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," 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. I mean that both in a literal sense—although that is the subject of an altogether different discussion—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

* 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.


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).
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. 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 visited upon them, we are shocked and indignant.


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

And this story, too, is powerful.⁷ 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.⁸

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.⁹ 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.


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, metaphorical, 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.10

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.11 Thus, the label is less important than the effects. Many would resist the term “racism,” even if they could be persuaded

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.\(^\text{12}\) 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.\(^\text{13}\) 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.\(^\text{14}\)

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.\(^\text{15}\) 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

\(^{12}\) 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).


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more. 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. 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.
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.\textsuperscript{19} 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.\textsuperscript{20}

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.\textsuperscript{21} 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

\textsuperscript{19} See Melvin L. Oliver & Thomas M. Shapiro, \textit{Black Wealth/White Wealth: A New Perspective on Racial Inequality} (2d ed. 2006); see also Thomas M. Shapiro, \textit{The Hidden Cost of Being African American: How Wealth Perpetuates Inequality} 107 (2005).
neighborhood). 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.

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. 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. If they do, they're driven from that role. They can no longer be a university president, a For-
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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. 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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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.27 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.28 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.29 It’s the micro-aggressions—the little signal that might be trivial in isolation, but multiplied over time.


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

Third, there's the shift from a civil rights frame to a human rights
frame. 32 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. 33 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. 34 So though there have always been individuals that have

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

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 Behavioral 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 WITH-
OUT 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, DIS-
CRIMINATION, 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
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 AMERI-
CAN ASSOCIATIONS (Nina Mjagkij ed., 2001); Leadership Conference on Civil and Human

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

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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.³⁵ 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.³⁶ 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.³⁷ The argument is not about dis-
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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.38

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.”39 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.40 It is now covert, a matter of practice

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. 1548 (2004).


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. 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 protesters, 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. They equally deserve attention and redress.

Eighth, there’s the shift from Brown I to Brown II and Cooper v. Aaron and Milliken.

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. 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;—that classrooms where there was a critical mass of peo-

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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).
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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.46

Eleventh, there is the multilateral nature of these issues.47 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.48 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.49 Or, without the physical threat, but with the demeaning effect, it only takes a heckler.50 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,51 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.)52

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

51. Oliver & Shapiro, supra note 19, at 29-32.
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Crow—even though many neighborhoods and schools are more segregated now than they were twenty years ago\(^\text{54}\)—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.\(^\text{55}\) 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.\(^\text{56}\) 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.”\(^\text{57}\) They want to know why more than fifty years after Brown, we’re still at it.

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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.” 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. 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-
tion that generations from now, that moment will be considered deci-
sive. It was thrilling.

What if the man or woman standing in front of you at your pol-
ling 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.

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. 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. Democ­

racy 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.

60. Adam Nagourney, Obama: Racial Barrier Falls in Decisive Victory, N.Y. TIMES, Nov. 5,

61. As Churchill noted, democracy is the worst of all political systems, except for the alter­
native. See Sir Winston Churchill, Europe Unite: Speeches 1947 and 1948, at 200 (Randolph

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).