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ECONOMICS AND DISCRIMINATION

Monograph 85-18

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I don't feel no ways tired.
I've come too far from where I started from.
Nobody told me that the road would be easy.
I don't believe He brought me this far to leave me.

This is the verse of a black gospel song that will serve as the foundation of my message to you on this night. Sung by a James Cleveland[1] or the Barrett Sisters,[2] the music becomes a mighty hymn of faith able to transcend oceans of discouragement and despair in a single chorus.

And, as I hope you heard, there is in a simple reading of the lyric, more than a suggestion of the motivation that sustains those of us who believe still in the principles of racial justice and equality even as we survey the wreckage of the legal edifices to those ideals erected over the decades at so much cost.

These are bleak times not unlike the era when Dr. George Sanchez, the man we honor here, served as teacher to his time. His scholarship produced books and articles,[3] but his voice and pen were also present in letters and in legislatures,[4] in public

debate with the masses and in private conference with the mighty.[5] A committed advocate for his people whose voice was neither stilled nor its volume lowered by heavy sanctions imposed by a profession and a society that prefers accommodation to accomplishment from even the most worthy of its members.[6]

Dr. Sanchez' outspoken zeal cost him the recognition of his profession,[7] but it gained for him an already legendary respect in our contemporary world, a world that has changed much but in those measures of justice and equality that matter most, has altered not at all. His books may be out of print, but his example is a source of inspiration that explains why some of us can say:

"I don't feel no ways tired."

I hope you receive from my message even a small portion of the insight and inspiration I gained from Dr. Sanchez's writings provided me by Prof. Michael Olivas. He honors me by the invitation to deliver the second George F. Sanchez Memorial Lecture, but I hope you do not think I am too bold when I suggest that you will better honor George Sanchez when a Hispanic educator stands in the place I occupy on this night. And, based on the indomitable fighting spirit that so characterized his life, if my suggestion is not soon heeded, Prof. Olivas may hear from Dr. Sanchez directly.

These are bleak times for the advocates of civil rights. The annual celebrations of the Supreme Court's decision in Brown v. Board of Education,[8] are as moving as ever, but one searches

without success for another legal precedent the society is increasingly willing to commemorate, and less and less willing to implement. The once great campaign to desegregate the public schools has slowed to a trickle of litigation while a majority of children of color continue to receive inferior and inadequate educations in schools many of which are as separate in fact as they were once segregated by law.

With some happy exceptions, black and Hispanic parents exercise little control as to either where their children attend school, or the educational policies in effect in the schools their children attend. And, as many have learned, sending minority children to school with whites is far from a guarantee of educational excellence.

The erosion of hard-won rights we once thought permanent is not limited to school desegregation. Legal and economic barriers to effective employment discrimination litigation are now so formidable that only the most idealistic continue to believe that Title VII and other fair employment laws will ever come close to eliminating racism in the work place.[9]

The concept of affirmative action, always controversial, has now lost much of its protest-born legitimacy. This sad fact is reflected in the Supreme Court's illogical retreat from the moderately progressive position of United Steelworkers of America v. Weber. (443 U.S. 193 (1979), to the decision last year in Firefighters Local Union No. 1784 v. Stotts. (104 S. Ct. 2576 (1984).

Of course, the federal voting rights act has been renewed and strengthened, and the number of black and Hispanic elected

officials continues to climb with what must be positive outcomes for the people they represent. But there is precious little hope that these officials, committed though they may be, will be able to act aggressively on those minority issues that are not perceived as also serving majority needs.

You may not agree, but I fear that the Jesse Jackson Presidential campaign of last year illustrates just how unwilling much of white America is to take seriously a black candidate even though he proved skillful and impressive in debate, knowledgeable on the issues and, as he proved in the midst of the campaign, able to negotiate successfully with Third-World leaders in a fashion the real value of which this country will only come to appreciate too late.

Certainly, Jackson made mistakes, but so did the other candidates. Is it only my race-based paranoia that leads me to doubt even a perfect campaign and the certain knowledge that Jackson as President would further peace, eliminate poverty, balance the national budget, and effect racial healing would have swayed those from voting for the winner who, rhetoric aside, is working with all his considerable political skill to heighten the risk of war, increase the number and suffering of the poor, set new deficit records, and intensify racial hostility both here and abroad.

The story is apocryphal, but it is said that during the campaign, the Presidential candidates met with the Pope and took a boat out to the middle of a beautiful lake to discuss the important issues of the day. During the ride, the Pope's hat

blew off and drifted away on the currents. Each of the candidates tried to reach the hat with an oar or a stick, but was unable to do so. Finally, Jackson, got up, stepped out of the boat, and walked across the water, retrieved the hat, walked back to the boat, gave the Pope his hat and returned to his seat as dry as he was before he left. The headlines the next day make my point. They read, "Jesse Can't Swim."

Often there is much truth communicated in jest, and the essence of the humor here is our recognition of the lengths to which those in our society will go to avoid acknowledging superior achievement by even individual minority persons when their talents are exhibited in circumstances that threaten traditional patterns of white control and domination.

Even in arenas like the stage or the athletic field where excellence by black performers is almost taken for granted, there is reluctance to cast black people in commanding positions: the leading man in a mainly white play or quarterback on a professional football team. And recall the similar control-based opposition to school desegregation: the reluctance to assign a majority of students of color to classrooms or schools where whites were to be assigned; the wholesale dismissal of minority teachers, principals and other administrators in the integration process.

It is not enough to simply dismiss this phenomenon as racism. The charge is too broad, the term too inflammatory, the implications for the future too important. For we simply cannot afford civil rights on a cyclical schedule in which minority rights are gained, then lost, then gained again in response to

economic and political developments over which minorities exercise little or no control.

Rather, we must assess carefully how so many years of vigorous activity, studded with so many victories in the courts and in the legislatures, could bring us to this point when minorities are suffering losses in income and status at the very same time that millions of whites and some minorities are experiencing real prosperity.

None of us here need have repeated the sad statistics of income gap, unemployment, broken families, teenage pregnancies, alcohol and drug related crime, and all the other indicia of both poverty and a still-subordinated people.

And each new report shows a worsening situation. In a recent article, Washington Post columnist, William Raspberry, referred to the "other shoe" quality of these reports. He noted that Reagan's Labor Department will release some new figures intended to show America's continuing economic vitality, and then down in the report, they will "drop the other shoe" and offer the grudging and unexplained information that joblessness for blacks increased again. (The Oregonian, Mar. 19, 1985)

Thus, while 300,000 new jobs were created in February of this year, increasing the number of working Americans to an all-time high of 106.7 million, 174,000 blacks, mostly black males, lost their jobs since January, increasing black unemployment by a statistically significant 1.4 percent.

For our discussion, it is significant that the individual and family tragedies reflected in these statistics are occurring

at a time when blacks are more protected by anti-discrimination laws than at any other time in our history. And yet these measures, hard-won as they were, are almost totally irrelevant in the current struggle for economic survival.

There is, for example, no civil rights law requiring the government to act to alleviate the hardship caused by black unemployment, nor is there even a law requiring the Labor Department's Bureau of Labor Statistics to try and discover the cause for the growing disparity in working whites and blacks.

As Raspberry observes, it is statistically intriguing to note that when things go badly for the general economy they go badly for blacks, but it is downright frightening to learn that when things improve dramatically for the general economy they still go badly for blacks.

"And," he adds, "because nobody in authority tells us why, we are left to argue among ourselves as to the most likely explanation."...."Not only does no one seem to know, but the government seems uninterested in finding out."

We have sought the Holy Grail of racial equality, and having gained it in law find it transformed in fact from a symbol of freedom to one more device dedicated to the racial status quo.

Paradoxically, there is a historic parallel to our plight. In the early Virginia colonies, the large plantations established a barrier between their black and white servants by reducing the blacks to a slave status and, having gained through this involuntary labor supply a safe economic advantage over those whites unable to afford slaves, granted poor whites a larger role in the political process.

In explaining the paradox of slaveowners espousing freedom and liberty, Professor Edmund Morgan explains that:

> Aristocrats could more safely preach equality in a slave society than in a free one. Slaves did not become leveling mobs, because their owners would see to it that they had no chance to. The apostrophes to equality were not addressed to them. And because Virginia's labor force was composed mainly of slaves, who had been isolated by race and removed from the political equation, the remaining free laborers and tenant farmers were too few in numbers to constitute a serious threat to the superiority of the men who assured them of their equality. E. Morgan, American Slavery, American Freedom 380-381 (1975).

If this sounds strangely contemporary, it is because, except for the racial switch, the same tactic is being used to neutralize blacks and Hispanics that much earlier in our history was used to assuage the aspirations of poor whites. It is generally assumed that the society adopted the ideology of racial equality as a concession to the civil rights movement. But Professor Sidney Willhelm claims "changes in the economy made the ideology of Equality an appropriate tool to preserve White privilege, just as earlier changes had led to the demise of slavery and the rise of segregation." (Willhelm, The Supreme Court: A Citadel for White Supremacy (Book Review), 79 Mich. L. Rev. 847, 850 (1981).

Willhelm believes that while slavery and segregation rested on the need to exploit black labor, whites now produce wealth through the exploitation of technology, and, not needing identifiable racial minorities, feel free to offer them "equal opportunity." Of course, because of generations of overt racial discrimination and exclusion, only the most gifted and fortunate of the minority class are able to avail themselves of the new, merit-based status. The rest are dismissed, not on the basis of race, but on the basis of their lack of qualifications.

You will recognize this as the heart of the argument against affirmative action made with perfectly straight faces by neoconservative academics with impeccable credentials.. The public, reassured by what they say, accept the arguments, ignore the logic, and thus, we must believe, are inured to the racial injustice.

But is there behind this espousal of merit any greater substance than that contained in the grandfather clauses struck down by the Supreme Court in 1915? (Guinn v. Unites States, 238 U.S. 347). Those laws gave all those who had the franchise before a certain date and their descendants the right to register permanently without complying with the educational qualifications required of all other voters. The Court found the date was fixed at a time when blacks were not permitted to vote, thereby allowing all illiterate whites, but not blacks, to vote in violation of the Fifteenth Amendment.

Evidently what was obvious to an early Twentieth Century Court is opaque to its late Twentieth Century successor although the impact on the victims of this merit-justified discrimination

remains the same. As Professor Willhelm puts it, the myth of equality within a context of oppression simply provides a veneer for more oppression.

As a lawyer, I am tempted to turn in this crisis to those civil rights lawyers of now great renown who led us from our prayers to God for deliverance to prayers for injunctive relief in the federal courts. Those lawyers had a great vision: that once the mighty barrier of the law was transformed into a bridge that enabled black people too to have access to the shining protections in the Constitution, then all would be well.

As former NAACP General Counsel and now federal judge Robert L. Carter put it, because of the Brown decision,

> the psychological dimensions of America's race relations problem were completely recast. Blacks were no longer supplicants seeking, pleading, begging to be treated as full-fledged members of the human race; no longer were they appealing to morality, to conscience, to white America's better instincts. They were entitled to equal treatment as a right under the law; when such treatment was denied, they were being deprived - in fact robbed - of what was legally theirs." (Bell, Race, Racism, 1st ed. at .461)

Who can deny the accuracy of what Judge Carter claimed he and the others won at the Supreme Court on that faithful day in May, 1954? That indeed was what the Court promised. But who can deny that the decision, read for all that it is worth, has any

but the most bitter meaning for the 20,000 black men who have in this very week lost perhaps the last jobs they will ever hold?

But our civil rights fathers believed that in the law, there was deliverance. And theirs was a great faith as we see when we read Groundwork, Genna Rae McNeil's stirring biography of Charles Hamilton Houston, or Gilbert Ware's recently published biography of Judge William Henry Hastie, Grace Under Pressure. Richard Kluger's Simple Justice placed the spotlight on the courageous lawyers whose long labors led to the Brown decision. And recall the militant but steadfast faith of Loren Miller in The Petitioners.

All must remember Thurgood Marshall assuring the Supreme Court that all Negroes sought was the elimination of the Jim Crow signs. It would be perfectly legal, he argued, if all children were separated on the basis of sex, or intelligence, or any basis save race. So strong was this faith that even the wisdom of W.E.B. DuBois was brushed aside when he dared to differ with those in the civil rights establishment who were committed to equality for blacks through integration with whites.

I have told perhaps too frequently the story of going after graduating from law school to Judge Hastie and telling him of my interest in civil rights law. Reminding me of the Supreme Court's decision in Brown a few years before, Judge Hastie told me kindly that I had been born 15 years too late, and that the major legal battles had all been fought and won.

Theirs was a great faith. But what should me do with this faith, now that it has been betrayed, and we find ourselves

standing amidst the ever-growing devastation of the people they were convinced they had rescued once and for all from racial oppression? Where did they go wrong, and how can we while honoring their courageous work avoid their near-fatal errors?

A start toward an answer lies in the observation of Historian Alfred H. Kelly who assisted the civil rights lawyers in developing their briefs. Kelly reports:

> In a sense, these men were profoundly naive. They really felt that once the legal barriers fell, the whole black-white situation would change. I was more skeptical, but they were convinced that the relationship between the law and society was the key. There was a very conservative element in these men then in the sense that they really believed in the American dream and that it could be made to work for black men, too. (R. Kluger, Simple Justice 639 (1976).

Professor Kelly may have a point, but we should also recognize that the commitment to desegregation was, for the most thoughtful among the civil rights lawyers, more a strategy than a philosophy. Indeed, there was more of the credo about Brown and its desegregation mandate after the decision than before. Black lawyers and their clients in the 1930s and 1940s faced constant humiliation because of their race and more than a little danger whenever they opposed segregation. Understandably, they saw as their enemy the top layer of racism (segregation) that was hurting them. It was so bad they believed there could be nothing worse.

Even so, we must learn from rather than emulate the strategies of our civil rights lawyers. We, after all, now have available their hard-won experience. We can build on that experience by studying more closely the history of our fundamental law. We will see that the provisions on which we rely for individual justice were intended by the Framers as primarily protection for those who had property and needed provisions to ensure it would not be placed in jeopardy to a too strong government or to the masses. Both were viewed as serious dangers.

In addition, we must regain the insight, somehow gone awry in the long effort to gain equality through integration, that white America will accommodate the interests of blacks and other racial minorities in achieving racial equality when and only when those interests converge with the interests of whites. This means, for example, that the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.

We must come to recognize that the availability of constitutional protection in racial cases is not actually determined by the character of harm suffered by blacks or the quantum of liability proved against whites. Racial remedies, judicial and legislative, are instead the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interest deemed important by middle and upper class whites.

It is for this reason that racial justice - or its appearance - may, from time to time, be counted among the interests

deemed important by the courts and by society's policymakers. Of course, in every freedom movement since abolition, there have always been whites for whom recognition of the racial equality principle was sufficient motivation. But, as with abolition, the number who would act on morality alone was insufficient to bring about the desired racial reform.

On the other hand, any gain for blacks, no matter how closely connected with the self-interest of the nation in general, will be seen as a threat by some whites, especially poorer whites who fear loss of their always shaky-hold on the societal ladder.

There is today, as there has been for generations, an unspoken expectation that white elites would maintain lower class whites in a societal status superior to that designated for blacks. Segregated schools and other public facilities were established, you will recall, at the insistence of the white working class. The Brown decision was seen by poor whites as a betrayal of their compact with white elites.

To the extent that Reagan is able to maintain an aura of old-fashioned patriotism which, of course, includes blacks in a clearly subordinate position, he is able to divert poor whites from a condition hardly better than that of blacks, and gain their opposition to social reform measures, condemned as "welfare programs for blacks," even though, ironically, whites have employment, education, and social service needs that differ from those of poor blacks by a margin that, without a racial scorecard, is difficult to measure.

Finally, future strategies and tactics must be built on recognition of the critical role that economics play as well as the balancing of the interests of working class whites and poorer blacks that has so often been used to keep both groups in a weak and subordinate posture.

All of these suggestions are relevant because I firmly believe that the policies of the Reagan administration, conservative in dealing with the needs of the poor, but extravagant in responding to the greed of the rich, are destined to fail. While awaiting this inevitable collapse, minorities cannot afford the luxury of inaction.

I suggest no major new initiatives in either the courts or the legislature. It will require great commitment in both arenas simply to stave off new efforts to reduce further the already inadequate aid provided by the government. Perhaps too much of our attention and resources in the last few decades has been directed toward externals: litigation, legislation, public appeals, protests. Too little effort has been devoted to organizing communities and in strengthening cultural ties that are always under attack in this hostile society.

Harlem activist, Preston Wilcox, reminds us that "no one can free us but ourselves." That internal liberation process must begin by recapturing the cultural heritage from a society quite capable of turning the most sacred into the profane for no better reason than that "there is money in it."

And as difficult as it is, we must come to recognize that power is the ability to define reality as each of us see it. Power is not, as this society thinks, synonymous with wealth, position, and guns. To accept this assumption would be dangerous if it were true, given the fact that those possessing most of the symbols of such asserted power are hostile to us.

What is the reality of the racism under which this society suffers? As Professor Manning Marable has written: "Racism is not", as I feared civil rights advocates of an earlier time believed, "a pattern of biased social attitudes and intolerant behavior by white people. Rather, it is a systemic or structural part of modern capitalist political economy."

It is far more than simple intolerance because of difference, but as Marable points out, developed in the West along with capitalism for the purpose of withdrawing the dominant group's sympathy from "inferior races" in order to facilitate their exploitation.

This exploitation takes many forms. The key manifestation, of course, is the utilization of labor without a fair return, and classification through discrimination of minority workers into a marginal, surplus labor pool that is the "last hired and first fired." But resistance to the exploitation of the labor of blacks and other minorities is facilitated by de jure and de facto segregation, and what Marable calls the "ideological hegemony" of a racist order.

The media, public schools, Universities, theatre, religion, civic associations, political parties, and government, indeed every institution in the society provide, directly or indirectly, intentionally or unconsciously, a public rationale to justify, explain, legitimize or tolerate a racial structuring of the society that maintains things as they are.

This systematic self-justification is so complete that when well-meaning white parents assure their five-year old child that all people regardless of color are the same, it is already too late. Even so young a child has already seen which race is regarded highly in the society, holds the best positions, is pictured in the media, comes most frequently as a guest to the home. And unless the child is deaf, blind, and dumb, he or she also has seen which group is disrespected, seldom seen in the media or in the home and then often in demeaning or clearly service roles.

So powerful is this system of self-justification that even the Supreme Court seems unable to recognize, for example, the similarity of "merit" in the voting place, seen as a shameless sham in the "grandfather clause" cases in 1915, and the use of "merit" in the workplace as in the Stotts case, just last year.

So marvelous is this ideological hegemony in its workings that most white people who practiced or condoned outright of exclusion of racial minorities until day before yesterday, now feel uplifted that they have the courage to make the "hard choices required by their commitment to the principles of merit.

And that is why it is so essential that blacks and Hispanics not accept the society's definitions of reality. Excluded by race for generations, and now excluded because of standards that ignore the previous injustice, should and must evoke feelings of rage, injustice, and violation. Acceptance results in despair and defeat.

As G. Carter Woodson wrote in his book, The Miseducation of the Negro, back in 1933:

> If you can control a man's thinking, you do not have to worry about his action. When you determine what a man shall think, you do not have to concern yourself about what he will do. If you make a man feel that he is inferior you do not have to compel him to accept an inferior status, for he will seek it for himself.

I think that the importance of self-definition of reality as the key to personal and group power, envisioned by only a few persons like G. Carter Woodson at an earlier time, is now far more obvious to those of us who labor still for justice in a land that espouses equality most for those likely to experience it least.

This is the crucial lesson that must come out of the Brown v. Board of Education years. Upon application that may differ with different individuals and in different circumstances, the bleakness of our present condition will not immediately change, but ways to move toward betterment will become apparent. Appraisals that fully justify despair when measured by the prevailing society's definition of power, will become opportunities for new

initiatives in a struggle carried on bravely by our forebears. For it is in this struggle that we achieve a continuing victory whatever the outcome of individual contests. It is clear to me that George Sanchez understood this, and we honor his life as well as uplift our own by following his example.

You may conclude that it is not scholarly, not reflective of intellectual potential as this society measures it, but my friends, as I stand here tonight, I must tell you that with the gospel singer,

I don't feel no ways tired.

I've come too far from where I started from.

Nobody told me that the road would be easy.

I don't believe me He brought me this far to leave me.

FOOTNOTES

1. James Cleveland, on recording Noways Tired, SMI C-31AS (Suffolk Marketing, Inc. 155 E. Main St., Smithtown, NY 11787, 1981).

2. Deloris Barrett Campbell and the Barrett Sisters, No Ways Tired, on Say Amen, Somebody, SB2L 12584, DRG Records, Inc., 157 West 57th St., New York, NY 10018, 1983).

3. See, Sanchez, Quantitative and Objective Criteria in Education: A Delusion, Texas Journal of Secondary Education, 13 (3), 1960; Sanchez, Group Differences and Spanish-Speaking Children: A Critical Review, Journal of Applied Psychology, 16, 1932; Sanchez, Bilingualism and Mental Measures: A Word of Caution, Journal of Applied Psychology, 18, 1934: Sanchez, Scores of Spanish-Speaking Children on Repeated Tests, Journal of Genetic Psychology, 40 (1), 1932.

4. See, Sanchez, Concerning Segregation of Spanish-Speaking Children in the Public Schools (The University of Texas); Sanchez,Future Legislative Programs for Financing Public Education in New Mexico, The University of New Mexico Bulletin, 8(4), 1934.

5. See, Murillo, The Works of George I. Sanchez: An Appreciation in Chicano Psychology (Academic Press, San Francisco, 1977); Mowry, A Bibliography of George I Sanchez in Humanidad: Essays in Honor of George I Sanchez (Chicano Studies Center Publications, Los Angeles, 1977);

Sanchez, An Experience in Texas in Van Til, A Symposium: Experiences in Cultural Integration, Educational Leadership, 15 (8), 1958; Sanchez, Theory and Practice in Rural Education, Progressive Education, 13, 1936.

6. Jorge Isidoro Sanchez y Sanchez (1906-1972). Remarks of Americo Paredes read at a dinner honoring George Sanchez, at the California State Unviersity in Sacramento, Dec. 8, 1972, and published by Chicano Studies Center Publications, University of California, Los Angeles, Monograph No. 6 (1977).

7. See, Murillo, The Works of George I. Sanchez: An Appreciation in Chicano Psychology (Academic Press, San Francisco, 1977).

8. 347 U.S. 483 (1954).

9. See, e.g., Days, Turning Back the Clock: The Reagan Administration and Civil Rights, 19 Harv.Civ.Rts. & Civ. Lib.L.Rev. 309 (1984).

10. 443 U.S. 193 (1979).

11. 104 S.Ct. 2576 (1984).

12. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973 (1982), 42 U.S.C.A. 1973b (Supp. 1983). For a discussion of the Amendment and citations to law review comment, see, D. Bell, Race, Racism and American Law 4.5.2. (1984 Supp.).

13. The number of black elected officials increased from 1,469 in 1970 to 5,606 in 1983. 70 ABA J. 52 (1984).

14. See, e.g., A Policy Framework for Racial Justice, a report by 30 prominent black scholars, Joint Center for Political Studies, Washington, DC (1983).

15. Id.

16. E. Morgan, American Salvery, American Freedom, 380-381 (1975).

17. Willhelm, The Supreme Court: A Citadel for White Supremacy (Book Review), 79 Mich.L.Rev. 847, 850 (1915).

18. Guinn V. United States, 238 U.S. 347 (1915).

19. Carter, The Warren Court and Desegregation, in D. Bell, Race, Racism and American Law 456, 461 (1st ed. 1973).

20. G. McNeil, Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights (1983).

21. G. Ware, Grace Under Pressure: The Life of William Henry Hastie.

22. R. Kluger, Simple Justice (1976).

23. L. Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro (1966).

24. Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka, 1952-1955, at 252-254 (L. Friedman, ed. 1969).

25. See, Bell, The Legacy of W.E.B. DuBois: A Rational Model for Achieving Public School Equity for America's Black Children, 11 Creighton L.Rev. 409, 419 (1977).

26. R. Kluger, Simple Justice 639 (1976).

27. M. Marable, How Capitalism Underdeveloped Black America (1983).