto*. Some may arise by estoppel, for example—and here one thinks of the inerasable words of the Declaration of Independence. Perhaps more to the point, there are obligations *quasi ex contractu*—for work and labor performed, for benefits had and received; that, I believe, was the theory of the Second Inaugural. Other concepts, such as the constructive trust, come to mind.

If you go this far, indeed, I think you are led quite irresistibly even further. Let us imagine a situation—just a contemporary situation—in which, for reasons which I ask you to imagine as not even known, twenty million black people were on the whole decidedly poorer, in virtually every tangible and intangible way, than the white population. Let us suppose, as I have said, that history were somehow blotted out of memory and we were altogether unaware that the American polity had introduced these people's ancestors as slaves, and after slavery was given up had treated them as untouchables. Even so, would we not feel a responsibility to take steps to change this position? I think we would, and if I am right then, in this matter, guilt is nothing, even causation is nothing, and present responsibility is everything. But, lest I be thought to have gone too far, let me make it clear that this is only an imaginary situation. I remind you of the revealing historic fact that I was taught

to play the harmonica by a former slave, who had grown to the age of 15 during years when, in at least some slave states, it was unlawful to teach him to read and write. And I remind you that, even as he and I played our harmonicas, he and his children could not in any effective sense participate in politics, that he and they lived, even then, under the threat of lynching, that his grandchildren, and probably even his great-grandchildren, went to segregated and plainly inferior schools—that, in sum, American society as a whole, until day before yesterday, grossly discriminated against these people, in ways not so much likely as certain to place them at a nearly hopeless disadvantage. No one can establish, by logical demonstration, that such a course of events generates a responsibility of corrective action, not discharged until correction is fully effected. All I can say is that if I found a person who denied this responsibility I would be at a loss to guess what that person thinks it takes for history to generate obligation—or, indeed, for anything to generate obligation.

Underneath what I have said, I think you will see a partly hidden premise, or perhaps, rather, a premise so obvious that it need hardly be stated. That premise is that the prime need is now and for a long time has been *affirmative corrective action*—"reparation" in the larger and perhaps etymological sense of *repair*, of actual removal of the consequences of wrong. It is still true that, if we look at the actions of the *society*, forgetting the "state action" concept, there is abundant raw discrimination against blacks—with respect to housing, to schooling, to employment, and to many other matters. But even as to these straight-out remnants of the older evil, correction must now go hand-in-hand with affirmative action. And it is this, I think, that makes "civil rights in a period of economic stress" a special topic, for three reasons.

First, when the country is hurting economically—and this, I believe, is true whether the hurt be depression, or inflation, or that strange mixture of both from which we have lately suffered—there is likely to be a general decline in moral fervor and energy, with respect to such questions as civil rights or effective racial equality. Interest in justice is to most people a luxury, much easier to give up than cigarettes or beer. Just in a general way, it seems to me, a white population worried about its own economic future finds it easy to forget the positions of black people. As Huxley, I believe, said, love drives out fear, but fear drives out love—even the love of justice.

Secondly, effective relief of racial injustice demands the spending of money, on programs of all kinds, such as Head Start. It takes money, gushing money, to dissipate the effects of a tradition coming from the days when it was unlawful to teach black people to read; it takes money to get rid of rats in tenements. Yet in times such as these, with our cities openly talking of bankruptcy, and with the national administration far from enthusiastic as to either the adequate financing

of programs in being, or (Heaven forbid!) the initiation of any new programs federally funded, the outlook is indeed bleak. Of course, this is never a question of actual lack of money, but a conception of priorities that looks on the salvation of children's minds, or the creating of decent housing conditions for blacks, as frills, easily postponable till shipping subsidies, interstate highways, and the registration of patents and trademarks are securely provided for. The effect on black people is disastrous, in material ways and in the flickering-out of hope.

As to both these problems, interconnected and perhaps even identical as they are, there is really no jurisprudential or philosophic insight that avails. The inability or unwillingness of the dominant part of America to treat the remedial needs of black people as an emergency, with something near a first-priority call on our resources, in bad times as well as good, is something that falls under the heading of shame rather than under the heading of philosophy. And the shame is the greater because it is likely to be in bad times that black people, the first sufferers from a slackening in economic activity and from inflation, need help the most.

This thought brings me to a third point—one that really does contain dilemmas of moral philosophy and of jurisprudential foundations. Some of the reparative needs of black people cannot be satisfied by public money, whether given directly to them or expended on programs set up to help them. Some of these needs can be satisfied only in kind, and very often the choice must be made between the valid claim of a black to preference by way of restitution for years or centuries of wrong, and the claim of the white man, equally valid in itself, not to be made the scapegoat and singled-out sufferer for wrongs in which he himself had no special part—not on a fair *pro rata* basis, as taxpayer, but by a severe loss falling on himself alone. We have recently seen a clash of this kind, or at least one presented as being of this kind, in the celebrated *De Funis* case.[4] I may say, parenthetically, that I think the Court was supremely wise, as well as technically in the right, in dismissing that case as moot, which it so clearly was, and thus avoiding decision of an issue which may disappear, or come to have much less importance, as time passes and which cannot be decided with any full satisfaction, either as to law or as to morality, in favor of either party. But periods of economic recession present unavoidable issues of a somewhat similar form, for they render scarce not only money but also things not altogether measurable in money. Let us think together a little about what is undoubtedly the most agonizing of these problems—the problem of access to satisfying work.

I state the problem that way because—jurisprudentially and philosophically, if you like—that is its tough and irremediable essence. A

4. DeFunis v. Odegaard, 416 U.S. 312 (1974).

man laid off from work, in times of high unemployment and hence of problematic reemployability, is in part compensated by various sorts of relief payments, and there is no reason, other than present political impossibility, why he should not be fully compensated for all his losses, as far as money can go. But modern psychology has shown, as if ancient common wisdom had not, that access to productive work is not compensable with money.

In bad times, the most common rule, hardened into one of the bargained privileges of seniority, has been that of "last in, first out." This was not in itself a bad rule. It had the merit of definiteness, and honored one of the most ancient human feelings, that of prescription. Where it prevailed, it eliminated corrupt favoritism. But consider how it works on blacks. As we have just passed through a period of constantly growing employment of blacks in jobs they never before were allowed to hold, black workers are, except in the lowliest occupations, on the average far junior to their white co-workers. The seemingly neutral and fair "last hired, first fired" rule massively and fairly consistently translates into "blacks fired." And the firing, remember is out into an economy of high unemployment and one containing, in spite of all legal efforts, a very considerable measure of anti-black discrimination in hiring—into a world which, the last time I looked, had an adult black male unemployment rate of around 25 percent. And think of the irony of this to its victims. In very many cases, the black is "last hired" because of rank racial discrimination in the past. He now finds that, in effect, this past wrong, with its inevitable corollary of low seniority, is to result in his being kicked in the teeth yet once again.

On the other hand, the alternative is to fire a white worker of higher seniority. This may be a man who had no part in the prior discrimination, which is traceable not to him but to the employer, or to industry custom, reinforced by the acquiescence or even the preferences of the whole society. Yet the employer, the industry, and the whole society pay nothing; this one white worker bears the whole load on his own shoulders—the economic loss, and those demoralizing effects of unemployment which can be fully appreciated only by those who have either experienced them or seen them at first hand.

I have stated here a genuine dilemma—a case, or class of cases, in which justice cannot be done—in which, instead, wrong must be done. The thought of the possibility of such cases comes hard to the modern mind. The problem *demonstratedly without solution*—a familiar phenomenon in mathematics—offends the generality of people. Lives have been given to trying to calculate π as a rational number, though a very simple demonstration shows this to be impossible. Yet the law faces such problems all the time, and *must* solve them—or, rather, must act as if it had. While airplane engines can be adequately built with π taken to only five or perhaps six places, there comes times in life, and in law,

when the impossible decision is a necessary decision. We have one of them here.

The law has one technique, often though not always useful, for making such problems more manageable, and that is by reducing their instances, one by one, to minute concreteness, so that the *weight* of competing considerations in the very case may be taken into account, though the arguments on a high level never can meet logically, and the classic techniques of refutation and rebuttal never can avail.

At the risk, then, of leaving the purely jurisprudential and philosophical, let me state you one hypothetical case rather closely similar to a case actually pending.[5] Let us say that a trucking company, on the undisputed evidence, refused as a matter of policy, until late in 1970, to hire black drivers, though some black applicants were clearly qualified, and though, to maintain its lily-white standard, the company hired white drivers deficient in respect of accident record and on-the-road experience. Let us take the case of a single black worker, turned down in 1970 under this policy, but—as a result of severe pressure—finally hired by this same company in 1972. When times get bad, and layoffs start, should this black get the benefit of a seniority dating back to his original rejection, or should all white drivers hired before he was actually taken on get full benefit of their own factual seniority?

It is to be noted here that the original policy of denying employment to blacks was not only wrong but flatly unlawful in 1970, that the same company is involved, that the very man claiming seniority was turned down though qualified; it ought perhaps to be presumed that the white drivers, perceiving the absence of blacks on the work-force, either knew or should have known of the discriminatory policy. The time, moreover, is short—a quite relevant consideration where the principal equity proffered by the white with greater actual seniority is that of action in reliance, both as to taking and as to staying on the job.

For my part, I should have no difficulty in pronouncing in favor of the black worker under these equities. But let us imagine a very different case. The evidence unequivocably establishes that a black, 25 years ago, wanted to work in a certain branch of electrical appliance assembly work. He knew that he had no chance, and so did not even apply—a thoroughly realistic assessment and action in 1950 as to many industries. In 1965, after the passage of the Civil Rights Act of 1964, he applies for and receives the necessary on-the-job training in a company complying with the Act, turns out to possess the requisite aptitudes in good measure, and becomes a very satisfactory worker in just the sort of job he would have held had his aspirations of 1950 been attainable. When times get bad, what should his seniority be for "last-hired-first-fired" purposes?

5. Franks v. Bowman Transp. Co., Inc., 495 F.2d 398 (5th Cir. 1974), *rev'd*, 44 U.S.L.W. 4356 (Mar. 24, 1976) (No. 74-728).

Here many factors are changed. The original discrimination, though cruel and irrational, was not unlawful. The company concerned is only diffusely connected with the original wrong; its white workers hired in 1950 and before would have had to be far ahead of their times, further ahead perhaps than it is realistic or fair to require, to realize that any wrong at all was occurring. Most important of all, the white worker of just under twenty-five years standing has invested not a few months but the better half of a working life in this job. To fire him is to ask him to pay a grievous price, in his own person, for a wrong which was general and societal, while the society as a whole goes scot-free.

I do not know how I would decide such a case. I have no doubt that the black has been wronged, and that the plain consequence of the wrong is his low seniority. But I feel the grim inequity, too, of loading the white with so terrible a consequence of a wrong not at all of his personal doing. And if you, like me, stand doubtful before such a case, I think you will agree that other cases, more extreme, could be stated, wherein the equity of the white worker would rather plainly outweigh that of the black.

In the whole range of these cases, as I have said, we have to do with a general problem, common enough in life but very hard of acceptance to the mind oriented not only toward problem-solving but toward the assumption of universal problem-solubility. We are faced with situation after situation in which justice is unattainable, in which definite wrong must be done to someone. No solution of such a problem produces any feeling of satisfaction. Yet action must and will be taken, one way or the other.

I would hope that there might come into being some recognition of the fact that such problems, calling for the weighing of competing equities rather than the discovery, by reasoning, of the location of justice, call in many cases for legislative rather than whole-cloth judicial solution. Courts are not always well-equipped to choose between two plain wrongs. The courts have to struggle along and do the best they can, if Congress gives no help. But I would hope that Congress, combining its commerce power and its power under section 5 of the fourteenth amendment, would attempt to assist the courts at least by the establishment of some guidelines. Perhaps administrative agencies might also have some part to play here as well.

Now to go back: when it comes to the diminishing or extinction of programs involving allocation of general public resources to the helping of black people in hard times, there is no justice problem, really. Very plainly, what we should be doing is augmenting rather than diminishing such aid, for the need is the greater. When the problem is access to something which, like productive work or educational opportunity, cannot wholly be created by money, then the terrible crux I have been discussing arises.

The thing nearest a solution to this problem lies, of course, in its *transcendence*, by the creation of a society which accepts and discharges, as to *all*, the responsibility of the *real social contract*—the quasi-contract, if you like—which in my view imposes on all of us the obligation to see that, in return for their living at peace within the society, *all* people, black and white, share in the good things of life. But here, perhaps, I leave my assigned subject, for a broader one to which, in my mind, it irresistibly leads. I can only speak my sorrow, which I am sure many of you share, that there are no signs at all that movement toward this goal impends—and my fear for the future of a society that so flagrantly and with such insouciance refuses to move toward fulfilling an obligation that seems so plain.