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# Beyond the Symbolic Black and White The New Challenges of a Diverse Democracy

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# Beyond the Symbolic Black and White: The New Challenges of a Diverse Democracy\*

FRANK H. WU

Good afternoon. What an honor it is to close this wonderful symposium. I would like to provoke you to think—not to persuade you to believe as I do—but to provoke you to think about the role of the black lawyer and the future of civil rights, as perhaps you have never thought about these issues before. That’s quite a challenge, but what I would like to offer is a view of the future, an interpretation of the issues that we now face in an era that many have called (I think wrongly) “post-racial,”<sup>1</sup> yet which certainly follows upon the tremendous victories of the civil rights movement. What I would like to propose is that race is more than black and white.<sup>2</sup> I mean that both in a literal sense—although that is the subject of an altogether different discussion<sup>3</sup>—and what I want to emphasize today: race as more than black and white in a figurative, metaphorical, symbolic sense.

I would like to describe to you a conventional narrative, a story that we tell ourselves in this great nation of ours, a myth that we hold

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\* This Essay is based on my closing address at the live symposium. The text is based on the transcript, with only modest edits; the footnotes have been added for this print version. I thank research associate Chelsea Zuzindlak for her work. I also thank Dean Kurt Schmoke, Professor Andy Gavil, the Branton family, and the sponsors of the Symposium for the opportunity to present these ideas.

1. See, e.g., Jim Hoagland, *The Post-Racial Election*, WASH. POST, Nov. 2, 2008, at B07, available at <http://www.lexisnexis.com> (search “The Washington Post” for article name); Frank Rich, Op-Ed., *Guess Who’s Coming to Dinner*, N.Y. TIMES, Nov. 2, 2008, at WK10, available at 2008 WLNR 20926042.

2. The “beyond black and white” model is meant to effectuate a “paradigm shift.” See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996).

3. See generally FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (2003) (proposing that race is not literally black and white, but the inclusion of Asian Americans also advances the interests of African Americans). The enormous literature on these demographic trends is beyond the scope of this Essay. See, e.g., FRANK D. BEAN & GILLIAN STEVENS, *AMERICA’S NEWCOMERS AND THE DYNAMICS OF DIVERSITY* (2005) (discussing immigration and the changing face of demographics in the United States).

dear as part of our civic culture.<sup>4</sup> This narrative is a story, like so many stories of national mythos, of progress, of the great strides that we have made from generation to generation. It is “triumphalist”; it is positive in spirit and verges on proud. More importantly, it portrays racial issues in starkly black and white terms. This is a story, plain and simple, of villains on the one hand and victims on the other hand.

It is a story of villains whom we can identify—the Ku Klux Klan and their present-day successors, such as skinheads.<sup>5</sup> It is a story of those who would commit the most vicious acts of violence, of those who would drive out communities, who would burn crosses on lawns, who would shoot people, stab them, spit upon them, deny them jobs, apartments, and basic dignity solely because of the color of their skin, their identity, their faith, or their creed. To be sure, there have been villains in the past, and I don’t want in any way to slight the importance of that historical story.

It is also a story of victims, of course, and we at least know who they are in the abstract. They are passive, faceless, nameless. They are not agents of their own destinies. We pity them, even if we cannot be bothered to know their individual identity. They are the persons who have these horrible wrongs visited upon them, sometimes on their communities, sometimes physically inflicted on their bodies. When we see the documentary evidence of the terror that has been

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4. See generally DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1996) (arguing that there are cultural differences that account for distinct levels of achievement among races, and that racism cannot be blamed for “black failure”); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (Touchstone 1999) (1997) (arguing that the perception of serious racial divisions in this country is outdated and dangerous). For critiques of “triumphalism,” see RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 5 (2001); Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education (Our No-Bell Prize Award Speech)*, 47 *How. L.J.* 473 (2004); and Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 *COLUM. L. REV.* 1622 (1986).

5. DAVID M. CHALMERS, *HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN* (Duke Univ. Press 6th prtg. 1998) (1981) (describing the Ku Klux Klan and its development over one hundred years); BETTY A. DOBRATZ & STEPHANIE L. SHANKS-MEILE, *THE WHITE SEPARATIST MOVEMENT IN THE UNITED STATES* (Johns Hopkins Univ. Press 2000) (1997); NANCY MACLEAN, *BEHIND THE MASK OF CHIVALRY: THE MAKING OF THE SECOND KU KLUX KLAN* (1995) (investigating the social conditions and ordinary people who created the Ku Klux Klan); RORY McVEIGH, *THE RISE OF THE KU KLUX KLAN: RIGHT-WING MOVEMENTS AND NATIONAL POLITICS* (2009) (analyzing the broad social agenda of the Ku Klux Klan, showing that the promotion of white supremacy included attacks on not only African Americans but also immigrants, especially Catholics); JAMES RIDGEWAY, *BLOOD IN THE FACE: THE KU KLUX KLAN, ARYAN NATIONS, NAZI SKINHEADS, AND THE RISE OF A NEW WHITE CULTURE* (2d ed. 1996).

## *Beyond the Symbolic Black and White*

manifest, such as the photographs of lynchings, we must avert our gaze because it is too terrible to look upon.<sup>6</sup>

And this story, too, is powerful.<sup>7</sup> It is a compelling description of the past that we repeat to ourselves, that we study because we like to say that we now know better. We have a consensus, fragile though it may be, achieved through the heroism of leaders, whether they are lawyers, such as Thurgood Marshall and Wiley Branton, or activists and community leaders—many whose memories are now lost to us, despite their heroic efforts.<sup>8</sup>

Now there is also truth to this. It is undeniable. There has been a sea of change in racial attitudes just within the lifetimes of those of us in this room.<sup>9</sup> You need do nothing more than pick up the newspaper and look in the classifieds section to realize that there is no longer what was once obvious, listed clearly in black and white print for all to see, those jobs that were open to some based on race and gender, and closed to others for that same reason. You need only look at who sits in the White House. You need only look at who now leads our nation to see that tangible, meaningful progress has been made in every respect.

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6. PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHINGS OF BLACK AMERICA* (2003); MICHAEL JAMES PFEIFER, *ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY, 1874-1947* (2004); JAMES H. MADISON, *A LYNCHING IN THE HEARTLAND: RACE AND MEMORY IN AMERICA* (2003); AMY LOUISE WOOD, *LYNCHING AND SPECTACLE: WITNESSING RACIAL VIOLENCE IN AMERICA, 1890-1940* (2009); *see also* WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (James Allen ed., 2000).

7. *See* TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963* (1988); CLAYBORNE CARSON ET AL., *THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE* (1991); JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965* (1988); *see also* GEORGE M. FREDERICKSON, *RACISM: A SHORT HISTORY* (2003).

8. *See* RICHARD KLUGER, *SIMPLE JUSTICE* (2004); *see also* CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION* (2005); ROBERT J. COTTROL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* (2003); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2002); JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* (1998); JUDITH KILPATRICK, *THERE WHEN WE NEEDED HIM: WILEY AUSTIN BRANTON, CIVIL RIGHTS WARRIOR* (2007).

9. The change in racial attitudes is documented in HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* (rev. ed. 1997) and DONALD R. KINDER AND LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* (1996). *See also* COMMITTEE ON THE STATUS OF BLACKS IN AMERICA ET AL., *COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1990); DENNIS A. GILBERT, *COMPENDIUM OF AMERICAN PUBLIC OPINION* (1988); JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION* (1995); 2 NATIONAL RESEARCH COUNCIL, *AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES* (2006).

And so it seems that this story reassures us. This story provides us with solace and hope, an important function of national mythos. It gives us the sense that when we study what has gone wrong, we realize it is part of the past. It is history. It is for museums. It is important and worth recollecting, but it properly remains only in memories. Yet it then becomes all too easy in this conventional story for many of us, because we have achieved some modicum of material comfort, because we are not black, because we think to ourselves, “Well, I am not a villain and I am not a victim either.” It allows us to opt out too easily. So, I would like to challenge this story, this stark figurative, metaphoric, symbolic black and white story about race that tells us it is only about villains and victims.

Now, don’t get me wrong. Like anyone else who does this sort of work, like anyone else honored to be affiliated with this important law school, I am dedicated to fighting against the villains that remain. There are egregious cases, and I am dedicated as well to helping anyone who is harmed. The damage done to them is ongoing. What I propose, however, is that we must turn our attention now to something different. It is not just these cases—they are important, yes—but there is much more. It is necessary, but not sufficient, to address the figurative black and white. For there is the gray all around us—ambiguous and complex—when there is no longer a wrongdoer to be identified and punished, but where there are still people who suffer. The disparities are concrete, and they affect people’s life outcomes, whether it is infant mortality, housing segregation, the glass ceiling, or any other measurement—you find consistently that black and white are not equal on average terms.<sup>10</sup>

We must understand that much of the struggle that we face—the new black lawyer, the activist of today, the student whom we train and impart these skills to—has to do with the legacy and shared burden of history that we bear together. It has to do with institutions and structures. It has to do with those cases that we might well balk at calling “racism;” yet where it is apparent that a pattern emerges that correlates to race. We lack the appropriate vocabulary to describe this protean phenomenon.<sup>11</sup> Thus, the label is less important than the effects. Many would resist the term “racism,” even if they could be persuaded

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10. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (rev. ed. 2003).

11. See LAWRENCE BLUM, “I’M NOT A RACIST, BUT . . . :” *THE MORAL QUANDARY OF RACE* (2002).

of the influence of race. They can be won over with effective advocacy.

Allow me to make this concrete for you. Consider a thought experiment if you will.<sup>12</sup> I propose if you are a student here that you conduct this experiment some day. Most of you here in this room live in Washington, D.C., our nation's capital, so this description will be recognizable to you from your own experience. If you look at the social science research it will bear out this thought experiment, so it is not merely an anecdote.<sup>13</sup> Imagine, if you will, that you're writing a term paper about housing segregation here in our nation's capital, which as you know is what is called a "majority-minority" jurisdiction, meaning that most of the residents of the city proper are black or brown.<sup>14</sup>

You don't have to spend much time looking at the matter before you realize that even in a "majority-minority" community, there is still racial segregation. All you have to do is get away from the Smithsonian, the National Mall, or the monuments downtown and go for a ride on the Metro, which of course is color-coded.<sup>15</sup> If you ride in one direction into this neighborhood (Van Ness), Cleveland Park, Forest Hills, or other posh places with those designations that realtors give them, to the areas along the red line in the upper northwest quadrant this side of Rock Creek Park, you will find many neighborhoods that have fancy houses, well-manicured lawns, and luxury cars parked out front. If you walk through the neighborhoods, you will soon notice—and you can confirm this by looking at the census—that these neighborhoods are ninety percent white, some ninety-five percent white or

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12. This thought experiment is a response to the Supreme Court decisions in *Freeman v. Pitts*, 503 U.S. 467, 490 (1992) (holding that federal courts can relinquish supervision of school desegregation plans in "incremental stages, before full compliance has been achieved in every area of school operations") and *Board of Education v. Dowell*, 498 U.S. 237, 247 (1991) (holding that when a school district "operate[s] in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that [is] unlikely that the school board [will] return to its former ways," a federal court's desegregation order should end, even when it results in re-segregation of a school).

13. See generally DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1998); see also PETER DREIER, *PLACE MATTERS: METROPOLITICS FOR THE TWENTY-FIRST CENTURY* (2d ed. rev. 2005).

14. U.S. CENSUS BUREAU, *DISTRICT OF COLUMBIA: CENSUS 2000 DEMOGRAPHIC PROFILE HIGHLIGHTS* (2000), available at <http://www.factfinder.census.gov> (search "fast access to information" for "District of Columbia"; then follow "2000" hyperlink) (last visited Jan. 16, 2010).

15. Washington Metropolitan Area Transit Authority, *Metrorail Interactive Map*, <http://www.wmata.com/rail/maps/map.cfm> (last visited Jan. 16, 2010).

more.<sup>16</sup> Maybe there's an Asian immigrant family that has moved in within the past decade, or one "well-to-do" black family, but you will have no difficulty finding a block, three blocks, or five blocks in a row where every single resident is white.

Then if you hop on the Metro and ride in the other direction, you'll find yourself in a neighborhood that isn't quite so nice, at least by reputation. The houses that were once fine have fallen into disrepair, or perhaps they've always been a little more modest. The lawns are poorly kept up; and the cars out front—maybe they don't run anymore. In those neighborhoods, there is scarcely a white face to be seen, unless someone's gotten lost. People pay a premium for the white neighborhoods, and prices there appreciate much more.<sup>17</sup> It is in these contrasting neighborhoods that there is tangible evidence of racial segregation.

The experiment continues as follows. If you're a student, on a fine afternoon go out with a clipboard and a pen and take a survey. Ring the bells and knock on the doors within one of the fancy neighborhoods, the exclusive neighborhoods, the white neighborhoods, and explain to the person, the very nice man or woman who comes to the door, that you're a law student and you're writing a paper and it's about housing. Don't mention race, you don't have to, it's better if you don't. Just say you're taking a class on real estate, or something similar, and you're conducting a little poll that asks, "Sir, Ma'am, Why do you live here?"

Now, you know, they didn't just drop in from Mars. None of these outcomes is random. They selected these houses, deliberating over their decision with care; as they ought, because this single decision will influence everything else about their identity and prospects.<sup>18</sup>

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16. Compare Ward 3 and Ward 7. Ward 3, with 73,753 people in 2000, is only 6.2% non-Hispanic black. See NEIGHBORHOODINFO DC, DC WARD PROFILE: WARD 3 (2009), [http://www.neighborhoodinfodc.org/wards/nbr\\_prof\\_wrd3.html](http://www.neighborhoodinfodc.org/wards/nbr_prof_wrd3.html). Ward 7, with 70,539 people in 2000, is 97% non-Hispanic black. See NEIGHBORHOODINFO DC, DC WARD PROFILE: WARD 3 (2009), [http://www.neighborhoodinfodc.org/wards/nbr\\_prof\\_wrd7.html](http://www.neighborhoodinfodc.org/wards/nbr_prof_wrd7.html). In Friendship Heights, American University Park, and Tenleytown, 2.3% of the population is non-Hispanic black; in Douglass and Shipley Terrace, .3% of the population is non-Hispanic white. NOAH SAWYER & PETER A. TATIAN, URBAN INSTITUTE & DC AGENDA, SEGREGATION PATTERNS IN THE DISTRICT OF COLUMBIA: 1980 TO 2000 9 tbl.1 (2003), available at <http://www.neighborhoodinfodc.org/pdfs/DC-Segregation-data.pdf>; see also Gregory D. Squires et al., *Experiencing Residential Segregation: A Contemporary Study of Washington, D.C.*, 38 URB. AFF. REV. 155 (2002).

17. Kristin Downey, *Segregation Persists in Housing, Study Says*, WASH. POST, Apr. 6, 2005 at E02, available at <http://www.lexisnexis.com> (search "The Washington Post" for article name).

18. See RICHARD FLORIDA, WHO'S YOUR CITY: HOW THE CREATIVE ECONOMY IS MAKING WHERE TO LIVE THE MOST IMPORTANT DECISION OF YOUR LIFE (2008).

*Beyond the Symbolic Black and White*

For almost all people who own a home, that home constitutes their greatest single asset. It is what they will bequeath to their children. It makes up their wealth.<sup>19</sup> It is their identity. This is where the hearth is, where the heart is. Their children play with the children next door. That's who their peers and equals are—"their people." That's whom they befriend and eventually marry, and then they move back into neighborhoods just like this.<sup>20</sup>

I will wager you something. I will risk you a large sum of money on this. I'll bet you that in this neighborhood, where 100 of the people that you survey are white, not more than 1 or 2 (you'll have to cut me a little slack) maybe there are one or two cranks who, if they trust you, will whisper that they live here because there aren't any black folks nearby. But my wager is this: the other 97 or 98 will give you answers that have absolutely nothing to do with race.<sup>21</sup> They'll tell you it's a nice floor plan, swimming pool out back, the realtor recommended it, their cousin lives around the corner, they grew up here, it's an easy commute, there are good schools, it's a solid investment, and so on and so forth.

That, I submit, is the paradox of race: we have all these individual decisions not about race and an aggregated outcome that is about race. Indeed, if you said to someone, "Say, might it have to do with race?" they would be mortified or indignant; they would say to you, "Well what are you accusing me of? Of course not! I just live here because—well look at the pretty shutters on this house, that's what attracted me to it!" That is the problem that we face. Individual decisions, each one of them—and I'd like to take these people at face value. Let's give them credit and assume they're sincere. They're not closeted bigots. They may have nothing more than a desire to not be a minority in their neighborhood (albeit they must perceive race as the salient characteristic by which status is measured, in a manner that they do not treat other characteristics: left-handers and right-handers likely are indifferent to whether they are a majority or minority in a

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19. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (2d ed. 2006); see also THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* 107 (2005).

20. For a discussion on socioeconomic stratification in the United States, see generally DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM* (2008).

21. See Michael O. Emerson et al., *Does Race Matter in Residential Segregation? Exploring the Preferences of White Americans*, 66 *AM. SOC. REV.* 922 (2002).

neighborhood).<sup>22</sup> In any event, the more trusting and less skeptical we are, the better they are, and the more, not less, difficult the problem becomes. It vexes us.<sup>23</sup>

For now, we confront one hundred decisions that these individuals and families have made, decisions that influence not just their lives, but the lives of the entire city. All of these decisions made emphatically not because of race, yet it produces a racial outcome and racial disparities. It cycles in a feedback loop: the housing decisions produce school segregation; the school segregation exacerbates racial disparities; and the racial disparities generate further housing decisions along similar lines.<sup>24</sup> This is race beyond black and white. It is to these issues that I ask that we as lawyers, scholars, and activists devote our attention. These are the new problems of the twenty-first century.

Ironically, they are a result of our previous triumphs. Because we have succeeded largely in the civil rights movement and have this consensus—fragile though it may be—everywhere in the country, among all communities, regardless of political party affiliation, nobody in a leadership position espouses open bigotry.<sup>25</sup> If they do, they're driven from that role. They can no longer be a university president, a For-

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22. This is the "Schelling tipping model." THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR (1978); Thomas C. Schelling, *Models of Segregation*, 59 AM. ECON. REV. 488 (1969). Substantial literature has tested this model, including in empirical settings. See, e.g., W.A.V. Clark, *Residential Preferences and Neighborhood Racial Segregation: A Test of the Schelling Segregation Model*, 28 DEMOGRAPHY 1 (1991).

23. For a discussion of the complexities of housing segregation, see Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843 (1994). See also Keith Aoki, *Direct Democracy, Racial Agency, Local Government Law, and Residential Segregation: Some Reflections on Radical and Plural Democracy*, 33 CAL. W. L. REV. 185 (1997).

24. SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004); see also Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199 (2001); George C. Galster, *The Geography of Metropolitan Opportunity: A Reconnaissance and Conceptual Framework*, 6 HOUSING POL'Y DEBATE 7 (1995); George C. Galster & Mark Kenney, *Race, Residence, Discrimination, and Economic Opportunity*, 14 URB. AFF. Q. 87 (1988); Paul M. Ong & Jordan Rickles, *The Continued Nexus between School and Residential Segregation*, in Symposium, *Rekindling the Spirit of Brown v. Board of Education* (2004), 6 AFR.-AM. L. & POL'Y REP. 178, 11 ASIAN L.J. 260, 15 BERKELEY LA RAZA L.J. 51, 19 BERKELEY WOMEN'S L.J. 379; James E. Rosenbaum et al., *How Do Places Matter? The Geography of Opportunity, Self-Efficacy, and a Look Inside the Black Box of Residential Mobility*, 17 HOUSING STUD. 71 (2002); Gregory D. Squires, *Demobilization of the Individualistic Bias: Housing Market Discrimination as a Contributor to Labor Market and Economic Inequality*, 609 ANNALS 200 (2007); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1990); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1997).

25. See MICHAEL A. MILBURN & SHEREE D. CONRAD, *THE POLITICS OF DENIAL* (1996); TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* (1995); see also DAVID O. SEARS ET AL., *RACIALIZED POLITICS: THE DEBATE*

tune 500 CEO, or a Senator. What this means, then, is that the challenge has changed entirely. I would like to suggest twelve different ways in which this new paradigm reflects changes and struggles that call for new thinking and new legal strategies.

First, the challenge was then normative; it is now descriptive. We may all say racism should be stopped, but we dispute what racism actually is. In the Thurgood Marshall and Wiley Branton phases—the struggle against the brutality, the pervasiveness, and the totalitarian nature of the Jim Crow South—the challenge was, in intellectual terms, a normative challenge.<sup>26</sup> That is, the challenge was to explain to people who practiced obvious racial segregation, what they were doing was wrong. Not just illegal, but morally wrong, something to be ashamed of, something you could not do with a good conscience, that you ought not be able to sleep easy at night if you lived in a society structured along such lines. Thus, it was a normative challenge, because no thinking person, no person of any background who was even remotely aware of their surroundings could deny the existence of the system and its expressly racial nature. You only had to walk around and to see how the schools, the drinking fountains, the swimming pools, the bus, and all the public and private facilities were divided into “white” and “colored.”

I’d like to suggest that today the challenge is no longer normative, it’s descriptive. What I mean is, we have won the normative fight. Almost everyone will side with us. Yes, there are still some exceptions and I don’t want to diminish that. But let’s set that aside for just one moment. By and large, the mainstream, the majority, the prevailing culture within which we work, all agree more or less. If you say to someone, “Are you a bigot? Do you espouse racism?” Without hesitating for a moment, she would exclaim to you, “No, no.” She embraces diversity and she wants that to be made known. She wants the classes in our law schools, our corporate boardrooms, and the halls of our Congress to look like the “face of the nation” or whatever phrase is in vogue at the time. So now, the challenge is not persuading people of what is right and what is wrong. Instead, the challenge is to persuade them, that though we have pledged racism is wrong, it nonetheless persists. That’s a different challenge. It requires that we point

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ABOUT RACISM IN AMERICA (2000). An optimistic reading of attitudinal change is PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* (1993).

26. C. VAN WOODWARD & WILLIAM S. McFEELEY, *THE STRANGE CAREER OF JIM CROW* (commemorative ed. 2002).

out to them how our good faith, good will, and consensus by itself is nothing more than rhetoric.

Second, there is a marked shift from egregious cases to subtle cases—from the ones where we can point a finger at to the ones where we shrug and look at in vain. The accumulation of minor effects is a major effect.<sup>27</sup> Consider leading law firms if you will. Virtually all the “Am Law 100” major firms have an African American and a Hispanic and an Asian American partner, someone who owns equity, who is important, and who is a real shareholder. But if you look at the statistics, there continue to be significant disparities all up and down and throughout the ranks, not for the people who aren’t working hard, but for the folks who are working hard, who have all the credentials, whose qualifications you could not doubt for a moment.<sup>28</sup> Yet they do not stay, and they do not make partner at the same rate. And once you get out of the largest, most prestigious firms, you will have no difficulty finding law firms to this day that do wonderful work for their clients, where there is not now, nor has there ever been, a black partner.

But here’s the difference. Though fifty years ago, or even twenty-five years ago, those law firms may have had a founding name partner say from behind his big desk in a corner office, “We don’t hire or promote Negroes or women,” those partners aren’t there anymore. Those firms now lament their lack of diversity. They say, “We’ve looked, we just can’t find anyone who’s qualified.” They wring their hands and they say, “Can’t you sympathize with us? Because despite everything we do, we just can’t seem to help these people.” That’s the difference. It’s no longer the egregious cases, but the subtle ones: aversive, subconscious, unconscious.<sup>29</sup> It’s the micro-aggressions—the little signal that might be trivial in isolation, but multiplied over time

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27. See MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000).

28. See David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996); see also Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669 (1997); David Segal, *For Minority Attorneys, Big Law Firms Prove Trying; Finding Partnerships Elusive, Many Leave*, WASH. POST, Jan. 16, 1998, at A01, available at <http://www.lexisnexis.com> (search “The Washington Post” for article name); Brent Staples, *When a Law Firm Is Like a Baseball Team*, N.Y. TIMES, Nov. 27, 1998, at A42, available at 1998 WLNR 3017124. For a specific case study, see PAUL M. BARRET, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999).

29. See KRISTIN J. ANDERSON, *BENIGN BIGOTRY: THE PSYCHOLOGY OF SUBTLE PREJUDICE* (2010); JOHN F. DOVIDIO & SAMEL L. GAERTNER, *PREJUDICE, DISCRIMINATION, AND RACISM* (1986); see also PO BRONSON & ASHLEY MERRYMAN, *NURTURESHOCK: NEW THINKING ABOUT CHILDREN* (2009) (discussing development of racial attitudes).

has the psychological effect that's every bit as traumatic, for it tells us who belongs where and to whom those institutions belong.<sup>30</sup> It is the powerful new research on "implicit bias."<sup>31</sup>

Third, there's the shift from a civil rights frame to a human rights frame.<sup>32</sup> As an indication of this shift, consider that the Leadership Conference on Civil Rights, the umbrella group founded in 1950 by the NAACP, the American Jewish Committee, and the Brotherhood of Sleeping Car Porters, which encompasses virtually every civil rights non-profit in the nation, recently changed its name to the Leadership Conference on Civil and Human Rights.<sup>33</sup> The challenge of our changing demographics is due to immigration—not just that which brings non-black minority groups to these shores to become members of the body politic, but also that which brings much of the African Diaspora.<sup>34</sup> So though there have always been individuals that have

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30. ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993); JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* (1994); LAWRENCE OTIS GRAHAM, *OUR KIND OF PEOPLE: INSIDE AMERICA'S BLACK UPPER CLASS* (2000); LENA WILLIAMS, *IT'S THE LITTLE THINGS: EVERYDAY INTERACTIONS THAT ANNOY, ANGER, AND DIVIDE THE RACES* (2000); see also ISHMAEL REED, *ANOTHER DAY AT THE FRONT: DISPATCHES FROM THE RACE WAR* 126 (2003).

31. See generally Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Stereotyping and Prejudice*, in 7 *THE PSYCHOLOGY OF PREJUDICE: THE ONTARIO SYMPOSIUM 55* (Mark P. Zanna & James M. Olson eds., 1994); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behaviorial Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063 (2006); Kristin A. Lane, Jerry Kang, & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. LAW. SOC. SCI. 427 (2007); Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); see also JODY ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (2000); EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2006); MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2005); JOHN F. DOVIDIO & SAMUEL L. GAERTNER, *PREJUDICE, DISCRIMINATION, AND RACISM* (1986); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 353 (2007). On the importance of the unconscious in general, see MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005); SHANKAR VEDANTAM, *THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS, AND SAVE OUR LIVES* (2010).

32. Larry Cox, *A Movement for Human Rights in the United States: Reasons for Hope*, 40 COLUM. HUM. RTS. L. REV. 135 (2008); see also CATHERINE ALBISA, *BRINGING HUMAN RIGHTS HOME* (2007); THOMAS F. JACKSON, *FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE* (2006). The practical consequences of the distinction are especially important as to immigrants, who, not being citizens, lack civil rights but being persons possess human rights.

33. See generally *ORGANIZING BLACK AMERICA: AN ENCYCLOPEDIA OF AFRICAN AMERICAN ASSOCIATIONS* (Nina Mjagkij ed., 2001); Leadership Conference on Civil and Human Rights, <http://www.civilrights.org> (last visited Jan. 16, 2010).

34. See generally MARY C. WATERS, *BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES* (1999); see also Darryl Fears, *A Diverse—and Divided—*

not been African American in a stereotypical sense, there are now increasingly Afro-Caribbeans, Africans, people who are bi-racial, people who are black and Jewish, people who are Afro-Asian, and people who are Hispanic and black. “Minority” and “black” are plural, not singular. Complexities run within the many communities that make up this movement.

Fourth, there is the change from an assimilation frame to a multiculturalist frame.<sup>35</sup> The old arguments that were made went like this: “I am the same as you; therefore, I ought to be treated similarly to you.” People who were “similarly situated,” it was said, deserved to receive the same treatment. The new arguments are: Yes, I am different, I do have traditions that are not the same, that have different geographic roots and historical origins. I should be respected. You ought to acknowledge that those differences are valuable, they should be nurtured and preserved, and they give us a competitive advantage as individuals and as a nation. Protection of the disabled through the Americans with Disabilities Act (ADA) is the paradigmatic example.<sup>36</sup> So there’s been a change in the way that we understand what different groups and communities can bring to society as a whole.

Fifth, there’s now increasingly what is called the “business case” for diversity or affirmative action.<sup>37</sup> The argument is not about dis-

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*Black Community: As Foreign-Born Population Grows, Nationality Trumps Skin Color*, WASH. POST, Feb. 24, 2001, at A1, available at <http://www.lexisnexis.com> (search “The Washington Post” for article name); Jonathan Kaufman & Gary Fields, *Black in a New Light: Sen. Obama’s Candidacy Has Sparked a Debate About Identity in the African-American Community*, WALL ST. J., Aug. 23, 2008, at A1, available at <http://www.lexisnexis.com> (search “Wall Street Journal” for article name); Sam Roberts, *More Africans Enter U.S. than in Days of Slavery*, N.Y. TIMES, Feb. 21, 2005, at A1, available at 2005 WLNR 2667830; Rachell L. Swarns, *‘African American’ Becomes Term for Debate*, N.Y. TIMES, Aug. 29, 2004, § 1, at 1, available at 2004 WLNR 5517877.

35. For the assimilationist position, see *Korematsu v. United States*, 323 U.S. 214 (1944) and Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949). For the pluralist position, see MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1991). See also RICHARD A. SHWEDER ET AL., *ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES* (Richard A. Shweder, Martha Minow, & Hazel Rose Markus eds., 2004); KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006). The classic work on the subject of assimilation is MILTON M. GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS* (1964). A more recent argument that assimilation is compulsory is presented in PETER D. SALINS, *ASSIMILATION, AMERICAN STYLE* (1997). Works that argue for multiculturalism include WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1996); CHARLES TAYLOR, *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* (Amy Gutmann ed., 1994); RONALD TAKAKI, *A DIFFERENT HISTORY: A HISTORY OF MULTICULTURAL AMERICA* (Back Bay Books rev. ed. 2008) (1993).

36. Americans with Disabilities Act (ADA), Pub. L. No. 101-336, § 2, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2009)).

37. GWEN MORAN, *DIVERSITY INC. STAFF, THE BUSINESS CASE FOR DIVERSITY* (5th ed. 2006); EDWARD E. HUBBARD, *THE DIVERSITY SCORECARD: EVALUATING THE IMPACT OF DI-*

tributive justice, but about efficacy. It is not about the costs of bias, but the benefits of inclusion. It is forward looking rather than backward looking.<sup>38</sup>

In the arguments that we make, the arguments are not solely about rights. We have been joined by those who will not only promote a rational cost-benefit/utilitarian analysis, but also—more dangerously—seek to replace all together the discourse of rights with that calculus. They want us to believe that really it is all about ensuring that we don't overlook talent because it improves our bottom line, with diversity a means to an ends and not an ends in itself.

Now, while it is wonderful to welcome these allies, the “business case” only takes us so far. It only takes us so far as the principled self-interest of those who espouse it. It counsels nothing more than rational conduct, leaving an opening for so-called “reasonable racism.”<sup>39</sup> But that is a change in the rhetoric. It is a recognition that others will benefit once the doors are open. People who are part of the dominant majority themselves gain by welcoming those who have been marginalized, so that a new mainstream is created.

Sixth, there is the shift from *de jure* to *de facto* racial discrimination. It is difficult to find those cases of legalized discrimination, where the discrimination is overt, or where it is a matter of statute. They only occasionally arise.<sup>40</sup> It is now covert, a matter of practice

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IVERSITY ON ORGANIZATIONAL PERFORMANCE (2003); R. ROOSEVELT THOMAS, JR., BUILDING A HOUSE FOR DIVERSITY: A FABLE: A GIRAFFE & AN ELEPHANT OFFERS NEW STRATEGIES FOR TODAY'S WORKFORCE (1999); R. ROOSEVELT THOMAS, JR., BUILDING ON THE PROMISE OF DIVERSITY: HOW WE CAN MOVE TO THE NEXT LEVEL IN OUR WORKPLACES, OUR COMMUNITIES, AND OUR SOCIETY (2005); RACE IN 21ST CENTURY AMERICA (Curtis Stokes et al. eds., 2001); see also David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004).

Derrick Bell long ago described the same phenomenon, with less enthusiasm. He suggested whites would support civil rights advances for blacks, if whites themselves benefited. Derrick A. Bell Jr., *The Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

38. For an early discussion of the distinction between the backward-looking, remedial justifications for affirmative action and the forward-looking, distributive justifications for it, see Kathleen M. Sullivan, Comment, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 86-91 (1986).

39. See, e.g., D'SOUZA, *THE END OF RACISM*, *supra* note 4.

40. A rare example of official action that constitutes straightforward racial discrimination is the Louisiana justice of the peace in 2009 who refused to marry an interracial couple. See *Interracial Couple Denied Marriage License by Louisiana Justice of the Peace*, HUFFINGTON POST, Oct. 16, 2009, [http://www.huffingtonpost.com/2009/10/15/interracial-couple-denied\\_n\\_322784.html](http://www.huffingtonpost.com/2009/10/15/interracial-couple-denied_n_322784.html). This decision is clearly unconstitutional under *Loving v. Virginia*, 388 U.S. 1 (1967). The official ostensibly justified his action on societal disapproval of such unions, not his own personal views—a rationale rejected in the child custody context in *Palmore v. Sidoti*, 466 U.S. 429 (1984).

disguised by reference to merit. It is a custom, it is benign neglect, it's what isn't done as much as what is done.

Seventh, there's a shift from the South to the North.<sup>41</sup> The research has only begun on the civil rights movement and segregation in the North and the Western half of the United States, and on the cases in those areas that we don't think about. It is no longer just the freedom riders, the police dogs and fire hoses being turned upon protestors, or the fire-bombings of churches. That is important, but alongside that, we increasingly see that there is the history of antebellum racial segregation in the North, and there are other school segregation cases in Boston, Detroit, Denver, and those places that also had racial segregation and massive resistance, but in a very different form.<sup>42</sup> They equally deserve attention and redress.

Eighth, there's the shift from *Brown I* to *Brown II* and *Cooper v. Aaron* and *Milliken*.<sup>43</sup>

And ninth, there's the shift from principle to implementation—where the real question is not how do we obtain consensus, how do we get people to agree that bigotry is wrong, but rather, now that we have such unity, what exactly do we do about it?

Tenth, there's the shift from abstract formal models to empirical results to realistic understandings of sociology and psychology.<sup>44</sup> This is in some sense the return to the pioneering work of Dr. Kenneth Clark and others who understood that it was not enough just to make lawyer's arguments, but that we had to call on our colleagues in other disciplines who could show (not just because it's a nice phrase, but because it is factually so)—that diversity makes us stronger; and, who could prove that there were real effects that could be observed and measured;<sup>45</sup>—that classrooms where there was a critical mass of peo-

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41. See THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* (2009).

42. J. ANTHONY LUKAS, *COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES* (Vintage Books 1986) (1985) (Boston school desegregation litigation); *Milliken v. Bradley*, 418 U.S. 717 (1974) (Detroit school desegregation litigation); *Milliken v. Bradley*, 433 U.S. 267 (1977); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973) (Denver school desegregation litigation).

43. *Milliken*, 433 U.S. at 267; *Milliken*, 418 U.S. at 717; *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

44. For a leading study on the positive effects of diversity, including but not limited to racial diversity, see SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007).

45. KENNETH B. CLARK, *PREJUDICE AND YOUR CHILD* 24 (2d ed. 1955); see also *WHAT BROWN v. BOARD OF EDUCATION SHOULD HAVE SAID* (Jack M. Balkin ed., 2002) (discussing *Brown*).

ple of color, as was shown in the University of Michigan cases, functioned in a different way: the discussion changed qualitatively—and it was not just in degree, but in kind.<sup>46</sup>

Eleventh, there is the multilateral nature of these issues.<sup>47</sup> Where it is no longer simply a matter of black versus white, where there aren't just two boxes and where it is easy to tell who has power and who does not.<sup>48</sup> It is dynamic. It is shifting. And even those who have nominal power nonetheless can face bias. President Barack Obama may be the leader of the free world, but all it takes is a single bigot, intent on doing him harm and able to avail himself of weapons or other means to carry it out, and all the political power in the world won't matter.<sup>49</sup> Or, without the physical threat, but with the demeaning effect, it only takes a heckler.<sup>50</sup> And so, it isn't just a matter of looking at who holds a prestigious title, it's a matter of understanding that income and wealth are very different,<sup>51</sup> that power comes in many forms, and that people, depending on the context, have different roles and relationships to one another. Diversity can be achieved, even as African Americans are absent. (Disputes in general no longer are simple dichotomies; all litigation is complex litigation.)<sup>52</sup>

And finally, twelfth, there's the risk that we will be co-opted.<sup>53</sup> There's the risk that having made the progress we have already made, having seen that in just two generations we have overcome Jim

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46. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (1998); see also *COMPPELLING INTEREST: EXAMINING THE EVIDENCE OF RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES* (Mitchell Chang et al. eds., 2003); PATRICIA GURIN ET AL., *DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN* (2004).

47. See ERIC YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (2000).

48. LEE ROSS & RICHARD E. NISBET, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (1990).

49. Katharine Q. Seelye, *Clinton's Reference to Killing of Robert Kennedy Stirs Uproar*, N.Y. TIMES, May 24, 2008, at A1, available at 2008 WLNR 9833184 (statement of presidential candidate Hillary Clinton in defense of staying in the Democratic nominating contest: "We all remember Robert Kennedy was assassinated in June in California."); see also Jeff Zeleny, *Comments Cast Shadow on Last Laps in Primaries*, N.Y. TIMES, May 25, 2008, at A23, available at 2008 WLNR 9877740.

50. Ann Gerhart, *The Congressman Who Called 'Lie!'*, WASH. POST, Sept. 10, 2009, at A09; Jeremy Levitt, Editorial, *President Obama, Race and the Unpatriotic Right*, ORLANDO SENTINEL, Sept. 15, 2009, at A11, available at 2009 WLNR 18105218.

51. OLIVER & SHAPIRO, *supra* note 19, at 29-32.

52. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

53. See Dr. Martin Luther King, Jr., *The Drum Major Instinct*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 259 (James M. Washington ed., 1991) (1986).

Crow—even though many neighborhoods and schools are more segregated now than they were twenty years ago<sup>54</sup>—that at least we have this consensus and many of us will no longer see the extra struggle as worth the effort. We approach the point of diminishing returns for those who follow a utilitarian calculus. And that is the greatest challenge.

Allow me to close now by talking for just a moment about our friends.<sup>55</sup> I'd like to ask you to picture someone. Maybe you have friends as I do, friends like this. I'm not worried about our enemies. I'd like to talk, rather, about our friends for a moment.

Give me friends who remember marching with nostalgia. You know, it's funny how many people marched. Even people who are too young to have been alive in 1963 are nostalgic about "back in the day" and how people stood under the hot sun listening to Dr. Martin Luther King Jr.'s "I Have a Dream" speech.<sup>56</sup> But let's take our friends at their word. Do you have any friends like this?

Even though they remember with great fondness "back in the day," when they talk about it, you can feel and sense that it's palpable, their disillusionment, and their embitterment. They end up saying, "That was then, this is now." They claim they suffer from "compassion fatigue."<sup>57</sup> They want to know why more than fifty years after *Brown*, we're still at it.

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54. GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 53-54 (1996).

55. This is a response to Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986); see also TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS* (1995); NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* (1997); ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* (1991); JIM SLEEPER, *LIBERAL RACISM: HOW FIXATING ON RACE SUBVERTS THE AMERICAN DREAM* (1997); TOM WICKER, *TRAGIC FAILURE: RACIAL INTEGRATION IN AMERICA* (1996). For a recent example of the phenomenon, see John McWhorter, *Color Blind*, NEW REPUBLIC, Oct. 7, 2009, at 7 ("Yes, some of Obama's critics are probably racist. So what?"). For an example of an author who supports anti-discrimination principles but opposes anti-discrimination practices, see TAMAR JACOBY, *SOMEONE ELSE'S HOUSE: AMERICAS UNFINISHED STRUGGLE FOR INTEGRATION* (2000). For an example of an author who argues social welfare has had the opposite of its intended effect, see CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (10th anniv. ed. 1994). A prominent example of a radical who moved from the left to the right is David Horowitz. See Jonathon Yardley, *Book World, Radical Son*, WASH. POST, Feb. 9, 1997, at X03, available at <http://www.lexisnexis.com> (search "The Washington Post" for article name) (profile of David Horowitz); Sharon Churcher, *Radical Transformations*, N.Y. TIMES, July 16, 1989, § 6, at 30, available at 1989 WLNR 2032181.

56. Dr. Martin Luther King, Jr., *I Have a Dream*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.*, *supra* note 53, at 217.

57. John M. Crewdson, *New Administration and Congress Face Major Immigration Decisions*, N.Y. TIMES, Dec. 28, 1980, § 1, at 1, available at 1980 WLNR 186842; Henry Kamm, *Western Nations Are Raising Barriers to Refugees*, N.Y. TIMES, Mar. 27, 1989 at A13, available at 1989

*Beyond the Symbolic Black and White*

Why do we have to have affirmative action, diversity programs, and historically black colleges? Why, they want to know, can't those people just get their act together? Isn't it now people's own fault if they can't pull themselves up by their bootstraps, because we've achieved equality of opportunity and given as much as we can possibly give? Do you have friends like this? The ones who say they're sick and tired of hearing other people complain about their problems?

I wonder when they say that they are sick and tired of listening to people describe their problems, if they realize what it must be like to live with those problems. You know, as Fannie Lou Hamer once said, "I'm sick and tired of being sick and tired."<sup>58</sup> You should remind them of that quote from time to time.

But you know, these friends of ours, they end up saying, "When is it over? When does it end?" It's almost a plea that they have, plaintive in tone. It's sincere, it's earnest. It cannot and should not be dismissed.

And when they ask this question, I always reply, "You know, I don't think it will ever be over. I don't think it should end."

And they shake their heads, saying, "What a cynic, what a pessimist you are, do you think our children and our children's children will still have to struggle with these issues of race and diversity or whatever they're calling it then?"

And I respond by saying, "You know, to the contrary, it's as an optimist, as a believer in the American Dream that I say that."

Perhaps diversity is like democracy—a process, not an outcome.<sup>59</sup> Allow me in closing to offer that law professors stock in trade: the analogy. Maybe democracy gives us a way of thinking about diversity. Think back to November 2008, that historic occasion, when you went to cast your ballot, to exercise your right, to fulfill your responsibility. While we are always living through history, we rarely self-consciously catch ourselves at a moment that is a turning point, with the realiza-

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WLNR 2014742 (documenting Senator Alan Simpson's coining the phrase "compassion fatigue").

58. KAY MILLS & MARIAN WRIGHT EDELMAN, *THIS LITTLE LIGHT OF MINE: THE LIFE OF FANNIE LOU HAMER* 93 (2007) (quoting Jerry DeMuth, *Tired of Being Sick and Tired*, *THE NATION*, June 1, 1964 at 549).

59. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (discussing the importance of diversity in democracy).

tion that generations from now, that moment will be considered decisive.<sup>60</sup> It was thrilling.

What if the man or woman standing in front of you at your polling place turned to you and said: “Democracy, when is this over? Elections, when do they end? We voted just two years ago. They’re gonna make us vote again in another two years!” If they lamented this in such a manner, you would realize they somehow don’t get it. They may have missed an important civics class in high school. It would be tragic if democracy were to end.<sup>61</sup>

The whole point is to engage, to participate, to roll up one’s sleeves; and, though we want to improve the processes at all times, what is most important is to take part.<sup>62</sup> We exercise our rights and fulfill our responsibilities. Democracy is not a finished product we put on the shelf. It is not something we admire as an abstraction. Democracy demands of us as individuals and communities that we see our own active role as crucial to its functioning.

Let me suggest that diversity is just the same—a process, not an outcome. By seeing race as more than figuratively, metaphorically, or symbolically black and white, by understanding diversity as related to democracy, a process rather than an outcome, we will be renewed and ready to march again. To such ideals should we be dedicated.

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60. Adam Nagourney, *Obama: Racial Barrier Falls in Decisive Victory*, N.Y. TIMES, Nov. 5, 2008, at A1, available at 2008 WLNR 21107287.

61. As Churchill noted, democracy is the worst of all political systems, except for the alternative. See SIR WINSTON CHURCHILL, *EUROPE UNITE: SPEECHES 1947 AND 1948*, at 200 (Randolph S. Churchill ed., 1950).

62. BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (20th anniv. ed. 2004); Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988); see also CASS R. SUNSTEIN, *REPUBLIC.COM 2.0* (2009).