The Birth Of The White Corporation

by Jeffrey Kaplan

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James Baldwin once compared white Americans' view of their own history to a factory within whose walls they have barricaded themselves. They remain trapped in that factory which "at an unbelievable human expense, produces unnamable objects."[1] Those objects are unnamable because they exist deep within our world of shared cultural beliefs. But we do have names for their outward manifestations: environmental degradation, class oppression, and racism, to name a few. Such a list must also include the legal fiction that the corporation is a person.

The primary engine of white United States history has been the use of property, the ownership of things, as a means of domination over people -- and the use of people as property, for slavery was the original basis for wealth in white America. But there are other ways besides slavery in which notions of property and race have become fused. For example, W.E.B. Du Bois noted that whiteness yields a "public and psychological wage"[2] to all white workers, which is expressed in the freedom to mingle across social classes, preferential treatment by police, eligibility for government jobs, and simply a greater sense of well-being than blacks.

Du Bois well understood that most of the wages of whiteness accrue not to poor whites, who receive only a pittance, but to the dominant classes. But what even he may not have been aware of is how, at the time of its birth, the modern corporation received as its patrimony the wealth and privileges accumulated during slavery. In 1883, the very same year that the US Supreme Court heard arguments in favor of declaring that a corporation is a natural person, the Court also invalidated the enforcement of civil rights for African Americans.[3] This was the first of a series of decisions that led to the Court's approval of racial segregation. The Court eventually held that both corporate personification and racial segregation were justifiable under the Fourteenth Amendment,[4] which was passed with the explicit purpose of protecting the rights of former slaves after the Civil War. This connection is more than a mere oddity of US legal history. **These court decisions are part of a common social structure in which the exercise of social power through property rights continues to mask the concomitant disempowerment of people of color. In effect, what the courts decided is that corporations are people while African Americans are not; and that, while property could no longer be held in the form of black skins, it could still be invested in white ones.**

WHITENESS AS PROPERTY

In a long article in the *Harvard Law Review* called "Whiteness as Property," African American legal scholar Cheryl Harris provides an analytical framework we can use to clarify some of the ways in which white skin privilege has been generally conjoined with property. Her paper "investigates the relationships between concepts of race and property and reflects on how rights in property are contingent on, intertwined with, and conflated with race. Through this entangled relationship between race and property, historical forms of domination have evolved to reproduce subordination in the present. . . . **Whiteness and property share a common premise -- a conceptual nucleus -- of the right to exclude.**"[5] [bolding added] The essence of property in the Anglo-American legal tradition is that its owner can exclude others from using it. The essence of white skin in the US is that those who do not possess it are excluded from certain rights and privileges, including that of being treated as a full human being.

Property is not restricted to those things that we can sell that are separable from ourselves. For example, a college degree has market value. The courts have held that in the event of a divorce, a spouse who supported her husband while he earned a medical or law degree has an interest in that degree and is entitled to compensation for her efforts in helping him earn it.[6] In a sense every Caucasian in the US is born with a "masters" degree.

The financial interest white people have in race was recognized by the justices who legitimized racial segregation in *Plessy v. Fergusson* in 1896. The case was a carefully staged challenge to a Louisiana law requiring segregation on railroads. The lawyers challenging the law purposefully chose a well-educated African American who could pass as white. One of the arguments the lawyers then made was that by publicly labeling Plessy as "colored," the railroad had deprived him of the reputation of being white "which has an actual pecuniary value."[7] The Court conceded that if such a thing were done to a white man he would have grounds for a lawsuit but evaded the issue in its decision to uphold the state law. As recently as 1957 a white person could sue for defamation if she was called "black" but a black person could not sue if she was called "white."[8]

THE PERSONIFICATION OF THE CORPORATION

The corporate person is a white person. It was given its invisible, but nonetheless valuable, color because of the conjoint exclusionary privileges of whiteness and property. The reasons why men of means saw fit to create such a legal fiction can only be understood in the context of the rise of large-scale capital in the period before the Civil War. **That war was fought not because the majority of the citizens of the North found slavery to be repugnant, but to determine which group would be the senior partner in the capitalist state: the old power elite of the Southern slave holders or their challengers, the Northern industrialists.** The Emancipation Proclamation was issued during the war not simply to free the slaves of the Confederacy but in large part because the Northerners feared they might lose unless they found a new source of recruits for their army. They hoped the slaves would fight for their freedom and some 180,000 of them did -- so well, in fact, that during the Reconstruction period after the war, the newly freed slaves briefly enjoyed the status of war heroes in the Northern newspapers.[9] This complicated the problem for Northern capitalists

who were trying to figure out how to consolidate their victory over the Southern planters. The politics of race in the years after the Civil War presented the Northern capitalists with both a threat to their newly enhanced position and an opportunity to achieve that consolidation. They moved quickly to eliminate the threat and take full advantage of the opportunity.

The war had not broken the power of the Southern elite. They still owned the plantations and thus controlled the only source of employment for the overwhelming majority of the newly freed slaves. If the Southern states were simply re-admitted to the Union without any other changes, the planters could have easily resumed the control of Congress they had held before the war. Enfranchising the freed slaves with the vote seemed to be the way to break the power of the planters. But to be effective, enfranchising blacks would also require that they have the means to support themselves. There would have to be a massive redistribution of land not only to blacks but also to poor whites. This was the program favored by the Radical Republicans who, as W.E.B. Du Bois put it, wanted to "make the slaves free with land, education and the ballot, and then let the South return to its place."[10]

The Northern capitalists saw this possibility as a threat to their interests, first because it would have broken down the racial split between blacks and Southern whites that the elites of both the North and the South had long exploited. This would have likely spilled over to the white Northern wage workers as well. Second, it would have destroyed the capital base of Southern agriculture and turned the South into a producer-controlled society of independent farmers. The Northerners didn't want to eliminate Southern capital; they wanted to dominate it. Finally, it would be enormously expensive, requiring the long-term presence of federal troops in the South and draining away resources the Northerners wished to devote to expanding the industrial system. For these reasons, their congressional allies opposed the proposals of the Radical Republicans. **For the Northern capitalists the newly won human rights of former slaves were of interest only insofar as black voters served as a check on the political power of the old Southern planter elite.** That check was needed as long as the Northerners had not yet established economic control over the states of the former Confederacy. As Du Bois described it, the Northern capitalists' plan was to "guard property and industry; when their position is impregnable, let the South return; we will then hold it with black votes, until we capture it with white capital."[11]

The capture was complete by 1877 when the capitalists brokered a deal over a contested presidential election whereby the federal troops were withdrawn from the South in return for a promise by the Southerners to become junior partners to the Northern capitalists.[12] This event marked the end of Reconstruction and the beginning of the post-Civil War oppression of African Americans in the South. The Supreme Court gave its approval to the new social order in 1883 when it declared the Reconstruction-era Civil Rights Act unconstitutional. Frederick Douglass declared that this decision by the Court "inflicted a heavy calamity upon seven millions of the people of this country, and left them naked and defenseless against the action of a malignant, vulgar, and pitiless prejudice." He yearned for "a Supreme Court of the United States which shall be as true to the claims of humanity as the Supreme Court formerly was to the demands of slavery!"[13]

THE BIRTH OF THE WHITE CORPORATION

After consolidating its political power over the South, the industrialists were hampered by the fact that the US legal system was heavily oriented toward the rights of individuals and, as such, did not fully support the kind of organization that was needed for the consolidation of control over the rapidly emerging industrial system. The personification of the corporation was their solution to this problem.

The legal argument made before the Supreme Court on behalf of corporate personification began with a lie that was perpetrated in December of 1882 in the case of *San Mateo v. Southern Pacific Railroad*. The lawyer who lied was Roscoe Conkling, a former United States Senator and one of the politicians DuBois identified as a principal architect of capital's strategy during Reconstruction. Conkling had served on the congressional committee that drafted the Fourteenth Amendment. He claimed that, according to his copy of the committee journal, the original intention was that the amendment should apply to corporations as well as to human beings. The journal had not been published at the time the case was being heard and the justices did not question his account. Some decades later the journal was published. It showed that Conkling's claim was, as a modern authority on the history of the Fourteenth Amendment put it, "a deliberate, brazen forgery."[14]

The railroad's lawyers did not let their case rest on a simple lie. Their concluding argument, made in 1883 by Silas W. Sanderson, leaves no doubt that they also made a blatant appeal to white racial solidarity:

> It is very clear, if we look back over the history of the past twenty years, that this country has done a great deal for [members of] the negro race. . . . It has made them free men . . . it has placed them on a par and equality with the white man. But that is none too much; we do not complain of that. We only say that something should now be done for the poor white man. We ask that he . . . be lifted up and put upon a level with the negro. We ask that this fourteenth amendment be so construed as to concede to the white man equal rights under the Constitution of the United States with the black man. Our claim is for universal equality before the law. . . . [M]y friends upon the other side, by their construction of this amendment, would create a privileged class. They have demonstrated . . . that the negro race . . . stands higher upon the plane of legal rights than the white man; that whenever his rights are invaded he founds a shield and a protection in the fourteenth amendment . . . but whenever the white man's rights are invaded, whenever he is outraged by unjust State legislation, we are told . . . that there is no shield for him to be found in the fourteenth amendment; that the white man is without protection in cases where the black man is protected. . . . I understand, then, that we may consider, for the purpose of this case . . . that there are not two Constitutions in this country -- one for the black man and one for the white man -- and that the white man is at last on an equality with the negro.[15]

Clearly, the modern corporation was not to be just any kind of person; it was to be -- it had to be -- a white person, a white person created by the corporations, of the corporations and for the corporations in direct opposition to the aspirations of African Americans to live their lives as human beings. But not only did the corporation have to be a white person, Sanderson also said he was arguing on behalf of the "poor white man." Of course he was not working at the behest of struggling white farmers and workers. Sanderson's client was Colis Huntington, one of the most powerful railroad barons in the nation. Sanderson sought corporate personification by claiming that the state was violating the railroad's civil rights when it wrote tax laws that made a distinction between individual human beings and corporations. However, there was a place for the poor white man in the

worldview of men such as Huntington and Sanderson. It was described nicely by an Alabama journalist in 1886: "The white laboring classes here are separated from Negroes . . . by an innate consciousness of race superiority which excites a sentiment of sympathy and equality on their part with classes above them, and in this way becomes a wholesome social leaven."[16]

The Court never issued an opinion in *San Mateo* because the parties settled out of court. But the railroad barons had already instigated another case, this one involving the neighboring county of Santa Clara. In 1886, in *Santa Clara County v. Southern Pacific Railroad*, the Court declared it would not hear any further arguments on whether the Fourteenth Amendment applies to "these corporations. . . . We are all of the opinion that it does."[17] Even at the time it was considered extraordinary that the Court did not state its reasoning for such an important statement. But then they would have had to expose to public scrutiny a blatant legal fabrication.

THE WHITE CORPORATION COMES OF AGE

At the time of its birth the white corporation was a child of the railroads, which had long been the only truly large-scale enterprises in the US. But within a few years industrial and manufacturing firms also began to form massive conglomerates. Their leaders realized that the white corporation would serve them well as they sought to extend their industrial empires. The years from 1895 to 1907 saw what has been termed the great Corporate Revolution, at the end of which entire industries were controlled by one or two large firms. Of the 100 largest corporations in existence 50 years later, 20 were created by consolidation during this period. Eight more were created a few years later when the courts ordered the split-up of Standard Oil.[18]

This was also the period during which racial segregation and imperialism became accepted features of white America's national identity. Not only did the US Supreme Court approve of racial segregation during those years, blacks were attacked in race riots in cities all over the country: Atlanta; New Orleans; New York City; Akron, Ohio; and even Lincoln's hometown of Springfield, Illinois. In 1903 the African American novelist Charles W. Chestnutt noted that "the rights of the Negroes are at a lower ebb than at any time during the thirty-five years of their freedom, and the race prejudice more intense and uncompromising."[19] White America had replaced the system of slavery with one of caste.

Once the caste system was safely in place, the white corporations could concentrate on expanding the privileges that inhered in their invisible white skins. Until about 1960, the corporations' status as persons was used primarily to protect and expand corporate property rights against attempts by the states to impose economic controls. In 1938 Justice Hugo Black noted that of the cases in which the Supreme Court applied the Fourteenth Amendment during the first 50 years after Santa Clara, "less than one-half of one percent invoked it in protection of the Negro race, and more than 50 percent asked that its benefits be extended to corporations."[20] As this statistic shows, the white corporation had usurped the rights of the people whom the Fourteenth Amendment was meant to protect. It was using those rights -- which it had obtained through what amounts to a legally engineered fraud -- to expand its own interests. At the same time, African Americans were deprived of their legal

voice and forced to suffer a violent oppression in silence. **Thus we can look at each one of those actions on behalf of corporations as a transfer of both economic and human rights from black people to those who control large-scale capital.** In a sense, James Baldwin's unnamable objects found their physical expression in the innumerable products marketed by the giant corporations.

But the desire for freedom found its own expression in the civil rights movement, the environmental movement, and the demands by women for a full role in social life. All of these attempts by real human beings to assert their rights threatened the prerogatives of the corporations. Corporate lawyers responded by seeking to expand the standing of corporate persons to include a number of protections under the Bill of Rights that previously had been granted only to human beings. Since 1960 the Supreme Court has granted to corporate persons the right of free speech -- especially political speech -- under the First Amendment, protection against double jeopardy under the Fifth Amendment, the right to counsel under the Sixth Amendment, and the right to a jury trial under the Seventh Amendment.[21] **In other words, the Court has endorsed a counter-attack by property against the assertion of human rights by the public in general, and people of color and women in particular.**

Of course the white skin possessed by real human beings of European descent is no guarantee of protection against the artificial white person. Recently a well-to-do white community challenged a federal law that allows telecommunications companies to ignore local zoning ordinances when putting up microwave towers. The community lost when their corporate opponents cited a civil rights statute whose language originated in a Reconstruction-era attempt to protect the rights of African Americans against the Ku Klux Klan.[22] Such an irony would not have been lost on Baldwin: "People who imagine that history flatters them (as it does, indeed, since they wrote it) are impaled on their history like a butterfly on a pin and become incapable of seeing or changing themselves, or the world."[23]

Jeffrey Kaplan is a writer and researcher in Berkeley, CA.

ENDNOTES

1. "White Man's Guilt," by James Baldwin, in *James Baldwin: Collected Essays*, edited by Toni Morrison, The Library of America (1998), page 727.

2. *Black Reconstruction in America*, by W.E.B. Du Bois, World Publishing (1964), page 700.

3. *Civil Rights Cases* 109 U.S. 3 (1883): 491, *County of San Mateo v. Southern Pacific Railroad*, 13 F. 722 (C.C.D. Cal. 1882).

4. *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886): 783 and *Plessy v. Ferguson*, 163 U.S. 537 (1896): 492, 822.

5. "Whiteness As Property," by Cheryl Harris, *Harvard Law Review*, Vol. 106, No. 8, June 1993, page 1714.

6. Harris, page 1733.

7. *Ibid*, citation provided on page 1747 (Brief for Plaintiff in Error at 8, Plessy (No. 210)).

8. *Ibid*, citation provided on page 1736 (*Bowen v. Independent Publishing Co.* 96 S.E. 2d 564, 656 (S.C. 1957)).

9. *Reconstruction: America's Unfinished Revolution, 1963-1877*, by Eric Foner, Harper & Row (1988), page 8.

10. Du Bois, page 268.

11. Du Bois, page 268.

12. *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction*, by C. Vann Woodward, Oxford University Press (1991), pages 208-209.

13. *Reconstruction and Reunion 1864-88, Vol. 2*, by Charles Fairman, Macmillan (1987), page 584.

14. *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, The "Conspiracy Theory" and American Constitutionalism*, by Howard Graham, State Historical Society of Wisconsin (1968), page 417.

15. Graham, page 423.

16. *The Origins of the New South, 1877-1913*, by C. Vann Woodward, Louisiana State University Press (1971), pages 221-222.

17. *Santa Clara County v. Southern Pacific R.R.*, 118 U.S. 394 (1886).

18. *The Emergence of Oligopoly: Sugar Refining as a Case Study*, by Alfred S. Eichner, Johns Hopkins Press (1969), page 1.

19. Woodward, *Origins*, page 355.

20. *Connecticut General Co. v. Johnson*, 303 U.S. at 90 (1938).

21. "Personalizing the Impersonal: Corporations and the Bill of Rights," by Carl J. Mayer, *The Hastings Law Journal, Vol. 4*, March 1990, pages 629-636.

22. *Omnipoint Communications Enterprises L.P. v. Zoning Hearing Board of Chadds Ford Township, PA*, UCS Bi, 98-2295, November 1998. The corporation was awarded attorneys' fees under section 1983 of the 1964 Civil Rights Act.

23. Baldwin, page 723.

By What Authority, the name of our publication, is English for *quo warranto*. *Quo warranto* is the sovereign's command to halt continuing exercise of illegitimate privileges and authority. Evolved over the last millennium by people organizing to perfect a fair and just common law tradition, the spirit of *By What Authority* animates people's movements today.

We the people and our federal and state officials have long been giving giant business corporations illegitimate authority. As a result, a minority directing giant corporations privileged by illegitimate authority and backed by police, courts and the military, define the public good, deny people our human and constitutional rights, dictate to our communities, and govern the Earth. *By What Authority* is an unabashed assertion of the right of the sovereign people to govern themselves. A publication of the Program on Corporations, Law and Democracy.

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POCLAD
P.O. Box 246, So. Yarmouth
Massachusetts 02664-0246
Phone: (508) 398-1145
FAX: (508) 398-1552
E-mail: people@poclad.org
Website: www.poclad.org

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