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Response to "The Rhetoric of Powell's Bakke"

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A RESPONSE TO "THE RHETORIC OF POWELL'S *BAKKE*"

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In his article Professor LaRue draws a direct connection between "who we are," which is the central question of ethics, and "how we talk," which is the central question of rhetoric. He asks those questions of legal literature, in this instance of a single judicial opinion, in order to discover how this part of our rhetorical and ethical community is constituted. He thus unites the concerns of ethics, rhetoric, and law in pursuit of a central question—the definition of character and community.

There are two different ways in which character is defined in a judicial opinion. First, there is the question how the writer defines himself, and the institution of which he is a part; second, how he defines the members of the social world he intends to address and to regulate. To take one obvious line, for example, it would be possible to ask of a particular opinion how far it demonstrates the assumptions about the character of its author—his competence, his knowledge, his statesmanship—upon which the opinion's authority may be said to rest. It is perfectly fair to ask of any opinion: what evidence is there here that this person should have the job of deciding a case such as this and others like it? If, for example, the reason the Court is thought to have the power to decide a certain kind of question is the learning that is required to decide it well, what evidence is there here of such learning? On the other hand, if all the Court does is to identify and balance interests, and to express a preference for one over another, as any law student, practically any citizen, could do, why should we have judges do that? As my tone may suggest, I think that there has been in recent years a real, but as yet unanalyzed, degradation in the language in which the Supreme Court speaks, and that this has entailed an erosion of the moral and political—Professor LaRue might call it the rhetorical and ethical—basis of its authority. This phenomenon, if such it be, has not been described and explained, and the *Bakke* opinion—in which the voice of the Supreme Court at the most critical moment of decision collapses into the voice of a Harvard College brochure—would not be a bad place to start.

Professor LaRue, however, focuses not upon this kind of question but upon those of the second sort: asking how the *Bakke* opinion talks about its audience—the people whose lives the decision affects— and what sort of community the decision establishes. In *Bakke*, the white and minority applicants for medical school, who are in some sense competing for the same positions, are told what is at stake in that competition.

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Each is afforded a language in which to characterize himself and the other, in which to explain his success or failure, to himself and to his friends. How adequate is this language to such purposes? (This is part of what Professor LaRue means, I think, when he asks how "persuasive" the opinion is). The discourse used by Justice Powell, according to Professor LaRue, is defective at its heart, because it is divorced from what he calls "history," which means that it is both unreal to the participants, and itself ultimately incoherent. (The guidance this language gives to those who make decisions of admission is unintelligible, unless it be to administer a quota system and to pretend not to).

But, one may ask of Professor LaRue, what would talk about these matters that was not divorced from history look like? As I read his article, Professor LaRue would favor a jurisprudence of the equal protection clause that was closely tied to its original purposes of eliminating the effects of black slavery, and which would certainly not subject to "strict scrutiny" a State's attempt to achieve that result. Presumably a State would have similar if less drastic powers to remedy the effects of other forms of racial discrimination, but the case of the blacks would remain the paradigm to which others need be assimilated.

All of this is appealing to one who thinks in terms of specific contexts and cases, and not theories. And Professor LaRue's approach entails two interesting results as well. First, such a jurisprudence could make a sort of sense, have a kind of coherence, that the modern version of the equal protection clause—potentially authorizing the review of every legislative classification in the world—cannot possibly have. And the coherence derives not from a theoretical principle, but from an understanding of the evil the clause was intended to remedy. The related second point is this: while the method of this approach is to root oneself in facts, its result is a clarification of value.

In specific terms, the reasoning of Professor LaRue would permit a State to set aside a specified number of places in its schools of higher education for blacks, and perhaps for members of other minority races as well. These places would be reserved not because minorities had so much to contribute to the educational process, but as a way of attempting to reduce harms, inflicted upon them or their families by the white race from which they are still suffering. This is what it means to talk to the black applicant for medical school in terms of his history.

But what of the white applicant? Here is a suggested addition to Professor LaRue's paper. One possibility would be to say to him that he is to pay, with his place in school, for the crimes committed by members of his race upon the blacks they enslaved and brutalized. Conceived of as an "isolated" individual in competition with others, he is to suffer a competitive harm in order to make another whole for an earlier injury. To this the applicant might well respond that he never owned or transported slaves, and neither did his ancestors—who perhaps, like Bakke's, came to America after slavery was abolished—and he has never profited

personally from the wrongs done to blacks. In his own life he has never discriminated, but he has been discriminated against, on the ground of race. What can one say in response?

To answer him I think we must change our statement of what we are doing, and why. The idea is not that he must pay today for what someone of his race did a hundred years ago, or more, that he must give up something to his black competitor because of prior crimes. There is, after all, another possibility. Think for a moment of the relationship between the ideal Union soldier and the slave he fought to free: he was not paying a debt for his past transgressions, but risking, perhaps losing, his life and wealth, in order to live in a national community in which no people would be slaves, and in which the effects of slavery would be destroyed. He was not the competitor but the friend of the slave. What we say to the modern white applicant is that he too is a member of a community that is seeking to rid itself of the residual and terrible evils of slavery, and that he should look upon what it costs him as a burden of that improvement, a burden like the soldier's burden which is in some sense a privilege to bear, even when imposed upon a draftee, then or now. This argument rests upon his imagined identity not with the white slave owner, but with the white liberator, and asks that he share and act upon those values. This is to insist upon a community of value between ourselves and those who won that war and established the Constitution of the country on a new basis. Such a community is what an inherited constitution is, a cultural legacy—not a penalty paid for the crimes of one's ancestors, but an opportunity for meaningful action. It is not too much to insist upon.