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Sharing Space: Why Racial Goodwill Isn't Enough

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I. INTRODUCTION

"On your mark. Get Set. GO!" yelled the coach, as he let go of the two young girls' shoulders, freeing them to run as fast as they could to the finish line.

"Tie," said the assistant coach as each girl slapped his outstretched hands. Mary and Annie (not their real names) smiled at each other, obviously pleased with their performances and their shared victory. After all, they were teammates and there was no particular glory in defeating your teammate. It was just a fun race.

"Okay, girls. Let's do it again," yelled the coach. "We need to see

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who's the fastest."

The girls looked at each other, shrugged their shoulders, and reluctantly trudged back down the field—hot, sweaty, and tired from their afternoon of softball practice. Other parents and I watched as Mary and Annie came zooming down the grass toward the finish line for the second time. The determination on their faces left no doubt that they were both putting everything they had into the race; one of them was going to win this one.

"Tie again," screamed out the assistant coach, smiling in disbelief, but with obvious approval. Parents, also happy that the girls had both come up winners again, released their sighs and smiled at each other. The girls tried to catch their breath as they enjoyed another moment of shared victory as teammates.

I called to Mary, my daughter, that it was time to go home, thinking that was the end of practice. But the coach wanted the girls to run yet a third race. I thought it wasn't a good idea—it was getting late, the sun was setting, the girls were tired, and everybody was feeling good that they had tied twice, evidencing their equal running talent.

"Why can't we leave it at a tie? They're both super runners. Let them enjoy that," I suggested. Other parents shared this sentiment. The coach either didn't hear us or ignored us, because the third race was about to begin. The girls were overly tired and this was part of our motherly concerns. But the races also had turned an afternoon of fun and camaraderie into an afternoon of anxiety and competition. Competing against each other, particularly with such intensity, was new and different and not in keeping with the spirit of the team. As parents, we understood that to continue to push for a winner was going to unnecessarily hurt the loser. Uncomfortable with the coach's decision, we stared at the starting line where the two girls were set for the third race.

"Go!", shouted the coach.

"Too bad," said the woman standing next me. "Mary got off to a late start." I had noticed it, too, and was not surprised that Mary was a step behind Annie as they crossed the finished line.

"Annie wins!" declared the assistant coach. Everyone approached the girls, congratulating them and remarking what great runners they both were. Within seconds of crossing the finish line, though, little eight-year-old Mary turned around, pointed her finger at her coach and exclaimed, "You held me back. That wasn't fair."

I felt everything slow down, like I was in a movie and the camera had just gone to slow speed. I couldn't believe what I was witnessing: my daughter was too small—literally—to be challenging this huge man. And what was she saying to him? Was I hearing her correctly? In a split sec-

ond, the dynamics of our softball community were drastically changed.

Mary burst into tears and dropped to her knees in turmoil. "Why did you hold me that way?", she kept asking the coach between sobs.

The coach became defensive and suggested Mary was lying. Parents and daughters lingered around, waiting to see what would happen. They turned to me with this look that told me I was supposed to calm down Mary, apologize for her "insulting" behavior, and smooth things over so we could all go home feeling okay about seeing each other at the next game.

But I knew I couldn't say anything to make the situation okay. In fact, my experiences with my daughter have taught me that she probably was not mistaken about being held back. She is often treated unfairly because of her race and she is the only Black person on the softball team. In fact, as soon as Mary made her comment to the coach, I thought, "So that explains it. Here we go again."

"But why would I hold your daughter back?" The coach seemed to be getting even bigger than he was when my daughter confronted him, as he angrily stomped toward me.

Of course, I didn't know the answer to this question—at least, not as an epistemological matter. On some level, it made no sense that the coach would intentionally give Annie a head-start. On the other hand, maybe he was just as tired as the girls, realized this third race wasn't such a good idea after all, and he just wanted a winner and arbitrarily picked one, perhaps without even being aware that he was treating Mary unfairly.

Like everyone else witnessing the incident, perhaps like most people reading this story, I wanted there to be a reason unrelated to Mary's blackness and everyone else's whiteness for my daughter's accusation that she had been held back. In my heart, though, I knew she had been treated unfairly because she is Black, but I kept my opinion to myself. I could not say what I was thinking because my proffered explanation would be a serious affront, which I could not prove and which would make everyone even angrier at my daughter who was already perceived to be a sore loser.

As other parents collected their belongings, the coach and I continued our increasingly heated argument. He admonished that I needed to teach my daughter how to lose. Before I could respond to this personal attack, my daughter interrupted us, tears continuing to stream down her cheeks: "I know how to lose, Coach. I lose all the time. But the game has to be fair. Let's do it again. I know if you don't hold me, I know I could tie her. I know I could tie her again if it was fair." Mary was demanding justice and significantly, she was not concerned with winning.

No more footraces, I thought. This whole thing has gotten out of control. But I was proud of my daughter for standing up to her coach.

Clearly, she wasn't a sore loser, she wasn't even interested in winning; she was simply asking to be treated fairly. I looked at the coach and said, "I wish there was something I could say that would help you understand."

"Hey, if you don't like my coaching, then why don't you put her on another team? That would be fine with me. Go ahead. Quit." he invited, getting in the last word before walking away.

My daughter cried for hours after we got home, struggling to understand why her coach would betray her and then get so angry about it when she expressed her feelings.

* * *

Many people, especially Whites, may doubt that the footrace incident had anything to do with race, thinking my perception is farfetched or that I am being overly sensitive, particularly as Mary's mother. Readers, especially Whites, may be asking the same question the coach angrily yelled at me: "But why would I hold your daughter back?" suggesting by the tone of the question that there is no reason he would do such a terrible thing.

Six or seven years ago, I would have shared this sentiment, even though I was a White liberal who believed in racial equality. My commitment to the Black Civil Rights Movement came at a very young age. I share this bit of my background in an attempt to express how deep my feelings are about the wrongness of racism and to emphasize that it was not until my daughter came into my life that I truly began to understand how profound and persistent racism is in our society.

As a young girl, I remember visiting my grandparents in Alabama every summer and being forcefully admonished, in the vernacular of the day, never to cross the railroad tracks marking the outer boundary of their property because that would have put me in the Black neighborhood. I do not remember whether it was the word itself or the disdain with which it was spoken that disgusted me more. I have no idea why I felt this way, but I wanted to dissociate from people when they started "being ugly," as I called it. I did not even know the word "racism," let alone have any idea what it meant. But I think the real "moment of awareness" for me came when, as a young girl, I witnessed some White children beating up some Black children. Watching the Black children being hit overwhelmed me with sadness; I simply knew it was wrong. Visiting my grandparents brought mixed feelings from that moment on. I could not bear to listen to the ugliness or watch another beating and yet I wanted to cross those tracks. Again, I do not know why. Was it just because I was forbidden to? Did I think I could escape the ugliness and beatings, which were painful for me? Did I just want to play with the Black children? Was I the eight-

year-old anthropologist who wanted to report back to my relatives that, "Yall've got it all wrong." I do not know why I wanted to cross the tracks, but the feelings about the wrongness of racism never went away; they became even stronger.

Dr. Martin Luther King's famous march from Selma to Montgomery, Alabama took place only miles from my grandparents' home when I was thirteen years old. Had I been older and had the resources, I would have been right in the thick of that march, which is where I was in 1987 as civil rights advocates marched on Forsyth County, Georgia to protest its exclusion of Black residents. Moreover, my commitment to achieving racial equality for Blacks and all people of color motivated me to become a lawyer and a law professor. My professional career centers around issues of racial equality: I teach, write, and give public speeches about it. My efforts are designed to persuade Whites to join in the struggle for racial equality.

Despite my life-long White liberalist commitment to racial equality, before my daughter and I became a family it probably would not have occurred to me that the softball coach held my daughter back because she is Black. In fact, years ago, if I had witnessed a similar incident involving a White child and a Black child who was not my daughter, I may have thought what most of the White adults were thinking about my daughter—that she exaggerated what happened. Years ago, I thought I had a keen grasp of racism and believed my knowledge would enable me to maneuver through racial incidents, successfully advocating for my daughter in the White world. I did not realize that my White liberal views on race and race relations were inadequate to comprehend how profound and pervasive racial inequality is in our society. In addition, my "goodwill," meaning that I did not think I had a prejudiced attitude, was evidenced by my commitment to racial equality, and was also supposed to make me a non-racist ally in the colored world. Looking back, my White liberalism of my pre-daughter days enabled me to understand the coach's and the other parents' inability to entertain my daughter's accusations. At one time, I suspect I shared with them a common view: We fashioned ourselves people of goodwill and people of goodwill would *never* lay a White hand of oppression on a Black child.

The years with my daughter reveal that being a White person of goodwill is not good enough in the struggle to achieve racial equality. I am powerless to mediate the racial incidents involving my daughter. I think back to the afternoon of softball practice and try to imagine what I could have done differently to make the coach and parents understand the relevance of race to the situation. One thought, somewhat humorous, came from Professor Patricia Williams' story in which she was accused of

using too much critical race theory in the courtroom.¹ I imagined myself calling a truce with the coach and asking everyone to kindly take their seats in the bleachers; the lesson on critical race theory was about to begin:

* * *

Why would the coach hold my daughter back? Let's start with the concept of unconscious racism. The mistreatment of my daughter by White authority figures comports with the phenomenon of "unconscious racism."² The coach's behavior may have been motivated by racism, a belief in the inferiority of Blacks compared to Whites. Naturally, none of us thinks of ourselves as racist—such an ugly word—and this is why the phenomenon is called "unconscious" racism. You, Coach, may not have realized this is what motivated you. Not that it did. (I don't want to make him even more defensive and therefore less open to hearing the lesson.) But it might have been the reason and that's worth thinking about.

Now I realize that most of you probably think this is outrageous and believe I am reading too much into the incident. But my point is that the burden of defusing this incident rested on you, Coach. I realize you think Mary's accusation was unjustified, but it nevertheless called for a reflective response as opposed to a reflexive response of calling her a liar. A reflective response would have acknowledged Mary's feelings of betrayal, not just as an eight-year-old, but also as a Black child and the only Black child in our softball community. Critical race theory suggests that it was incumbent on you, Coach, primarily as the adult but also as the White authority figure, to dispel any notions that you were prejudiced against Mary because she is Black. Specifically, it is her trust in you that is at issue. If you had said you were sorry that she felt mistreated (assuming you did not mistreat her), reassured her that you want to be fair to all the girls, and promised that she and Annie could run again at the next practice if they wanted to, perhaps such a reflective response would have eliminated any misunderstandings, especially any misunderstandings that you treated her unfairly because she is Black. Rather than becoming defensive and angry, reflecting on Mary's comment would have allowed you to see that Mary was hurt, confused, and needed your reassurance that you are a fair coach. Even if you disagreed with her comment, a moment of reflection would have allowed room for the importance of her feelings to be validated. A reflective response was the only way for you to win

1. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 108 (1991).

2. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976); Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

back Mary's trust, assuming that was important to you. Any questions?

* * *

Ignoring obvious reasons why this would have been absurd, I realize it has taken me close to seven years to uproot my own White liberalism. Significantly, the critical years involved living in an intimate mother/daughter relationship with a Black child. The parent/child relationship may be the most profound, intense, inexplicable, unconditional love relationship that any two people can share. A natural part of that relationship, particularly with young children, is a mutual need for the other person to be happy, safe, and secure. Parents are especially concerned that their children *thrive*, and are acutely emotionally vulnerable when their children are injured, mistreated, or otherwise unable to thrive. Compounding the problem, children are sensitive to their parents' anxiety and frustration as they try to protect their children from harm. In this way, children of color suffer double assaults from racism: externally, racism prevents them from thriving by holding them back in all of life's races; internally, they have to cope with the damage racism does to them and to their parents. As a Black mother recently said to me, "I remember the pain on my mother's face and I'm sure my children see it on mine."³

White parents of children of color are uniquely situated to contribute to the study of the relationship between White people of goodwill and racism. I am inspired and encouraged by Professor bell hooks' invitation to join in this discourse on race. She writes:

Luckily, there are individual non-black people who have divested of their racism in ways that enable them to establish bonds of intimacy based on their ability to love blackness without assuming the role of cultural tourists. We have yet to have a significant body of writing from these individuals that gives expression to how they have shifted attitudes and daily vigilantly resist becoming reinvested in white supremacy.⁴

I am writing about my journey from being a person of goodwill to being a person who understands she needs to repudiate the privileges that attach to being White in America. An example of a modest first step to accomplishing this goal is supporting affirmative action, a theme of this article.

Professor Peggy McIntosh defines White privilege as "an invisible

3. Comment from an audience member at a conference sponsored by the Gainesville Commission on the Status of Women on "Violence Against Women," April 30, 1998.

4. BELL HOOKS, *KILLING RAGE: ENDING RACISM* 157-58 (1995).

package of unearned assets which . . . [a White person] can count on cashing in each day, but about which [she] was 'meant' to remain oblivious."⁵ My journey has enhanced my understanding of the relationship between White privilege and its conjoined ideologies of Black domination and subordination. Professor Adrienne Davis poignantly describes this relationship:

Domination, subordination, and privilege are like three heads of a hydra. Attacking the most visible heads, domination and subordination, trying bravely to chop them up into little pieces, will not kill the third head, privilege. Like a mythic multi-headed hydra, which will inevitably grow another head if all heads are not slain, discrimination cannot be ended by focusing only on . . . subordination and domination.⁶

My new vantage point, as the mother a Black child, provides me with a deeper understanding of three aspects of racism:

1. White Denial: People of goodwill deny that racism continues to be a problem.
2. Black Skepticism: White denial creates and justifies Black skepticism about Whites' commitment to equality.
3. Racial Anger: White denial and Black skepticism feed a cycle of anger and this is poignantly illustrated in the controversy over affirmative action.

Perhaps parts of my journey will "ring true" for other White people of goodwill and, in exposing them to deeper aspects of racism, they will better appreciate how their views on race may be inadequate to achieve racial equality. In turn, perhaps some of them will also be moved to repudiate the privileges associated with being White and will be motivated to share space⁷ with Blacks and all people of color in equal ways.

In undertaking this difficult task, I offer three important caveats. First, I accept that complete racial equality cannot be achieved in America as it exists today. Yet I also believe that a higher level of racial equality can be

5. Stephanie M. Wildman & Adrienne D. Davis, *Making Systems of Privilege Visible*, in *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 7, 17 (Stephanie M. Wildman ed., 1996) (footnote omitted) [hereinafter *PRIVILEGE REVEALED*].

6. *Id.* at 19-20 (footnote omitted).

7. There is actually a science of "space geography" (the study of the social construction of space) and scientists have conducted studies that reveal that involuntarily "segregated space correlates to lack of power and knowledge on the part of the excluded group." Stephanie M. Wildman, *Privilege in the Workplace: The Missing Element in Antidiscrimination Law*, in *PRIVILEGE REVEALED*, *supra* note 5, at 27 (citation omitted).

achieved if (at least some) Whites repudiate their White privilege and actively support equal citizenship for Blacks. By this, I mean that Blacks and all people of color have the right to participate in American life with equal dignity enjoyed by Whites. To achieve this goal, Whites who are *people of goodwill* must take proactive steps to equalize the racial imbalance in America. Repudiating White privilege is a necessary precursor to a complete dismantling of White Supremacy.⁸ Initially, it may seem implausible that even some Whites would voluntarily repudiate privilege. As one young Black student pressed me at a conference, "But how realistic is it for anyone to voluntarily walk away from power?" My response, perhaps inadequate and overly optimistic, focused on appealing to an essential aspect of humanity—its goodwill toward others.⁹

Understandably, this suggestion seems full of folly. After all, Dr. Alvin Poussaint suggests in his foreword to W.E.B. Du Bois' book *The Souls of Black Folk* that Du Bois was naive to suppose that he could reason with Whites and appeal to their goodwill to end Black subordination.¹⁰ Specifically, Dr. Poussaint wrote:

There is constantly the temptation to indulge himself to some extent in the thought that perhaps the problem has never been presented to the white man in a way that he could truly understand, that perhaps *this time he* could find a way, a language, a medium for transmitting the urgency of black America to the white man—for surely the progress of civilization has proven that reason can sometimes prevail, illumine, create; and certainly, the alternatives of continuing anguish, hatred, and ultimate suicidal warfare are unbearable!¹¹

Certainly, I cannot accomplish what Du Bois and other scholars have been unable to accomplish. At times, the frustration is enough to craze anyone who loves someone of color or who cares deeply about equality. As the mother of a Black child, I must make this effort for my daughter and for all children. However foolish this project seems, my hope and

8. See Noel Ignatiev, *Treason to Whiteness Is Loyalty to Humanity*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 607, 608 (Richard Delgado & Jean Stefancic eds., 1997) ("So-called whites have special responsibilities to abolition that only they can fulfill. Only they can dissolve the white race from within, by rejecting the poisoned bait of white-skin privileges.").

9. See *id.* at 610 (referring to the WWII slogan "An injury to one is an injury to all" as a motivator for repudiating white privilege). See also Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990) (exploring the need to develop strategies for the common good of all people in the struggle for racial equality).

10. See Alvin F. Poussaint, M.D., *Introduction to W. E. BURGHARDT DU BOIS, THE SOULS OF BLACK FOLK* xxviii, xxxi (New Am. Library 1969) (1903).

11. *Id.* at xxxiii.

faith are abiding.¹²

Importantly, most people of goodwill do not want to become co-conspirators with people, White or Black, who have internalized the assumption that America can never repudiate its racism.¹³ Professor bell hooks admonishes Black people: "Like our white allies in struggle we must consistently keep the faith, by always sharing the truth that white people can be anti-racist, that racism is not some immutable character flaw."¹⁴ Goodwill Whites who accept racism as immutable may think this absolves them of responsibility for helping to end it.¹⁵ In reality, this perspective strips them of their agency,¹⁶ and, therefore, their power to help end racial inequality. A person of goodwill would be inclined to repudiate White privilege because she understands her privilege was wrongfully obtained through the subordination of Blacks. Thus, an appeal to goodwill Whites' commitment to equality can and should be constantly tapped in the struggle.

My second caveat concerns the fact that my comments throughout this paper focus primarily on Whites' construction of racism against Blacks. By choosing this focus, I do not mean to devalue other critical theories about race¹⁷ and offer this discussion as part of an ongoing dialogue involving "rotating centers."¹⁸ My focus on "White over Black"¹⁹ race rela-

12. When Anthony Cook was my colleague at Florida, I used to attend his church and listen to his sermons about the role of law in developing goodwill toward others. My daughter was only one year old and Anthony, his family, and his congregation helped me begin my journey of love across the color line. He is now teaching at Georgetown University and his lessons come to me largely through his writings, but with equal inspiration. See, e.g., ANTHONY E. COOK, *THE LEAST OF THESE* (1996); Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence*, 82 GEO. L.J. 1431 (1994).

13. See HOOKS, *supra* note 4, at 269.

14. *Id.* at 269-70.

15. See *id.* at 271.

16. For an excellent analysis of the dynamic of agency in sex discrimination, see Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995). See also, Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997) (exploring agency concept in same-sex harassment cases).

17. See, e.g., Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Radical Thought*, 85 CAL. L. REV. 1213, 10 LA RAZA L.J. 127 (1997) (suggesting that the focus on Black/White race issues marginalizes other racial groups); Berta Esperanza Hernandez-Truyol, *Borders (En)gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882 (1997) (exploring the need to include Latinas and Latinos in critical race theory); Berta Esperanza Hernandez-Truyol, *Building Bridges-Latinas and Latinos At The Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994) (same). But see Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457 (1997) (arguing that "White on Black" racism is central to inequality).

18. Professor Frank Valdes suggests the concept of "rotating centers" allows one to focus on one type of oppression at a time without diminishing the importance of focusing on other types of oppression and learning how different types of oppression work together. See Frank Valdes, Remarks at the Confronting Race Conference, University of Florida Center for the Study of Race and Race Relations (February 20-21, 1998) (videotape available at the University of Florida College of Law

tions stems from my personal experiences with my daughter whose color is brown and whose biological mother is White and biological father is African American. As Professor Dorothy Roberts explores in her book *Killing the Black Body*, the darker one's skin color, the less valuable one is perceived to be in America.²⁰ My personal experiences with my daughter support this observation. When the agency set the adoption fee for my daughter, it offered to cut the fee in half because she is biracial, she appears Black, and would have been harder to place than a White baby. Personal experiences such as this lead to my focus in this article.

As I share some of the lessons I have learned about racism from loving my daughter, my final caveat is equally important. As a person of goodwill, I try hard not to be racist. Recently, a Black colleague publicly accused me of being racist. I was mortified by the accusation, which was leveled at me in front of a large crowd attending a conference on race. Although I understand that I am racist because I am part of the institution of White privilege, my colleague's image of me as a "blatant" racist was out of keeping with my self-image. The embarrassment and hurt I felt overwhelmed my intellectual sensibilities. Unlike the coach, I did not aggressively defend myself, but my reaction was just as ineffective; emotionally I shut down, and consequently, did not hear much of what my colleague said thereafter. My silent defensiveness caused me to miss an opportunity to learn from my colleague.

Finding an appropriate tone for this article is difficult because I try to move those of us who identify ourselves as goodwill Whites into thinking about ways we can repudiate White privilege without also feeling defensive about being White. Defensive Whites may be inclined to "drop out" of the struggle for racial equality. Simultaneously, as much as I want to believe I would never act like the coach, I am also reminded by my colleague's comment that I may be more like him than I realize or want to be. Goodwill Whites are on constant alert as we try to overcome our own racism but realize we are vulnerable to accusations, often justifiable, that we sometimes get it wrong. I accept Professors Stephanie Wildman's and

Media Center). Professors Trina Grillo and Stephanie Wildman use a similar concept of "recognition time," which they explain: "Recognition time acknowledges both the need to honor the pain of those oppressed by other isms, each in their turn, and the need to allow the oppression being focused on to remain center stage." Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons between Racism and Sexism (or Other Isms)*, in *PRIVILEGE REVEALED*, *supra* note 5, at 99.

19. See generally WINTHROP D. JORDAN, *WHITE OVER BLACK* (1968) (discussing the historical attitudes of Americans toward Blacks).

20. See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997). See also D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 471-78 (1993) (role of color in defining race).

Adrienne Davis' advice to worry less about "how to avoid that label [racist] . . . [and] worry[] [more] about systemic racism and how to change it."²¹ In speaking of "goodwill Whites" in the third person, I try to create a safe distance among the images many of us have of ourselves, the images others might have of us, and the images we aspire to as we move toward repudiating our White privilege so that more racial equality can exist than currently does throughout society.

Thus, learning particularities²² about different racial, ethnic, and other identities better enable us to form coalitions and develop overarching strategies for ending subordination in the myriad forms it takes—from White Supremacy to patriarchy and beyond. In turn, our efforts to appreciate racial equality and repudiate privilege will promote equal citizenship for all people.

II. THE LIMITS OF GOODWILL

A. *How Goodwill Facilitates Whites' Denial of Racism*

As Professor bell hooks writes:

When liberal whites fail to understand how they can and/or do embody white supremacist values and beliefs even though they may not embrace racism as prejudice or domination (especially domination that involves coercive control), they cannot recognize the ways their actions support and affirm the very structure of racist domination and oppression that they profess to wish to see eradicated.²³

As a mother of a Black child, at times I am situated in a different position from my compatriots of goodwill. I often move from the spotlight we share as White liberals and feel isolated from them as I live in the shadow of racism. My new vantage point causes me to question the limits of White liberalism, a plea many Black and some White scholars have been making for a long time.²⁴ Until my relationship with my daughter, however, I did not fully appreciate what they were asking me and other White liberals to do. My commitment to racial equality as evidenced by

21. Wildman & Davis, *supra* note 5, at 11.

22. See Perea, *supra* note 17, at 1237, 1256.

23. HOOKS, *supra* note 4, at 185.

24. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED* (1987); JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* (1994); HOOKS, *supra* note 4; DAVID K. SHIPLER, *A COUNTRY OF STRANGERS: BLACKS AND WHITES IN AMERICA* (1997); STEPHEN STEINBERG, *TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY* (1995).

my goodwill seemed to be the best I could offer.

My motherly experiences bring a reality to the scholars' intellectual teachings. Ironically, to understand this, I had to let go of my goodwill persona and accept that I play a part in subordinating Blacks. My goodwill toward Blacks was not good enough to dislodge my White liberalist's views of the struggle for racial equality. Indeed, a difficult lesson I have learned from living with my daughter is that a major, perhaps the greatest, barrier to the achievement of racial equality is White liberals' comfort in being people of goodwill. As Dr. Martin Luther King, Jr. said of "moderate" Whites in his famous letter from a Birmingham jail:

I have almost reached the regrettable conclusion that the Negro's great stumbling block in the stride toward freedom is not the White Citizens Counciler or the Ku Klux Klanner, but the white moderate who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says "I agree with you in the goal you seek, but I can't agree with your methods of direct action;" . . . who lives by the myth of time and who constantly advises the Negro to wait until "a more convenient season."²⁵

Being a person of goodwill is comfortable because it does not require much more than declaring oneself a non-racist and supporting the theory of racial equality.

Significantly, the community of goodwill includes just about everyone. Except for avowed racists and White Supremacists, almost every White person wants to be thought of as a person of goodwill because most White people of goodwill cannot imagine that any of them would act in a racist manner. By definition, people of goodwill are not racist, at least not intentionally, although occasionally their unconscious racism surfaces. For example, the president of the University of Florida, a White man with a solid reputation for racial equality, recently made a racist comment about a newly appointed Chancellor of the Board of Regents, an African American.²⁶ The President publicly apologized for his comment and the Chan-

25. Martin Luther King, Jr., *Letter From a Birmingham Jail*, in *I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD* 91 (James Melvin Washington ed., Harper San Francisco 1992) (1986). See also STEINBERG, *supra* note 24, at 134 (discussing the motivation behind King's *Letter from a Birmingham Jail*).

26. See Michelle Jacobs, Closing Remarks at the Confronting Race Conference, University of Florida Center for the Study of Race and Race Relations (February 20-21, 1998) (videotape available at the University of Florida College of Law Media Center).

cellor and Board of Regents allowed him to remain President.²⁷

Unconscious racism that never bubbles to the surface plays an especially significant part in trapping people of goodwill in the limits of their own liberalism. As Professors Joe Feagin and Melvin Sikes point out, racism is understood by most White people to be an attitude of prejudice toward Blacks.²⁸ In contrast, Blacks define racism more inclusively; it is a system of institutional preferences for Whites, resulting from historically ingrained prejudices Whites have against Blacks. White society's general attitude toward Blacks is reflected in the institutional oppression of Blacks beginning with slavery and continuing today in ways explored in this paper. Over the last 300-400 years, the subordination has become reified and an elementary lesson children learn is to accept Black subordination and White privilege as "natural."²⁹

This observation usually takes goodwill Whites aback, although it should not be surprising. The viewpoint that Whites are "superior" to Blacks is akin to the viewpoint that boys are "superior" to girls. While people of goodwill openly reject both viewpoints, they nevertheless have become well-settled in young children's (and some adults') minds *despite* the efforts of liberal Whites and liberal parents. Still, while liberal parents seem more able to accept the existence of the false viewpoint of male superiority/female inferiority and openly attest to doing the best they can to fight it, liberal Whites are much more suspicious of the continuing existence of the false viewpoint of White superiority/Black inferiority and are afraid to confront it.

This observation may help explain why people of goodwill are disinclined to attribute racial connotations to ordinary, everyday *negative* interactions involving Whites and people of color as *long as the Whites are people of goodwill* (people who do not think they have prejudiced attitudes).³⁰ A specific example arose recently at my law school. In one

27. See *U-Fla. Leader Keeps Job After Apology For Racial Remark*, WASH. POST, Jan. 28, 1998, at A6. See also John Lombardi, *To: Students, Faculty, Staff, Alumni and Friends*, INDEP. FLA. ALLIGATOR, Jan. 20, 1998, at 1.

28. See FEAGIN & SIKES, *supra* note 24, at 3.

29. See HOOKS, *supra* note 4, at 114-15 (critiquing representation of Black characters in media: "[Black] subordination is made to appear 'natural' because most black characters are consistently portrayed as always a little less ethical and moral than whites, not given to rational reasonable action."). See also Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1757 (1993) (discussing the evolution of whiteness from a racial identity to a form of property). See generally A. LEON HIGGINBOTHAM, *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996) (discussing the historical relationship between race and the American legal process from the 17th Century to the 20th Century).

30. Most White Americans think that discrimination is no longer significant in America. See FEAGIN & SIKES, *supra* note 24, at 11. However, studies show that a majority of Whites consider race in making important decisions such as "choosing neighborhoods, employees, business partners, places to go in the city, and mates for themselves and their children." *Id.* at 23.

class, as a Black woman contributed to the classroom discussion, one of her White classmates started jingling his keys. The Black student interpreted the White student's behavior as racist (and sexist); this was the only time anyone had jingled keys in the classroom.³¹ Another White student thought the Black student's perception was outrageous and he quickly and publicly disavowed that the jingling was racist.³² Rather, he insisted the jingled keys indicated that her comments were wasting time.³³ The incident became newsworthy around the law school and within days, the White student apologized to the class for his insensitivity, which he assured everyone had nothing to do with race. Some students expressed concern that his apology was half-hearted and superficial, which also made its way around the law school and students talked more and more about both incidents. The student eventually wrote a more serious apology and published it in the student newspaper.³⁴

As events unfolded at school, some White students talked with me and expressed their disbelief that the incident had focused on race because they knew the White student who had jingled the keys and they voluntarily vouched for his racial goodwill. They simply could not imagine any connection between the White student's disrespectful behavior and their classmate's race. Similarly, although I connected the coach's behavior with my daughter's Blackness, I was uncomfortable sharing this with everyone around us because I understood that the White parents' goodwill was unlikely to allow them to entertain the connection. In the key jingling incident, many White students responded by insisting the comment was unrelated to race, as the coach responded by angrily denying he treated my daughter unfairly and inviting us to quit the team. The Whites involved in the different situations reacted similarly to restore goodwill comfort consistent with White denial.

At least three significant concerns arise from these observations, although I return to my experience with the coach because it involved me. First, recall how ludicrous it would have been for me to deconstruct the situation for the coach and parents; that would have been too intense and

31. See Christine Leon, *UF Launches Race Relations Center with Symposium*, INDEP. FLA. ALLIGATOR, Feb. 23, 1998, at 1. The Honorable Susan H. Black, Circuit Judge, United States Court of Appeals for the Eleventh Circuit, who earned her J.D. from the University of Florida College of Law in 1967, has commented publicly (and with a smile) about the customary jingling of keys and shuffling of feet by male classmates when women spoke in law school classrooms. Judge Black's comments were made at a reception honoring the University of Florida's Women of Distinction at the College of Law in the Fall, 1997.

32. See Kevin Eckhardt, *Opinions: Key-Jingling Meant to Silence Irrelevance*, INDEP. FLA. ALLIGATOR, Feb. 24, 1998, at 7.

33. See *id.*

34. See Paul Mascia, *Opinions: Perception Is Our Problem*, INDEP. FLA. ALLIGATOR, Feb. 27, 1998, at 7.

somewhat silly because critical race theory cannot be explained in a few minutes. On the other hand, a *mere suggestion* by me that race was relevant to the incident also would have been too intense because the discomfort level was already too high. The most important concern for the coach and parents was to maintain the spirit of goodwill, which acted as a barrier to any discussions about race, particularly racism. The coach and parents reacted as though my daughter's Blackness was irrelevant to any interactions between her and other members of the softball community. Consequently, I could not have said anything to the softball community that afternoon that would have been helpful to promote racial equality. If anything, I was supposed to say something to restore everyone (but my daughter and myself) to a level of comfort. Goodwill can be an effective silencer.

Second, goodwill comfort is important to maintain, causing many Whites to shy away from *any* discussions about race. Even *positive* daily, interracial interactions generally receive no open acknowledgment or discussion. For example, my daughter's Blackness made the softball team diverse, a value many Whites support. Yet the many hours I spent in the bleachers with other parents never resulted in one conversation about our racial differences. It is hard to imagine that no one was curious about her Blackness and my Whiteness. Admittedly, I could have raised the topic, but my experiences have taught me that people are more open to such discussions when they initiate them, and some people do. Increasingly, however, many Whites get stuck in the race paradox: How can race be valuable and yet also irrelevant? How can they talk about race in positive ways and avoid talking about racism? This leads to my third concern.

People of goodwill have felt this cognitive dissonance since the 1960s when both color consciousness and color-blindness were the ambiguous orders of the day. Specifically, former President Lyndon Johnson, a person of goodwill, issued executive orders to implement affirmative action in federal contracting.³⁵ He did this partly in response to the growing unrest among Blacks and other people of color in the early 1960s. Arguably, implementation of affirmative action programs was a minimal response to the vast problem of racism,³⁶ but it nevertheless promoted more racial equality than before.³⁷ It also had symbolic significance because it sent a message that even the President of the United States supported racial equality and would strive to achieve it.

35. See Exec. Order No. 11,246, 3 C.F.R. 301 (1964-65), as amended by Exec. Order No. 12,086, 41 C.F.R. §§ 60-2.10—60-2.15 (1978-1979).

36. See STEINBERG, *supra* note 24, at 166-67 ("[A]ffirmative action was never a desideratum pursued for its own sake, but rather a policy of last resort . . .").

37. See *id.* at 167-68.

Shortly after the executive orders, however, President Johnson delivered a speech at Howard University that implicitly called for race-neutrality in White society's thinking about racial inequality. Professor Stephen Steinberg suggests an examination of part of President Johnson's speech:

[E]qual opportunity is essential, but not enough. Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family you live with, and the neighborhoods you live in, by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the infant, the child, and the man.³⁸

As Professor Steinberg observes, "[t]he conceptual groundwork was being laid for a drastic policy reversal: The focus would no longer be on white racism, but rather on the deficiencies of Blacks themselves."³⁹ In this way, individual circumstances became the focus of Black success, obviating a need to notice or value color differences between Blacks and Whites.

The cognitive dissonance people of goodwill feel continues to move them toward color-blindness because they need to resolve the race paradox to restore goodwill comfort. This is increasingly more apparent in the last few years as many White liberals join with conservatives to explicitly abolish affirmative action. If people of goodwill can be convinced that adopting the color-blindness philosophy is in individual Blacks' self-interest, then they are likely to support abolishing affirmative action because they believe in racial equality.

Thus, color-blindness is seemingly a perfect solution to the paradox. It is only imperfect because it is premised on one big myth: The existence of racial equality. White society posits that racial equality is extant throughout America.⁴⁰ Moreover, a focus on formal racial equality pro-

38. *Id.* at 114 (quoting President Johnson's speech "To Fulfill These Rights," addressed to the Howard University graduating class on June 4, 1965). Professor Steinberg compares Johnson's speech, written by Richard Goodwin and Daniel Patrick Moynihan, with the following passage from a 1956 book:

Overt job discrimination is only one of the important hurdles which must be overcome before color can disappear as a determining factor in the lives and fortunes of men. . . . The prevailing view among social scientists holds that there are no significant differences among groups as to the distribution of innate aptitudes or at most very slight differences. On the other hand, differences among individuals are very substantial. The extent to which an individual is able to develop his aptitudes will largely depend upon the circumstances present in the family within which he grows up and the opportunities which he encounters at school and in the larger community.

ELI GINZBERG, *THE NEGRO POTENTIAL* 7 (1956).

39. STEINBERG, *supra* note 24, at 115.

40. See FEAGIN & SIKES, *supra* note 24, at 319.

vides Whites and their supporters with evidence of racial equality. For example, they quickly point out that Blacks and other people of color have enjoyed opportunities and attained increasing levels of success denied to them prior to the Fourteenth Amendment and during Jim Crow. In this way, not only is White society beyond the unspeakable atrocities of slavery and the open condoning of race discrimination by the government as illustrated by de jure segregation, but White society has also enacted many laws to protect people of color from race discrimination. Anti-discrimination laws such as the Fourteenth Amendment,⁴¹ the Civil Rights Act,⁴² and § 1983,⁴³ to list a few, are invoked by White society as concrete evidence that it is not racist and that racial equality is a reality. As Professor John A. Powell posits, many Whites believe that racism went out with the government's abandonment of explicitly racist laws.⁴⁴

Further, Whites who suggest racial equality has been achieved point to specific instances where Blacks have been successful at attaining powerful positions. They suggest White society is beyond racism because the following events, among others, would not have occurred in a racist society: The late Thurgood Marshall and now Clarence Thomas would not have been appointed to the United States Supreme Court; the military would not have been racially integrated; Colin Powell would not have been Chairman of the Joint Chiefs of Staff; graduate schools, medical schools, law schools, and other public schools would not have increased their enrollments of people of color. In a racist society, none of these phenomena would have happened. A few illustrations of Whites' efforts to promote racial equality, coupled with an example or two of instances where individual Blacks have excelled, are taken as absolute evidence that racial equality has been achieved.⁴⁵

Given this need for people of goodwill to believe that racial equality has been achieved because this makes them comfortable, it also becomes easier to understand the influential forces of "semantic infiltration."⁴⁶ This is a rhetorical device used by politicians, scholars, and other people that involves "the appropriation of the language of one's political opponents

41. U.S. CONST. amend. XIV, § 1.

42. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000a-3 (1964).

43. 42 U.S.C. § 1983 (1994).

44. See John A. Powell, *An Agenda for The Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 903-04 (1995) (discounting the colorblind doctrine which suggests that, because the government's explicitly sponsored racism is largely a thing of the past, so must racism be a thing of the past).

45. Perhaps it may be obvious (certainly it is obvious at least from the perspective of a person of color) that in a non-racist society, absence of persons of color in these positions would not have lasted for so long. But see DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997).

46. See STEINBERG, *supra* note 24, at 116.

for the purpose of blurring distinctions and molding it to one's own political position."⁴⁷ As long as racial equality has been achieved, then people of goodwill will be sensitive to cries of "reverse discrimination" because they do not like to be unfair to *anyone*. Even the United States Supreme Court has sanctioned the use of this term.⁴⁸

By sleight of hand, many White people of goodwill conflate the apparent absence of intentional racism in their goodwill communities, which they helped eliminate as civil rights advocates, with the existence of racial equality in American society. The general disappearance of intentional racism in their goodwill communities was replaced simultaneously by racial equality in their minds. Moreover, the focus on individual successes by Blacks obviates any need for White people of goodwill to confront their support for institutional racism, the systematic subordination of Blacks throughout society, which I discuss below. Concurrently, many White people of goodwill metamorphosized from active civil rights advocates who thought they did a lot of good, to passive people of goodwill who think they do no harm. They deny that this transformation from racism to equality did not happen because it is at odds with their goodwill comfort. Moreover, the idea that racial equality has been achieved is necessary to goodwill people because this is the very ideal that gives them their identity.

In everyday life, the color-blind philosophy functions as follows in goodwill communities. When a company hires a Black chief executive officer, many people of goodwill are unlikely to see this as a step toward racial equality and a cause for celebration for two possible reasons. On the one hand, some Whites posit that the candidate was hired *only* because he was the most qualified candidate; his race was irrelevant in the selection process *because racial equality is already here and the competition was color-blind*. On the other hand, if the company had an affirmative action policy, many more Whites increasingly posit that the candidate was hired *only* because he was Black, which was unfair to White candidates *because racial equality is already here and the competition should have been color-blind*. Conversely, when the company passes over the Black candidate and hires another White chief executive officer, people of goodwill do

47. *Id.* Semantic infiltration is one part of the general "backlash" phenomenon common in most struggles for equality. The "backlash" occurs when the dominant group demands that "center stage" be restored to them because the subordinated groups are receiving too much attention and accommodation in their struggle. In the context of race, Professors Grillo & Wildman state, "White supremacy creates in whites the expectation that issues of concern to them will be central in every discourse." Grillo and Wildman, *supra* note 18, at 90. For an analysis of the same concept in sex, see SUSAN FALUDI, *BACKLASH* (1991).

48. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 413 (1978) (Stevens, J., concurring in part and dissenting in part).

not have to attribute the choice to racism and have cause for concern *because racial equality is already possible and the competition was color-blind*. The White candidate was hired *only* because he was the most qualified candidate; his race was irrelevant in the selection process. Whites who support this view are particularly persuaded of it if the White candidate was hired *despite* the company's affirmative action policy and its deviation from a color-blind philosophy.

Thus, color-blindness seems to offer a way out of the race paradox that perplexes people of goodwill. Specifically, they are most comfortable not talking about race and succeed in avoiding such discussions so long as the world operates under their view of color-blindness. Correspondingly, they are less reluctant to talk about race in instances where they believe the color-blind principle is violated, as they think it is in affirmative action. Whites of goodwill do not feel any dissonance between their support for racial equality and their opposition to affirmative action because, from their view, racial equality has become the norm and affirmative action jeopardizes it.

B. *How White Denial Promotes Black Skepticism*

As most of White society relaxes in the easy chair of denial, most of Black society is increasingly agitated about the persistent inequality. Justifiably, Blacks are skeptical about White society's commitment to racial equality and as White denial sets in, Black skepticism grows. Consider life in America from Blacks' viewpoint. As a factual matter, a focus on formal racial equality reveals that inequality continues to be the norm. The American Dream is held out as a promise of equal opportunity for success and economic prosperity for all members of society. Most people of color understand the promise is largely an empty one, as visions of their success and economic prosperity fade into the distance along with White society's memories of slavery and, more recently, Jim Crow's institutional segregation.

For example, White Americans average approximately twice the income of Black Americans and are over two times more likely to live in a family with an income exceeding \$50,000.⁴⁹ Moreover, Black Americans are unemployed at over double the rate of White Americans and are nearly three times more likely to live in poverty.⁵⁰ Current sociological studies

49. See Robert L. Hayman & Nancy Levitt, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 678. The economic disparities reflect something beyond a recurring and exceptional set of coincidences. See Francis D. Blau & Marianne A. Ferber, *Discrimination: Empirical Evidence from the United States*, AM. ECON. REV., May 1987, at 319 (1987) (surveying empirical studies and finding that "even when fairly refined measures of productivity-related characteristics are held constant, blacks and women earn less than whites and men.").

50. See Hayman & Levitt, *supra* note 49, at 678-79.

report that "95% or more of top positions in major economic, political, [and] educational organizations are held by White men."⁵¹ Since *Brown v. Board of Education*'s⁵² promise that the government would ensure that children of color receive public school educational opportunities equal to those available to White children,⁵³ not only do many public schools remain largely involuntarily racially segregated,⁵⁴ but the economic disparities between public schools populated predominantly by White children compared to those populated predominantly by children of color remain extremely large.⁵⁵ Our post-Jim Crow society remains largely divided along color lines where Whites and Blacks live separately and unequally.⁵⁶ Thus, juxtaposed against the promise of inclusion and equal opportunities for everyone is the reality of exclusion and denied opportunities for most Blacks and other people of color.

More progressive thinkers posit that the struggle for racial equality in the context of formal equality is misguidedly narrow. Not only is the promise of formal racial equality an empty one, but it has done little, if anything, to dislodge Western imagination—colored and White—from a racist political agenda that is premised on White supremacy, the heart of institutional racism.⁵⁷ The concept of institutional racism often needs clarification and the definition offered by Stokely Carmichael (former chairman of the SNCC) and Charles Hamilton (a professor of political science) in their book *Black Power*, is informative. The following passage distinguishes between individual and institutional racism:

Racism is both overt and covert. It takes two, closely related forms: individual whites acting against individual blacks, and acts

51. JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* (forthcoming 2000).

52. 347 U.S. 483 (1954).

53. See Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. LAW & SOC. CHANGE 1, 2-7 (1997).

54. See, e.g., GARY ORFIELD ET AL., *DEEPENING SEGREGATION IN AMERICAN PUBLIC SCHOOLS* (1997).

55. See generally JONATHAN KOZOL, *SAVAGE INEQUALITIES* (1991) (examining the disparities between wealthy and poor public school districts). The Supreme Court held in *Missouri v. Jenkins*, 495 U.S. 33 (1990), that a school district did not have to continue to fund quality public education programs in an attempt to improve standardized test scores of students in a predominantly Black school. For an analysis of *Missouri v. Jenkins*, see Bradley W. Joondeph, *Missouri v. Jenkins and the De Facto Abandonment of Court-Enforced Desegregation*, 71 WASH. L. REV. 597 (1996). See generally Robin D. Barnes, *Black America and School Choice: Charting A New Course*, 106 YALE L.J. 2375, 2381 (1997) (exploring how charter schools "offer a viable option for the effective education of black children" in light of integration's failure).

56. See ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992).

57. See HOOKS, *supra* note 4, *passim*. See generally Kenneth B. Nunn, *Law As A Eurocentric Enterprise*, 15 LAW & INEQ. J. 323 (1997).

by the total white community against the black community. We call these individual racism and institutionalized racism. The first consists of overt acts by individuals, which cause death, injury or the violent destruction of property. This type can be recorded by television cameras; it can frequently be observed in the process of commission. The second type is less overt, far more subtle, less identifiable in terms of *specific* individuals committing the acts. But it is no less destructive of human life. The second type originates in the operation of established and respected forces in the society, and thus receives far less public condemnation than the first type.⁵⁸

The authors continue and provide a concrete example of the different kinds of racism:

When a black family moves into a home in a white neighborhood and is stoned, burned or routed out, they are victims of an overt act of individual racism which many people will condemn—at least in words. But it is institutional racism that keeps black people locked in dilapidated slum tenements, subject to the daily prey of exploitative slumlords, merchants, loan sharks and discriminatory real estate agents. The society either pretends it does not know of this latter situation, or is in fact incapable of doing anything meaningful about it.⁵⁹

Naturally, the radical voices of oppositional thinkers who focus their concerns primarily on institutional racism are even less likely to be heard by White society or by their moderate “formal equality” allies of color. Thus, in addition to disagreeing on the question whether formal racial equality has been achieved, most goodwill Whites also disagree on the question of whether institutional racism exists.

In *Shades of Freedom*, Professor Leon Higginbotham explores the precepts of White superiority and Black inferiority as the underpinnings for institutional racism.⁶⁰ These precepts function to prevent any kind of racial equality, formal or informal. By definition, the precepts posit that Blacks are less talented and capable than are Whites as a matter of biology, a theory popularized by Dr. Samuel George Morton in the nineteenth century.⁶¹ Although largely discredited by the 1930s, this theory occasion-

58. STEINBERG, *supra* note 24, at 75 (quoting STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 4 (1967)).

59. *Id.* at 76.

60. See HIGGINBOTHAM, *supra* note 29.

61. See STEINBERG, *supra* note 24, at 29 (citing SAMUEL GEORGE MORTON, *CRANIA AMERICANA* (1839)).

ally rears its ugly head. For example, in 1995, Richard Herrnstein and Charles Murray wrote *The Bell Curve*, a book that promotes White superior intelligence compared to other races, including Blacks.⁶²

Professor Steinberg offers an explanation for this theory's resurgence only a few years ago. Specifically, he suggests that a focus on native intelligence is yet another way of shifting discussions about institutional racism back to individuals. Just as the debate about racial equality in the 1960s shifted from institutional barriers in housing, jobs, and education to individual Black poverty, the current debate has shifted from the same institutional barriers to individual Black merit.

A dramatic indication of the vitality of the precepts of White superiority and Black inferiority is seen in the anti-affirmative action movement. At the time affirmative action policies were implemented in the 1960s, any person of color or White woman who was hired by a public employer or admitted to a public university probably was a beneficiary of affirmative action: but for affirmative action, the Black person or the White woman would not have been hired or admitted. White society's enduring attachment to Jim Crow segregation and its concomitant resistance to integration indicated that without the nudge from the government, public employers and universities would not have taken steps to desegregate their environments on the basis of race or sex.

Unfortunately, the initial purpose of affirmative action, to promote Blacks' equal citizenship, has become lost. Again, through the use of semantic-infiltration, anti-affirmative action activists successfully changed the focus of affirmative action so that some people think it is synonymous with "lowering standards." Shifting the discourse from equality to merit suggests the two are mutually exclusive and plays off the view held by many Whites in the inherent inferiority of Blacks. The rhetoric of this "new racism" merely disguises the message.⁶³

Consequently, racial minorities who are hired by public employers or admitted into public universities as affirmative action beneficiaries are stigmatized by the negative connotation given to affirmative action. Rather than viewing their addition to public work forces and school programs as positive steps toward eliminating institutional racism, consistent with the struggle for racial equality, their presence in public programs as beneficiaries of affirmative action seems to be viewed as a negative step backward in America's struggle for national excellence. Couching the

62. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1995).

63. See Paul Finkelman, *The Rise of the New Racism*, 15 YALE L. & POL'Y REV. 245, 246, 281 (1996) (critiquing DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1995), as a "big lie.").

objection to affirmative action in the language of "lowering standards" is not as overtly racist as the language used by Chief Justice Taney in *Dred Scott v. Sanford*,⁶⁴ but the derogatory message conveyed by the precepts of White superiority and Black inferiority in both contexts is clear.

Naturally, goodwill Whites resist discussions about institutional racism. Even if they were willing to acknowledge it, they would vehemently object to a characterization of their anti-affirmative action position as promoting institutional racism because it is at odds with their goodwill identity (self-proclaimed non-prejudiced) and also violates their spirit of goodwill because it makes them uncomfortable. In their minds, affirmative action can be abolished, not because they (consciously) think it jeopardizes the quality of America's public employment sector and schools, but rather because they believe in color-blindness; the best candidate should win and does win and race has nothing to do with it. As long as sophisticated discussions about institutional racism fall on deaf White ears, Black skepticism makes sense.

Finally, Black skepticism is justified because White society does not seem to be trying to understand racism. Not only is this evidenced by the prevalence of White denial throughout society, but it is also premised on the reality that Whites can never know the full effects of racism. Regardless of a White person's empathic skills,⁶⁵ the person's Whiteness alone largely insulates him or her from racism's harm. Many Whites may think this limitation excuses them from putting their best effort into the struggle.

Moreover, glimmers of hope for ending racism fade quickly if racism's demise depends on Whites' abilities to empathize with victims of racism to a degree where they are moved to repudiate their White privilege. Justifiably, Blacks wonder why any White person would voluntarily repudiate privilege. After all, if Whites were inclined to be so "altruistic,"⁶⁶ what are they waiting for? I explore this in detail in Part IV and briefly mention here that repudiating privilege is not altruism but rather is premised on correcting a wrong: the privileges associated with

64. 60 U.S. (19 How.) 393 (1857).

65. See generally Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) (arguing that empathy is an important component of proper legal decision making); Cynthia V. Ward, *A Kinder, Gentler Liberalism: Visions of Empathy in Feminist and Communitarian Literature*, 61 U. CHI. L. REV. 930 (1995) (positing that empathy cannot validly support the contentions of feminist and communitarian theorists).

66. I do not think that repudiating privilege is motivated by altruism, which implies that only kindness is behind the act. This would make Blacks' equality with Whites dependent on Whites' kindness. Rather, repudiation is built on the idea of rejecting the underlying premise of a transaction. A person of goodwill would be inclined to repudiate White privilege because she is a person of goodwill toward others and she understands her privilege was wrongfully obtained through the heinous subordination of Blacks. Her repudiation is not a gift to Blacks; her repudiation is an act of harmonizing her self-identity with her goodwill toward others.

Whiteness were borne out of the enslavement and dehumanization of Blacks. Today's Whites may not be directly responsible for the "sins of their fathers," but neither should they be able to benefit directly from their inheritance of their fathers' White privilege at the continued expense of Black equality. Rather, the act of repudiating White privilege is a necessary step toward equality. Still, Black skepticism warns that the notion that a White person would repudiate his or her White privilege seems too good to be true.

Thus, it is reasonable for Blacks to be skeptical of the sincerity of Whites who profess to support racial equality. In fact, the barriers of White denial, semantic-infiltration tactics, and the anti-affirmative action movement lead to an ultimate skepticism reflected in the view held by many Blacks and other people of color that racism is here to stay.⁶⁷ Stated alternatively, the continued and persistent de facto involuntary segregation as evidenced *both* by the disproportionate exclusion of people of color in sharing the American Dream *and* by the perpetuation of "nondiscriminatory" racial subordination operate to oppress people of color in ways similar to historical institutions like Jim Crow.

This is a difficult lesson for goodwill Whites who would have to expend immense amounts of time and effort to learn it. Unfortunately, many of them seem unmotivated to study racism, largely because they are in denial, but also because the dominant discourse on race in America reinforces their need to believe that everything is okay. Moreover, their need to believe that racism is history occasionally gets reinforced by prominent scholars. For example, Dinesh D'Souza, a scholar of color no less, recently published his book *The End of Racism: Principles for a Multiracial Society*, in which he argues that racism *never was a problem in America*.⁶⁸ In their book *America in Black and White: One Nation, Indivisible*, the authors Stephan and Abigail Thernstrom do not deny America's racist history, but throughout their book they do deny that current inequality has much, if anything, to do with racism.⁶⁹

Goodwill Whites need to be jolted out of this stupor on race—dumped out of the easy chairs of White denial that provide so much comfort. Even with a jolt, of course, grasping the profoundness of racism on an intellectual level may be inadequate to move some Whites beyond liberalism and into the realm of acknowledging the need to repudiate White privilege and

67. See Derrick Bell, *Racism is Here to Stay: Now What?*, 35 HOW. L.J. 79 (1991).

68. See DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1995). An excellent critique by Paul Finkelman, *The Rise of the New Racism*, 15 YALE L. & POL'Y REV. 245 (1996), summarizes a 700 page journey through the arguments supporting White denial.

69. STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997).

create shared racial space. For example, I wonder if I would have been moved beyond my own White liberalism if I had not become the mother of a little Black girl and fallen in love with her. This thought leads to interesting observations. First, intimate love only occasionally crosses racial lines. For example, in terms of formal relationships, 1992 data report just over one million interracial marriages, of which 246,000 were Black/White couples.⁷⁰ With respect to children in interracial families, 1991 data reveals that approximately 128,000 children were born to interracial couples⁷¹ and that almost two million children have parents of different races.⁷² This data does not reveal how many Whites were involved in the interracial families, which might consist of all people of color with different races. Nevertheless, the statistics show that a relatively small part of the population enters into formal interracial relationships. Racism is here to stay if White people of goodwill are going to move from their comfortable positions *only if* they fall in love with a person of color.

Interestingly, Alexis de Tocqueville suggests in *Democracy in America* that racial equality between Blacks and Whites can only be achieved by becoming one race of mulattoes: "the mulattoes are the true means of transition between the white and the negro; so that wherever mulattoes abound, the intermixture of the two races is not impossible."⁷³ Although de Tocqueville's observation for achieving racial equality is not necessarily premised on love, it is premised on Whites and Blacks developing intimate, even sexual, relationships. Historically, America's legal system was structured to criminalize such relationships (except when the White Master "raped" the Black Slave), precisely to avoid annihilation of Whiteness. Indeed, much of the historical segregation imposed on Blacks was designed to protect the genetic and social purity of the White race by outlawing the mixing of Black with White blood.⁷⁴ This is the rationale for the "drop of Black blood" caste system throughout America.⁷⁵

70. See Arlene F. Saluter, *Marital Status and Living Arrangements: March 1992*, in U.S. DEP'T. OF COMMERCE, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS X (Dec. 1992) (the number of interracial marriages was reported as 1,161,000).

71. See Jane Gross, *UC Berkeley at Crux of New Multiracial Consciousness*, L.A. TIMES, Jan. 9, 1996, at A1, available in LEXIS, News Library, Lat File.

72. See Linda Mathews, *More Than Identity Rides on New Racial Category*, N.Y. TIMES, July 6, 1996, at A1.

73. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 367 (Henry Reeve trans., Arlington House 1966) (1835).

74. See Cheryl I. Harris, *supra* note 29 (explaining how the phenomenon of historical segregation relates to property laws).

75. Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1163 (1997) (arguing that the "drop of Black blood" rule has become a source of Black power). Hickman also notes that "[t]he Devil fashioned [the one drop rule] out of racism, malice, greed, lust, and ignorance, but in so doing he also accomplished good: His rule created the African-American race as we know it today." *Id.* at 1166.

One of the most disturbing stereotypes of a Black man is that of the rapist of the White woman.⁷⁶ The 1931 Alabama trial of the Scottsboro defendants illustrates the brutal ways White society responded to accusations of rape by White women against Black men.⁷⁷ In Scottsboro, nine young Black teenagers were convicted of raping two young White women on nothing but the women's testimony. As punishment, eight defendants received death penalties.⁷⁸ Through a series of appellate court reversals, new trials, more reversals, and more new trials, all of the defendants eventually were set free. Unfortunately, the young men spent an aggregate of "more than 100 years in jail for a crime they almost surely did not commit."⁷⁹ The Scottsboro defendants, of course, were not alone in being the target of White society's rage at the prospect of Black men raping White women. As Edward Lazarus reports in his book *Closed Chambers*, "of the roughly 450 Americans executed for rape between 1930 and 1960 almost 90 percent were black."⁸⁰

In reality, most rape is intra-racial. "Seventy percent of black rape victims were raped by blacks, and 78 percent of white rape victims were raped by whites."⁸¹ Moreover, the persistence of the myth of the Black rapist has masked the reality and ugliness of the White Master raping his Black women slaves, a largely untold story in White American history. Significantly, the myth also masks the story of the modern Black victim by rendering her invisible in discussions about male power and female subordination.⁸² As Professor Cheryl Harris observes: "The archetypes of the slave and the mistress were ideologies of womanhood that functioned not simply to describe reality, but to represent social relations in a way that legitimized and normalized racial and sexual domination."⁸³

Moreover, White society also found it unconscionable that a Black man and a White woman (or a Black woman and a White man) would

76. For a critique of the myth of Black men raping White women as the primary rape statistic, see Jennifer Wiggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983).

77. Lynching was also a common response. See Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J. L. & FEMINISM. 31, 32-39 (1996).

78. See EDWARD LAZARUS, *CLOSED CHAMBERS* 77-81 (1998). See generally DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (rev. ed. 1979); JAMES GOODMAN, *STORIES OF SCOTTSBORO* (1994).

79. LAZARUS, *supra* note 78, at 81.

80. *Id.* at 89. He also notes that Blacks made up only 12% of the population. See *id.*

81. Irene Sege, *Race, Violence Make Complex Picture*, BOSTON GLOBE, Jan. 31, 1990, National/Foreign Sec., at 1.

82. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 158-60.

83. Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 313 (1996).

have a voluntary intimate sexual relationship. For example, antimiscegenation statutes that imposed criminal sanctions on Blacks and Whites who married each other were not held unconstitutional until the late 1960s, only 30 years ago.⁸⁴ The idea of interracial marriage continues to arouse negative sentiments of almost 15% of White Americans who favor making interracial marriage illegal.⁸⁵ Many Blacks also oppose marriage with Whites, viewing such unions as a threat to Black unity.⁸⁶ Naturally, falling in love with a person of color does not mean a White person *will* understand racism or be motivated to help end it.⁸⁷

The parent/child relationship involves a different kind of love from that of romantic partners, but it also is characterized by a power imbalance⁸⁸ that is magnified when the parent is White and the child is Black because of historical and persistent racial subordination of Blacks by Whites. The concern that interracial love is inadequate to overcome racism largely shapes the debate about interracial adoptions. Many Blacks oppose adoption by White parents of Black children because they see such adoptions as inevitable "cultural genocide."⁸⁹ That is, most Blacks understand the limits of White liberalism; no matter how goodwill the prospective White parents are, they are not fully able to appreciate the significance of being Black in America.⁹⁰

84. See *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (holding that the Equal Protection and Due Process Clauses of the Fourteenth Amendment prevents states from imposing statutory schemes prohibiting miscegenation).

85. See Hickman, *supra* note 75, at 1164 n.10 ("[A] 1994 poll showed that 14.7% of White Americans still favor a law making interracial marriage illegal" citing *Up From Separatism*, THE ECONOMIST, Oct. 21, 1995, at 30). See generally Randall Kennedy, *How Are We Doing With Loving?: Race, Law, and Inter-marriage*, 77 B.U. L. REV. 815 (1997) (exploring impediments to Black/White marriages, although supportive of them).

86. See SHIPLER, *supra* note 24, at 115-16 ("Not all objection to interracial dating comes from whites. In the spirit of black pride, black solidarity, black cultural cohesion, some blacks also resist and resent.").

87. In an analogous context, heterosexual love has not dismantled patriarchy. In fact, many feminist scholars posit that heterosexual "love" *maintains* patriarchy. As Professor Catherine MacKinnon admonishes: "Heterosexuality is [patriarchy's] social structure, desire its internal dynamic, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, and control its issue." CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 3-4 (1989). Similarly, Professor bell hooks writes that "[p]atriarchy is about domination." HOOKS, *supra* note 4, at 73.

88. See Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 843 (1989).

89. The National Association of Black Social Workers took the position in 1972 that "Black children should be placed only with Black families" primarily in its belief that this policy was in the child's best interest and that it also protected black cultural identity. See RITA JAMES SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION* 9 (1977) (quoting from the National Ass'n of Black Soc. Workers, Position Paper (1972)).

90. See Jacqueline Macaulay & Stewart Macaulay, *Adoption for Black Children: A Case Study of Expert Discretion*, 1 RES. L. & SOC. 265, 280-305 (1978) (exploring the arguments against adoption of Black children by White parents). But see Elizabeth Bartholet, *Where Do Black Children Belong?*

Thus, arguments against transracial Black/White adoptions rest on an assumption that it would not be in the Black child's best interest to be raised by White parents who have a limited understanding of racism and who cannot teach the child to value his or her racial and cultural identity.⁹¹ Moreover, White parents who believe in color-blindness and knowingly teach their Black children to assimilate into White culture jeopardize the existence of the Black community by altogether undermining the importance of race and culture to the child's identity.⁹² This is not in Black society's best interest, either.

Supporters of transracial adoptions posit that policies that prevent interracial adoptions also are problematic and discriminatory.⁹³ People who take this view argue that it is better for a Black child to be placed in a permanent home with White parents than it is for the child to be moved from foster home to foster home awaiting adoptive Black parents.⁹⁴ Significantly, there are many more Black children available for adoption than there are Black adults willing to adopt them.⁹⁵ Finally, supporters of transracial adoptions also emphasize that studies consistently report that Black children raised in White families fare as well as adopted children raised by same-race parents.⁹⁶

As an adoptive White mother of a Black child, I am caught in the middle of the national discourse on interracial adoptions by White parents of Black children. As a mother, though, the debate is moot for me: my daughter and I are a family and to separate us now would do inexplicable damage to both of us. Ironically, the state allowed us to become a family because we were both "imperfect" in its eyes. I was "imperfect" because I was unmarried; she was "imperfect" because she is mulatto. Our devia-

The Politics of Race Matching in Adoption, 139 U. PA. L. REV. 1163 (1991) (arguing that the best interests of Black adoptees are often served through transracial adoption).

91. See Macaulay & Macaulay, *supra* note 90. See generally Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33 (1993) (discussing the role of colorblind individualism in the transracial adoption debate).

92. The assimilation problem has been articulated most poignantly in the context of school integration and the failure of *Brown*. See, e.g., Jerome McCristal Culp, Jr., *Black People in White Face: Assimilation, Culture, and the Brown Case*, 36 WM. & MARY L. REV. 665 (1995); Charles R. P. Pouncy, *Marriage and Domestic Partnership: Rationality and Inequality*, 7 TEMP. POL. & CIV. RTS. L. REV. 363 (1998).

93. See generally ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* (1993) (arguing for a more positive construction of adoption and the need for a nurturing home); R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998) (exploring how racial preferences in adoption impact contemporary racial inequality).

94. See Bartholet, *supra* note 90, at 1223-26 (arguing that delay in placement can cause psychological trauma).

95. See BARTHOLET, *supra* note 93, at 96.

96. See Bartholet, *supra* note 90, at 1211-16, 1221-25.

tions from patriarchal and White supremacist values brought us together.

As a scholar, however, the debate continues to intrigue me, although my motherly experiences influence my theoretical analysis. My increased knowledge about racism informs my theoretical position on interracial adoptions *in one limited and narrow way*: my daughter would benefit from having a Black parent in her life. Coincidentally, she seemed destined to have a White mother, which would have been the case if her biological mother had decided to raise her. Her foster parents and their children also were White. From my dual mother/scholar perspective, I think both sides in the adoption debate have meritorious arguments. Professor Twila Perry's suggestion that a Black child raised by White parents does suffer some loss comports with my growing awareness of racism.⁹⁷ Specifically, and I am speaking only for my family situation based on what I have learned, I think my daughter suffers from the loss of racial connectedness between herself and a Black parent. A Black parent would be able to understand her pain of racism in ways that I still cannot articulate. Perhaps this deeper connectedness would empower my daughter in ways I cannot.

There is no empirical way to measure the loss a Black child suffers from being raised by White rather than Black parents. Nor is there any empirical way to evaluate whether the quicker permanent White home placement choice outweighs the waiting for Black parents choice. Given this uncertainty, recent federal legislation governing transracial adoptions struck a balance by outlawing mandatory same-race adoptions, but allowing agencies to deny placement of Black children with "racially or culturally insensitive" White parents.⁹⁸

Thus, although I have always espoused positive color consciousness because I have always "seen" race and think racial differences are valuable, my development from being a person of goodwill to being an advocate for repudiating White privilege and actively abandoning White racism has taken years and is an on-going process. My life consists of almost daily lessons on racism and race relations. My experiences have taught me a valuable lesson: in addition to reading about racism on an academic level, one must also take deliberate steps to learn about practical, day-to-

97. See Perry, *supra* note 91, at 57-59 (criticizing studies suggesting Black children suffer no harm from being raised by White parents).

98. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755, § 1808 (a)(3) (codified as amended at 42 U.S.C. § 671 (a)) reads:

[N]either the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may—

(A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of race, color, or national origin of the person, or of the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

day effects of racism and White society's denial of equal citizenship to Blacks. Even if people of goodwill do the former, my guess is they do not do the latter.

Racism is intellectually and practically difficult to fathom for most Whites. White denial absorbs most thinking about race among Whites who increasingly posit that racism is history. Some Whites think formal equality has been achieved; many reject the nondiscriminatory racial subordination theory; and yet a third group of self-proclaimed White Supremacists do not believe in racial equality at all. An intellectual grasp of racism may be insufficient to enable most White liberals to understand that repudiating their unearned racial privilege is necessary to end Black subordination and achieve racial equality. Simultaneously, Black skepticism grows as most people of color believe racial equality remains elusive either because formal equality has failed or because of the more systemic problem of institutional racism that results in their persistent racial oppression. Not surprisingly, this talking at cross-purposes has resulted in an angry racial divide on fundamental questions of racial equality.

C. How White Denial and Black Skepticism Feed a Cycle of Racial Anger

Racial anger is worth studying because it is an emotion that directly jeopardizes White society's comfort zone and concomitantly manifests deep frustration among Blacks at White denial that racial subordination persists. My experience is that the potential for anger seems to lie just beneath the surface of almost every interracial interaction or any discussion about race, particularly if the interaction or discussion takes place with a pre-existing underlying tension. Being aware of and sensitive to racial differences minimizes the possibility that any negative racial feelings (even unconscious ones) will exacerbate existing angry ones.⁹⁹

For example, the footrace incident evoked many feelings, but certainly anger was a driving force behind the exchange. My daughter was mad at the coach, he was mad at her, I was mad at him, and he quickly got mad at me. Moreover, my daughter's Blackness and the coach's and my Whiteness were relevant in evaluating our behavior toward each other. Consider the incident from my daughter's and my perspectives. When a Black person is mistreated by a White person, the Black person knows the mistreatment was race-related even if the White person did not act intentionally racist.

Perhaps my daughter was too young to articulate the racial dynamics involved in the footrace incident, although she has articulated on occasion

99. Obviously, this is true in all interracial interactions, even those in which the perpetrator is Black and the victim is White. Healthy race relations are a two-way street.

how she feels devalued by Whites because she is Black. Like most Blacks, my daughter *constantly* is aware of her Blackness and was sensitive to being the only Black child on the team. As her mother, I also am constantly aware of her Blackness. How could she not wonder if her Blackness turned the coach against her? I wondered.

Now try to imagine the incident from the coach's perspective or the perspective of any White person of goodwill. It is reasonable to conclude that the White person was aware of Mary's Blackness during the angry exchange. This is a realistic conclusion because White people of goodwill *consciously* try not to be racist, a goal that generally requires maximum effort in an angry exchange with a Black person. How could the coach not wonder if we (or at least I and perhaps the other White adults) were thinking he was racist? And if he did wonder about this, it probably would have caused him to be angrier or more defensive than he would have been with a simple accusation of unfairness that could more easily have been seen as a misunderstanding.

Thus, from both perspectives, race was at the forefront of the angry exchange. Although none of us ever mentioned it, I knew the exchange had an element of racial anger in it. I suspect the coach knew it as well on some level of consciousness even if he was not fully aware of it.

The footrace incident is a small example of racial anger, but nevertheless is significant. As Mary's mother, I am concerned that my daughter will build up resentment toward White society at the injustice she endures. Like most types of anger, racial anger does not appear suddenly but rather festers over time. In a larger context, Professor bell hooks writes that much of the current rage felt by African Americans and other people of color about the absence of racial equality in society centers around White society's denial that ours is a White supremacist society.¹⁰⁰ Continuing, she admonishes: "The danger of that denial cannot be understood, nor the rage it evokes, as long as the public refuses to acknowledge that this is a white supremacist culture and that white supremacy is rooted in pathological responses to difference."¹⁰¹ The reality of pervasive racism against Blacks throughout society, including seemingly small incidents, supports Blacks' accusations that unfair treatment is race-related.

Understandably, any human being who is persistently subordinated and oppressed is likely to object and protest, and justifiably feel angry or enraged. Legal theory understands this individual human tendency as evidenced by the concept of "justifiable homicide." For example, some criminal defendants charged with murder have been able to avoid convic-

100. See HOOKS, *supra* note 4, at 27.

101. *Id.*

tion on showing that their murderous anger was justified by some action—persistent physical abuse, violence, threats of harm—directed at them by their victims.¹⁰² In 1968, psychiatrists William H. Grier and Price M. Cobbs identified a mental condition they called “black rage,”¹⁰³ which has been offered by criminal defense lawyers in American courtrooms to excuse their client’s criminal conduct.¹⁰⁴ The defense is premised on psychiatric findings that the constant racial stress Blacks endure can cause them to act out their uncontrollable rage by committing criminal acts.¹⁰⁵ Whether or not one finds merit in the defense of “black rage,” its mere existence is sociologically noteworthy. If nothing else, reflecting on it focuses attention on the profound and justifiable frustration White denial causes Blacks. The defense posits that Blacks’ pleas to end racism, when met with persistent denial or indifference, can be a highly effective psychological tool to drive Blacks figuratively or literally mad.¹⁰⁶

In a different context, a relationship between White denial and Blacks’ mental health may seem more plausible. White denial can operate as a form (mild or harsh) of emotional abuse with respect to its use with children. Elsewhere, I have written on the psychological harm White denial causes children of color.¹⁰⁷ The law plays an especially important role in protecting children from abusive adults, including emotionally abusive adults. For example, child abuse legally has been defined broadly to include inflicting “mental injury.”¹⁰⁸ Even if White society is unwilling to acknowledge the psychological toll racism takes on Black adults, perhaps it can better understand how racism, in its myriad forms, chips away at the self-esteem of children of color. There can be no doubt that racism, especially the precepts of Black inferiority and White superiority, is psychologically unhealthy for all children.

Moreover, when oppressors ignore victims’ protests or otherwise re-

102. See, e.g., Judd F. Sneirson, *Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate*, 143 U. PA. L. REV. 2251, 2260-62 (1995) (surveying the justification and excuse defenses in criminal law); see generally PAUL HARRIS, *BLACK RAGE CONFRONTS THE LAW* 2-7 (1997) (describing the Black rage defense and its role in the legal history of the past century); Patricia J. Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731, 748-57 (1996) (discussing how Black rage is affected by precipitating events and racial overtones).

103. See WILLIAM H. GRIER & PRICE M. COBBS, *BLACK RAGE* (1968).

104. See Sneirson, *supra* note 102, at 2252.

105. See *id.*

106. See *id.* The contrary view is presented by Professor Alan Dershowitz who posits that “the ‘black rage’ variation on the abuse-excuse defense is an insult to millions of law-abiding black Americans.” ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES AND EVASIONS OF RESPONSIBILITY* 90 (1994).

107. This is the primary motivation for writing my book, *LOVING ACROSS THE COLOR LINE: A WHITE ADOPTIVE MOTHER LEARNS ABOUT RACE* (forthcoming 2000).

108. See, e.g., FLA. STAT. ch. 827.03 (1997).

spond with indifference to victims' cries of pain, naturally the victims' rage and frustration are exacerbated. Individuals who share concerns about subordination may come together and violently protest. Indeed, White America was established out of rage at English laws that denied colonists freedom of religion, speech, autonomy, and liberty. Their need to live a life of dignity resulted in the Revolutionary War. The Boston Tea Party, a relatively modest but violent protest, reflected the colonists' outrage at oppressive taxes. Many historical wars and physical engagements exemplify this point. As victims of mistreatment by oppressive governments, White society has often responded with rage, rebellion, and revolution.

Colored rage is to be expected in a society that privileges Whiteness over other racial colors. Alexis de Tocqueville wrote, "To give a man his freedom and to leave him in wretchedness and ignominy is nothing less than to prepare a future chief for a revolt of the slaves."¹⁰⁹ Indeed, America has witnessed several significant riots by Blacks and other people of color in response to racial oppression. The Watts riots in the 1960s illustrate the profound rage Blacks felt about their subordination. Professors Donald Kinder and Lynn Sanders describe the scene:

In Watts the violence raged unchecked for three days, and three days longer in sporadic eruptions. Blacks looted stores, set fires, burned cars, and shot at policemen and firemen. Before the violence was halted, 14,000 National Guard troops, 1,000 police officers, and more than 700 sheriff's deputies were pressed into service. More than 46 square miles—an area larger than Manhattan—came under military control. In the end, 1,000 buildings were damaged, burned, looted, or completely destroyed; almost 4,000 people were arrested; more than 1,000 were injured seriously enough to require medical treatment; and 34 were dead, all but three black.¹¹⁰

Watts was followed by at least 250 more riots in 1967,¹¹¹ a forceful message (similar to the one the colonists sent to England) by Black America that it had had enough of White denial, White privilege, and persistent inequality.

Thirty years later, White America was given another Watts-type message in the 1992 Los Angeles riots following the acquittal of the White

109. DE TOCQUEVILLE, *supra* note 73, at 373-74.

110. DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* 103 (1996) (footnote omitted).

111. *See id.*

police officers who brutally beat Rodney King.¹¹² Professors Joe Feagin and Hernan Vera describe the riots as the worst ones this century: more than 2,400 people were injured, over 50 died, and property worth billions of dollars was damaged.¹¹³ Certainly, the Los Angeles riots forcefully demonstrate that Blacks, Latinos, Asian-Americans, and all people of color continue to be outraged by the unequal treatment they receive in America even though the days of slavery and de jure segregation are gone.

Nor is evidence of Black rage limited to examples of violent outbursts. Just as White society resisted Blacks' non-violent boycotts and marches, (remember how they were "pummeled with nightsticks and set upon by police dogs"¹¹⁴) it continues to be challenged by modern Black non-violent protests of racism. For example, Professor Paul Butler suggests as an antidote to the racial inequality in the criminal justice system that jurors should refrain from convicting Black criminal defendants who are accused of nonviolent, victimless crimes.¹¹⁵ In his opinion, a criminal justice system that is so permeated with racial inequality should be dismantled.¹¹⁶

Not surprisingly, Professor Butler's pleas for a revolution in the form of jury nullification have been opposed,¹¹⁷ even by other Blacks. A most notable critic is Professor Randall Kennedy who suggests that jury nullification crosses the line of "respectable" tactics challenging racial subordination.¹¹⁸ Butler focuses on Kennedy's remarks:

[F]or a stigmatized racial minority, successful efforts to move upward in society must be accompanied at every step by a keen attentiveness to the morality of means, the reputation of the group, and the need to be extra careful in order to avoid the derogatory charges lying in wait in a hostile environment.¹¹⁹

112. See Deborah Waire Post, *Race, Riots and the Rule of Law*, 70 DENV. U. L. REV. 237, 250 (1993). For an excellent critique of the meaning of the riots, see Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 968-69 (1995).

113. See JOE R. FEAGIN & HERNAN VERA, *WHITE RACISM* 83-84, 97 (1995).

114. KINDER & SANDERS, *supra* note 110, at 104. See also THERNSTROM & THERNSTROM, *supra* note 69, at 119-20 (describing the Greensboro sit-in on Feb. 1, 1960).

115. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677, 679 (1995); see also Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997).

116. See Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1285-86 (1998); see also Sheri Lynn Johnson, *Respectability, Race Neutrality, and Truth*, 107 YALE L.J. 2619 (1998); Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63 (1993) (both analyzing racial injustice throughout the criminal justice system).

117. See, e.g., Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109 (1996); Richard St. John, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563 (1997).

118. See RANDALL KENNEDY, *RACE, CRIME AND THE LAW* (1997).

119. Butler, *supra* note 116, at 1282 (quoting KENNEDY, *supra* note 118, at 20).

Butler questions why Kennedy is concerned with choosing anti-subordination strategies that are not upsetting to Whites: "Kennedy's apprehension of how whites would react to widespread black jury nullification leads him to urge blacks to chose tactics, that, unlike nullification, do not offend the white majority."¹²⁰

This exchange between two prominent Black law professors exemplifies the powerful interplay between White denial and White privilege. Butler justifiably is enraged at the profound and persistent racial subordination in America and thinks radical tactics are necessary to snap White society out of its denial. Jury nullification, although radical and controversial to some people, seems modest in comparison to Watts and Los Angeles. Kennedy may be right that this disturbance of White society's rules may result in a heightened protection of White privilege. If Kennedy is correct, he is justifiably worried about making Whites feel even more threatened and uncomfortable about issues of racial equality. Recall that the predominant White response to Watts was to turn away from the Civil Rights struggle for racial equality. Watts may have signified the beginning of White society's belief that (enough) equality had been achieved.¹²¹

Certainly, Watts, Los Angeles, and jury nullification illustrate that White society is not a good listener to Blacks' cries of foul. White America's reactions to Blacks' pleas for equality resemble more those of the British Monarch than they do the freedom-seeking colonists who would have appreciated an empathic ear, especially if resolution of their conflicts could have avoided a revolution. Rather than responding to the problem of increasing anger in colored communities with reflection, compassion, and empathy, however, White society uses its privilege to maintain its comfort by creating its own protests as a reminder and insistence of its view that (enough) race equality has been achieved. A specific example is provided by White society's outrage at the Los Angeles riots and what it interpreted as a barbaric "eye-for-an-eye" beating of Reginald Denny by Black rioters. Professor Juan Perea's analysis is insightful: "Reginald Denny's beating created possibilities for certain artificial and misleading symmetries: Even if the Los Angeles police were out of control, so were the black rioters; a black victim is matched by a paired white victim."¹²²

Three years later, a jury of nine African-Americans, two Whites, and

120. Butler, *supra* note 116, at 1283.

121. See KINDER & SANDERS, *supra* note 110, at 103 ("If the civil rights movement and the flagrantly racist reaction it incited compelled many white Americans to express their support for racial equality as a matter of principle, the riots and the new belligerent rhetoric pushed them in quite a different direction. . . . In the view of many white Americans, the problem of race was solved.").

122. Perea, *supra* note 112, at 967 (footnote omitted); see Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1303 (1995) (analyzing the rhetoric of race in trials involving racial violence).

one Hispanic acquitted O.J. Simpson of murdering Nicole Simpson and Ron Goldman.¹²³ To the amazement of most Whites, most Blacks were ecstatic. Professor David Shipler offers an explanation:

Perhaps the rush of joy after the Simpson verdict came from a burst of empowerment, a sudden feeling that black people could finally penetrate the high walls of the system to make something right. That may also have been a source of much of the white distress—the notion of blacks having power, of blacks wielding their authority as unjustly as whites have wielded theirs. Black violence and black power seem part of the same continuum.¹²⁴

In White society's eyes, O.J. killed Nicole Simpson and Ron Goldman.¹²⁵ The riots and the responses to O.J.'s acquittal dramatically illustrate the different ways Whites and Blacks see race in America.¹²⁶

White society did not respond with like-kind violence to the Los Angeles riots, the Reginald Denny beating, or the O.J. Simpson verdict. Interestingly, however, within four years of Los Angeles and within one year of O.J.'s acquittal, California passed Proposition 209, making affirmative

123. See SHIPLER, *supra* note 24, at 397.

124. *Id.* at 400-01.

125. See *id.* at 347 ("After the jury made its decision, a *Washington Post* poll found that 85 percent of blacks and 34 percent of whites agreed with the verdict; 8 percent of blacks and 55 percent of whites disagreed.").

126. Although the acquittal of O.J. Simpson in his trial for allegedly murdering Nicole Brown Simpson and Ronald Goldman did not inspire Whites to riot, his acquittal did enrage most White Americans who felt he got away with murder. That was disturbing enough to many White Americans, but their anger was exacerbated in the O.J. case because most Whites believed Simpson's lawyer, Johnnie Cochran, deliberately and inappropriately played "the race card." Specifically, some Whites believed that Cochran obscured the question of O.J.'s guilt or innocence by turning the case into a conspiracy by the White police officers and detectives against O.J. For most White Americans, the idea that the White officers would be involved in a conspiracy against Blacks was preposterous and deeply offensive.

Compounding their sense of outrage at the allegations of a conspiracy within the specific context of the Simpson trial was a more generalized feeling by many White Americans that Black America attributed the White officers' alleged racist motivations to any White who believed O.J. committed the murders. Somehow, the allegations of the officer's conspiracy against O.J. translated into an accusation that White America, particularly its criminal justice system, was "out to get" Black Americans, especially Black men. The ugliness and absurdity of the allegation that White America is racist made many Whites defensive and angry. Any possible relationship between White police officer conduct in the O.J. investigation and White police officer conduct in Los Angeles and elsewhere toward Blacks, Latinos, and other people of color never got explored in the broader context of institutional racism. Rather, the allegations of White police officer racism could simply be dismissed as irrational in the context of O.J.'s case because it was so obvious to White society that he was guilty. See generally Devon W Carbado, *The Construction of O.J. Simpson as a Racial Victim*, 32 HARV. C.R.-C.L. L. REV. 49 (1997); George Fischer, *The O.J. Simpson Corpus*, 49 STAN. L. REV. 971 (1997).

action illegal.¹²⁷ Whether there is a connection between the events is a matter for sociologists and political analysts. My point here is much more modest and does not turn on finding a causal connection. In fact, people of goodwill would not retaliate, at least not consciously. Assuming that Proposition 209 is not retaliatory, then White denial of the problem of racial unrest is perfectly illustrated because passage of Proposition 209 only created more anger and frustration in the Black community as its access to California's public universities was sharply curtailed.¹²⁸ If Proposition 209 is related (even unconsciously) to growing White discomfort with racial unrest, then it is clear that, not only is White society unable or unwilling to engage in healthy discourse in response to Black anger, but it seems determined to see just how far it can push Blacks' patience to maintain Whites' comfort. Concomitantly, when Blacks explode with rage (Los Angeles) or offer radical theories of anti-subordination (jury nullification), White society feels justified in restoring its position of comfort by outlawing policies like affirmative action that promote (some) racial equality and symbolize America's commitment to equality for Blacks.

This view of the anti-affirmative action movement is worth exploring; perhaps there are ways to break the cycle of racial anger. Affirmative action, perhaps more than any other policy on race, keeps society deeply entrenched in an angry debate about racial equality. The two are inextricably intertwined. Whites posit: equality is here, affirmative action is obsolete. Blacks posit: inequality persists, affirmative action is necessary. Most Whites are so uncomfortable talking about race that perhaps they think abolishing affirmative action will stop the riots and radical theories and restore their comfortable peace. Simultaneously, Blacks fear abolish-

127. Proposition 209 states: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art. 1, § 31, cl. a. Ward Connerly, a University of California Regent and a Black man, is the leader behind the Proposition 209 movement. See Louis Freedberg, *UC Law Schools at Wit's End As Minorities Go Elsewhere*, S.F. CHRON., July 18, 1997, at A1, available in LEXIS, News Library, Sfchron File. Because Proposition 209 is supported by a Black person, some people will be inclined to summarily dismiss any possibility that Proposition 209 passed because the recent racial unrest was making Whites too uncomfortable. Blacks often disagree on many issues and Ward Connerly is entitled to oppose affirmative action, just like Whites are given that option. See Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990). However, the fact of his Blackness is relevant precisely because many Whites think in essentialist terms. See Leslie Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878, 1883 (1990) (taking exception to Professor Randall Kennedy's position that being Black does not give one a "special vantage point," in his article, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1801-03 (1989)). The point, of course, is that Proposition 209 passed because a lot of White voters supported it and they may have been influenced by the fact of Ward Connerly's race.

128. See Carl Rowan, *Scholastic Genocide*, DENV. POST, May 24, 1997, at B7, available in LEXIS, News Library, Dpost File (enrollment of black and Hispanic students in law and medical schools in Texas and California reported to be down 81% and 50%, respectively).

ing affirmative action enhances White denial and allows White society to continue to subordinate them. Obviously, eliminating affirmative action will augment the racial divide by placing the burden of managing racial anger on Blacks who will continue to be denied equal citizenship, an increasingly intolerable situation. As the debate rages on, one of the most obvious issues surrounding affirmative action and racial equality is overlooked: Whites and Blacks have not figured out a way to talk constructively about race. The following section explores these dynamics of affirmative action and racial anger.

III. RECKONING WITH PRIVILEGE: THE CHALLENGE FOR WHITE PEOPLE OF GOODWILL

A. *Struggling with the Dissonance Between White Privilege and Black Subordination*

1. *Public Elementary and High Schools*

In *Brown v. Board of Education*,¹²⁹ the Court held that it was unconstitutional to legally mandate the separation of Black children from White children in public education.¹³⁰ The *Brown* decision requiring admittance of Black children to White public elementary and high schools functioned as an affirmative action order by imposing a duty on states to create public space that could be shared by Blacks and Whites. Affirmative action is not typically couched this way, but I want to define it this way in this paper. Specifically, the *Brown* Court understood that affirmative steps had to be taken to change the reality of two essential aspects of Jim Crow racism: the lack of formal equality of Blacks compared to Whites, and the continuation of White society's subordination of Blacks. Affirmative action involves taking steps to promote the equal citizenship of Blacks consistent with the democratic principle of racial equality by eliminating publicly reserved White space and creating publicly shared racial space.

By the time *Brown* was decided, the Court understood that achieving racial equality for Blacks depended on dismantling, not just the economic inequality, but also the social inequality perpetuated by White Supremacy that wreaked havoc on the souls of Blacks, as W.E.B. Du Bois described.¹³¹ A decision to provide equal funding for Black and White public schools and otherwise to uphold the constitutionality of the "sepa-

129. See 347 U.S. 483, 495 (1954).

130. See *id.* at 495.

131. See W. E. BURGHARDT DU BOIS, *THE SOULS OF BLACK FOLK* (New Am. Library 1969) (1903).

rate but equal" doctrine in public education in the 1950s would have left in place a social caste system that defined Black space as "space at the bottom," and that concomitantly reserved "space at the top" for Whites only. Dismantling White over Black racism is the heart of *Brown* and equality.

Brown's mandate to make public elementary and high schools share racial space proved to be a daunting task and one that was met with extreme resistance by many states.¹³² For example, some schools allowed children to opt out of placements in racial minority schools and return to their home schools where they belonged to the racial majority, but the Supreme Court held this practice unconstitutional in 1963 in *Goss v. Board of Education*.¹³³ Some schools decided it would be better to shut down altogether rather than share space with Blacks, but the Court also held this practice unconstitutional one year later in *Griffin v. County School Board*.¹³⁴ Finally, in 1968 in *Green v. County School Board*,¹³⁵ the Court emphatically stated that a school board has "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."¹³⁶ The *Green* decision held unconstitutional a plan that allowed children to choose which school to attend thereby maintaining separate spaces for Black and White public school students.

As Professor Erwin Chemerinsky states, with passage of the Civil Rights Act of 1964, particularly Title VI which prohibited public schools from discriminating on the basis of race if they received federal funds, came a certain acquiescence by most states that White-only space had to be shared with Blacks.¹³⁷ It bears highlighting that White society took almost fifteen years after *Brown*, through a series of Supreme Court cases and after passage of the Civil Rights Act, to accept that shared racial space

132. See James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained* 90 COLUM. L. REV. 1463, 1587-88 (1990). The author notes:

The [Virginia] General Assembly met in special session and enacted legislation to close any public schools where white and colored children were enrolled together, to cut off state funds to such schools, to pay tuition grants to children in nonsectarian private schools. . . .

In April 1959 . . . the Assembly repealed Virginia's compulsory attendance laws and instead made school attendance a matter of local option. . . .

Id. See also *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 221-22 (1964) (holding that it was unconstitutional for Prince Edward County, Virginia, to close its schools to avoid integration).

Many other Southern States also closed schools to avoid desegregation. See Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 81 NW. U. L. REV. 92, 99 (1994).

133. 373 U.S. 683, 687 (1963).

134. 377 U.S. 218, 232 (1964).

135. 391 U.S. 430 (1968).

136. *Id.* at 437-38.

137. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 578 (1997).

in public schools is constitutionally compelled. Moreover, busing children from school to school in an attempt to achieve some level of shared space became the common, but controversial, method for achieving some level of racial equality.¹³⁸

2. *Public Work Space*

Recall that around this time, President Lyndon B. Johnson also implemented one of the most important affirmative action policies emanating from the Executive Branch, Executive Order 11246,¹³⁹ which represents the more typical understanding of affirmative action. Under the Order, government contractors had to abide by two principles: officially, they were obligated to stop discriminating against racial minorities, and they also were obligated to ensure an adequate representation of minority contractors in the government contracting program.¹⁴⁰ By the late 1960s, the Department of Labor had issued regulations pursuant to the Order, establishing goals and timetables for government contractors to hire minorities.¹⁴¹

Sociologists and historians have documented how President Johnson's Executive Order stemmed less from his commitment to racial equality and more from his concern with quelling the racial violence at the time. The former President is quoted as telling business leaders, "If they're [Blacks] working, they won't be throwing bombs in your homes and plants. . . . Keep them busy and they won't have time to burn your cars."¹⁴² It is unfortunate that President Johnson invoked the stereotype of Blacks as naturally violent and criminal as justification to White society for the need to implement affirmative action. His comments grossly failed to appreciate the validity of Black society's naturally angry and predictable violent response to White society's heinous mistreatment and exclusion of them from empowering spaces in the public sector. President Johnson's attitude, as reflected in his comments, causes critics to question the sincerity

138. See J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 131-216 (1979); Davison M. Douglas, *The End of Busing*, 95 MICH. L. REV. 1715 (1997) (reviewing GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996)).

139. See Exec. Order No. 11,246, 3 C.F.R. 301 (1964-65), reprinted in 42 U.S.C. § 2000e app. at 538-41 (1994), amended by Exec. Order No. 12,086, 3 C.F.R. 230 (1979), reprinted in 42 U.S.C. § 2000e app. at 543-45 (1994).

140. See *id.* See also 41 C.F.R. § 60-2.10 (1998) (protecting "minority groups and women").

141. See Jean Stefancic, *Affirmative Action: Diversity of Opinions-An Overview of the Colorado Law Review Symposium*, 68 U. COLO. L. REV. 833 (1997).

142. Joseph A. Califano, Jr., *Bookmark: the Day LBJ Looked Industry in the Eye—and Stared Them Down*, L.A. TIMES, Oct. 13, 1991, at 3, available in, LEXIS, News Library, Lat File.

of the entire country's commitment to racial equality.¹⁴³

Notwithstanding this significant misstep in the initial implementation of affirmative action, at least two positive things can be said about it. First, President Johnson's 1965 Executive Order 11246, renewed by President Nixon in 1974, reflected the Executive Branch's evaluation that, as the principal enforcer of the law, it needed to take a leadership role in overcoming White society's resistance both to racial equality generally, and to shared public space specifically. Just as public schools needed to be "persuaded" to follow the Supreme Court's decision in *Brown*, other sectors of White society also resisted the demise of Jim Crow and needed similar inducements to abandon segregation and share space with Blacks.

A second valuable message was conveyed by Executive Order 11246. Notwithstanding the racism surrounding its implementation, President Johnson had it right: violence is the inevitable outcome whenever a group of people are persistently subordinated because of their race and their government does virtually nothing to promote the group's right to equality. White society should have seen the violence coming, not because the protestors were Black, but because White society subordinated the protestors because they were Black. A continuing manifestation of White over Black racism was the persistent exclusion of Blacks from participation in public spaces where critical legal and social policy decisions were made. Executive Order 11246 is a small but significant sign that White America *can be* responsive to Blacks' pleas for equality consistent with its goodwill and even if its motives reflect (unconscious) racist attitudes.

Thus, although the typical form of affirmative action was implemented to avoid racial violence by making public employers' create space for Black workers, Blacks' right to equality as decided by *Brown* and its progeny could be meaningful only if Blacks were included and allowed to participate in the educational and economic vitality of America. Enforcing public employers' constitutional duty to create shared space for workers of all races was equivalent to enforcing *Brown's* mandate to create shared space for public school students of all races.

Moreover, while enjoining official discrimination was necessary to meet *Brown's* mandate, it was not sufficient to achieve the goal. Ensuring Blacks' presence in public elementary and high schools, as well as public employment, required active, affirmative steps because neither environment willingly and immediately surrendered its Whites-only exclusivity privileges. In this way, affirmative action has always been about creating

143. See generally Eleanor Marie Brown, Note, *The Tower of Babel: Bridging the Divide Between Critical Race Theory and "Mainstream" Civil Rights Scholarship*, 105 YALE L.J. 513, 518 (1995) (addressing the common critiques of critical race theory and racial opinion surveys over the past 40 years).

shared racial space—an essential aspect of racial equality.

3. *Public Colleges and Universities*

As public colleges and universities tried to achieve racial equality in their programs, busing made no sense at all and the Executive Order 11426 governing public employment did not apply. Yet public colleges and universities also were subject to the Fourteenth Amendment's equality principles. Title VI provided incentives for public colleges and universities to stop official racial discrimination by threatening to withhold federal funding if they continued to maintain all White space through discriminatory practices.¹⁴⁴ Again, Title VI laid the foundation for enjoining discrimination, the necessary first step to dismantling Jim Crow, but standing alone, it lacked the impetus that even *Brown* and Executive Order 11426 each lacked. Without some affirmative step beyond stopping the discrimination, *Brown*, Executive Order 11426, and Title VI would be theoretically significant, but practically meaningless. Even in the face of those laws, White society tenaciously held onto White space at the expense of Blacks' equality.

Delightfully, University of California at Davis Medical School was a public institution founded in 1968 that affirmatively tried to walk away from Jim Crow. It was eligible for, and did receive, federal funding under Title VI because it did not discriminate officially on the basis of race in its admissions policy.¹⁴⁵ But the absence of official race discrimination did little, if anything, to ensure a minority presence in the medical school classes, largely because of institutional racism. Consequently, Davis implemented an admissions policy in 1969¹⁴⁶ that represented for public higher education the more typical affirmative action policy similar to what Executive Order 11246 represented for government contractors. Specifically, the school decided to take affirmative steps to ensure the presence of racial minority students in its medical school by setting aside 16 of 100 seats for them.¹⁴⁷ Its plan was to create shared racial space where students of all races could study medicine together.

144. See Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

145. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 412 (1978) (Stevens, J., dissenting) ("The University also acknowledges that it was, and still is, receiving federal financial assistance."). Naturally, U.C. Davis Medical School did unconsciously discriminate against racial minorities while receiving federal funds because it was a part of institutional racism.

146. When it was implemented in 1973, it focused on applicants who considered themselves "economically or educationally disadvantaged." *Bakke v. Regents of the Univ. of Cal.* 553 P.2d 1152, 1156 (Cal. 1976).

147. See *Bakke*, 438 U.S. at 275.

The dearth of minority students in medical schools generally resulted from the schools' heavy reliance on the Medical College Aptitude Test ("MCAT"), which minority students performed poorly on compared to most White students.¹⁴⁸ The disparity in scores between Whites and minority students was a reflection of cultural bias on the exam, particularly at that time when segregation continued to be preferred by most of White society. Some people, especially Whites, have difficulty imagining what cultural bias means in the context of applicants seeking admission to Davis based on a standardized exam they all had to take, because this seems fair. However, imagine what the exam represented to Black applicants. The MCAT, particularly at the time of the Davis plan in the late 1960s, was created by educators who had been educated in an all-White, Jim Crow society that was legally and socially unavailable to Blacks. Not only were Black applicants denied access to that space and to the resources to obtain an education equivalent to that available to White applicants, but the White educators who prepared and administered the exam also had no knowledge of Black culture and history, which was not included on the exam. This resulted in a double disadvantage for the Black applicants: they were not acquainted with many aspects of White culture tested on the exam, and the examiners were not acquainted with any aspects of Black culture, which consequently could not be tested on the exam.¹⁴⁹

To compensate for this unfairness in the admissions selection process, Davis' policy set aside 16 of 100 seats in its 1973 entering class for self-identified applicants who were "economically and/or educationally disadvantaged."¹⁵⁰ In 1974, the school changed the set-aside application form to conform to the one prescribed by the American Medical College Application Service and allowed students to self-identify based on their race or ethnicity, not on their "disadvantage."¹⁵¹ Applicants who were identified as disadvantaged in 1973 or as a racial minority in 1974 were reviewed by a separate admissions committee, which looked more closely at factors other than MCAT scores and grade point averages to evaluate the applicant's aptitude to study medicine.¹⁵² All applicants admitted under the

148. See *id.* at 277 & n.7; see also *id.* at 377 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part); *Bakke*, 553 P.2d at 1184 (Tobriner, J., dissenting).

149. See *Bakke*, 553 P.2d at 1169; see also *id.* at 1186 (Tobriner, J., dissenting). Professors Susan Sturm and Lani Guinier have gathered the research data and provided a critical analysis of the problems with reliance on standardized exams in establishing merit in a recent article. See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996).

150. *Bakke*, 438 U.S. at 274-75.

151. See *Bakke*, 553 P.2d at 1156 & n.3.

152. See *id.* at 1158-59.

program from 1969 through 1974 were racial minorities.¹⁵³ In this way, U.C. Davis' affirmative action policy was highly successful at achieving its primary goal of "promot[ing] diversity."¹⁵⁴ Stated alternatively, U.C. Davis successfully created shared racial space by annually admitting at least 16 economically or educationally disadvantaged students during those years.

U.C. Davis Medical School was like every other public medical school that suffered from a noticeable absence or dearth of minority applicants in their classes in the early 1970s. After all, it was not until the late 1960s that *Brown* began to be fully (even if involuntarily) appreciated, and it was only in 1974 that President Nixon renewed President Johnson's Executive Order governing affirmative action in government contracts.¹⁵⁵ Davis' plan seemed in keeping with growing efforts around the country to end the remnants of Jim Crow segregation and to take serious, affirmative steps toward racial equality. Significantly, the Davis plan was an effort to create shared racial space at the Medical School consistent with the growing goodwill many Whites felt toward racial minorities or wanted to adopt as part of their self-images as non-racists and supporters of racial equality.

4. *Mr. Bakke's Suit*

In 1973 and 1974, as Davis functioned under its affirmative action policy, a White man named Allan Bakke applied to Davis and other medical schools to become a doctor.¹⁵⁶ He did not self-identify as economically disadvantaged or as a racial minority either year.¹⁵⁷ At Davis, Mr. Bakke faced keen competition for the 84 "regular" spaces; in 1973, 2,644 persons applied and in 1974, 3,737 persons applied.¹⁵⁸ Mr. Bakke, along with 814 applicants in 1973 and 462 applicants in 1974, qualified for an interview with Davis officials based on his MCATs and his undergraduate grade point average.¹⁵⁹ Getting the interview, however, did not and could not guarantee acceptance because the school only had 100 seats available each year. Logically, the interview played a key role in determining who would be admitted to the school.

Mr. Bakke was not admitted to Davis or placed on the waiting list ei-

153. See *id.* at 1157.

154. See *id.* at 1155 (The University's "purposes of the special program were to promote diversity in the student body and the medical profession and to expand medical education opportunities to persons from economically or educationally disadvantaged backgrounds.").

155. See Exec. Order No. 11,246, 3 C.F.R. 301 (1964-1965), reprinted in 42 U.S.C. § 2000e app. at 538-41 (1994), amended by Exec. Order No. 12,086, 3 C.F.R. 230 (1979), reprinted in 42 U.S.C. § 2000e app. at 543-45 (1994).

156. See *Bakke*, 553 P.2d at 1155.

157. See *id.*

158. See *id.* at 1157.

159. See *id.*

ther year.¹⁶⁰ Admissions processes are competitive and the evaluations of applicants are necessarily relative. The question faced by the admissions committee at Davis, then, was not whether Mr. Bakke was academically impressive in some *absolute* way, but rather, the question the committee asked was whether he was among the most academically impressive candidates in light of multiple factors, including at least his MCAT scores, his undergraduate grade point average, and his interviews. If the school had relied only on MCATs and GPAs to admit applicants, the admissions committee may (or may not) have concluded that Mr. Bakke should have been admitted. Because the school relied on additional criteria, the committee concluded Mr. Bakke was not as academically impressive as the admitted candidates.

Understandably, getting rejected from Davis would upset most people, especially most people with a strong academic record like Mr. Bakke's. Although, Mr. Bakke's determination to become a doctor was admirable, unfortunately, he decided to try to gain admission to Davis by establishing the illegality of Davis' set-aside policy in a lawsuit. His suit was premised on his exclusion from consideration for the 16 spaces set-aside for disadvantaged students in 1973 and racial minorities in 1974,¹⁶¹ a policy he alleged promoted "reverse discrimination."¹⁶² Under this theory, he asserted that because the government could not discriminate against Blacks based on their race, then neither could it discriminate against him based on his race.¹⁶³ Stated alternatively, Mr. Bakke claimed that the admissions policy had to be color-blind to avoid race discrimination, an important value to people of goodwill.¹⁶⁴ This perspective has become increasingly more popular during the last thirty years among White people of goodwill.

It is common knowledge that the Supreme Court upheld Mr. Bakke's challenge,¹⁶⁵ and it is adequate to briefly review the Court's rationale. First, the Court built upon the principle that Mr. Bakke was an "innocent

160. See *id.* at 1155.

161. See *id.* at 1169.

162. See *id.*

163. See *id.* at 1155.

164. For the significance of "color-blind" rhetoric in U.S. Constitutional jurisprudence, see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

165. It remains unclear on what basis the Supreme Court ruled in favor of Bakke. In an opinion authored by Justice Stevens, four justices, including Chief Justice Burger and Justices Stewart and Rehnquist, opined that the admission plan violated Title VI and therefore did not reach the constitutional issue. See *Bakke*, 438 U.S. at 417-18 (Stevens, J., concurring in part and dissenting in part). However, Justices Brennan, White, Marshall, and Blackmun concluded that the admission plan complied both with Title VI and with the Constitution. See *id.* at 324-26 (Brennan, White, Marshall & Blackmun, J.J., concurring in part and dissenting in part). Justice Powell, announcing the judgment of the Court, interpreted Title VI "to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* at 287.

victim" in the struggle to achieve racial equality at Davis.¹⁶⁶ Consequently, the Court held it would be unfair to impose on him the burden of helping to racially diversify the medical school by making him ineligible to compete for the 16 seats set aside for minority applicants.¹⁶⁷ The Court acknowledged that public colleges and universities constitutionally can strive to achieve "diversity," but the Court also admonished that diversity must be defined more broadly to include characteristics other than race.¹⁶⁸ For example, the Court opined that it would be constitutional for admissions officials to factor in the attractiveness of an applicant based on his or her geographical residence, athletic ability, or musical talent.¹⁶⁹

Mr. Bakke's lawsuit reflects an attitude held by many White applicants to public universities even today.¹⁷⁰ A controversial example is provided by Ms. Cheryl Hopwood, a White applicant who was rejected from the University of Texas Law School in 1992.¹⁷¹ The basis for her lawsuit mirrored that of Bakke's; she had higher scores than those Blacks and Mexican-Americans who were admitted under an affirmative action program.¹⁷² *Hopwood* is controversial because the Fifth Circuit held, contra to *Bakke*, that it was unconstitutional for the University of Texas to consider race in admissions for the purpose of diversifying its class.¹⁷³

Operating on the assumption that Mr. Bakke and Ms. Hopwood are people of goodwill, a closer look at their lawsuits provides an opportunity to understand why goodwill is not enough to achieve racial equality. Indeed, their cases show how goodwill allows Whites to act in ways that seem in keeping with racial equality, but which impose significant if not impossible barriers to the creation and existence of shared racial space.

B. *Struggling with the Tension Between White Goodwill and White Privilege*

As discussed above, in the 1960s White society began to appreciate

166. See *id.* at 298.

167. See *id.* at 319.

168. See *id.* at 315.

169. See *id.* at 316-18.

170. Contrast the *Bakke* Court's opinion with a more recent case mandating the desegregation of public schools, see *Sheff v. O'Neill*, 238 Conn. 1, 678 A.2d 1267 (1995). For an analysis of *Sheff*, see Mary Jane Lee, *How Sheff Revives Brown: Reconsidering Desegregation's Role in Creating Equal Educational Opportunity*, 74 N.Y.U. L. REV. 485 (1999).

171. See *Hopwood v. Texas*, 78 F.3d 932, 938 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

172. See *id.* at 936-38.

173. See *id.* at 945-46. The court justified its departure from *Bakke* on this issue by explaining that only Justice Powell had upheld the use of diversity in *Bakke*, see *id.* at 944, and that in later cases, such as *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990), *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226-27 (1995), the Supreme Court failed to support diversity as a compelling rationale to justify affirmative action programs. See *id.* at 944-45.

the need to act affirmatively to share racial space with Blacks and other people of color. Over the years, White society has not lost its goodwill toward Blacks, but it has used its goodwill persona to deny the reality of continuing racial inequality as evidenced by the persistent existence of predominantly, if not exclusively, White spaces in most public arenas at the privileged end of the socio-economic hierarchy. Since the 1960s, the minds of many goodwill Whites who consciously support racial equality are often the *same minds* that suffer from White denial and oppose affirmative action. Yet Whites who feel this way experience little, if any, dissonance because most of them do not appreciate or even fully understand the concept of White privilege. In fact, most White people of goodwill probably would say they enjoy no special privileges under the law; they are ordinary people, just like Blacks.

This view does not fully explain *Bakke*, which came at a time when this country had barely begun the effort to achieve racial equality. In this way, it is unbelievable that the Court adopted the theory of "reverse discrimination," which made no sense at the time. Critically, it does not make sense even today. Both Mr. Bakke's and Ms. Hopwood's cases show how insidiously White privilege operates, which is not always easy to see or to explain, and the help of Professor Berta Hernandez-Truyol deserves mention. I thank her and proceed with caution.

Specifically, critical facts in *Bakke* and *Hopwood* were not highlighted by the plaintiffs or the courts, but when brought out, they expose the (unconscious) racism in both decisions. For example, much is made of the fact that Mr. Bakke's MCATs and GPA were higher than the racial minorities who were admitted. Indeed, this is the crux of his lawsuit. However, little is made of the fact that Mr. Bakke's MCAT scores also were higher than the scores of many White applicants who were admitted. It is hard to discern exactly how many Whites with lower scores were admitted over Mr. Bakke, but it is fair to conclude that it was a significant number given that Mr. Bakke's Verbal, Quantitative, Science and General Information scores on the MCAT were 15, 18, 14 and 3 points higher, respectively, than the average scores for all of the White applicants who were admitted in 1973.¹⁷⁴ His scores in 1974 were also significantly higher than the average scores of the admitted Whites.¹⁷⁵

Similarly, Ms. Hopwood stressed in her suit only that racial minorities with lower scores than hers had been admitted.¹⁷⁶ Like Mr. Bakke, she did not challenge as unfair or as illegal the admission of White applicants with

174. See *Bakke*, 438 U.S. at 277 n.7.

175. See *id.* at 278 n.7. The one exception was his score on General Information. His score of 72 was also the average score for the Whites who were admitted. See *id.*

176. See *Hopwood v. Texas*, 861 F. Supp. 551, 553 (W.D. Tex 1994).

lower scores than hers, of which there were over 100.¹⁷⁷ Admittedly, the only practical basis for a legal challenge to the affirmative action policies at Davis and Texas was race, which may explain why Mr. Bakke and Ms. Hopwood did not make much of the facts that White applicants with lower scores also were admitted over them. It is worth highlighting, however, that both Mr. Bakke's and Ms. Hopwood's arguments against the affirmative action policies were based on how unfair it was for the admissions officials to reject them because their scores were higher than the admitted racial minorities, without also alleging the unfairness of admitting Whites with lower scores. If scores were the crux of the matter (assuming no bias concerns), then unfairness rightfully was the name of the game and Mr. Bakke and Ms. Hopwood should have challenged the admission of Whites with lower scores as well. If scores were not the crux of the matter, as they obviously were not, then (unconscious) racism wrongfully was the name of the game and Mr. Bakke and Ms. Hopwood should not have challenged the admission of the racial minorities. Regardless of which version of the game was played, however, notice how White privilege operated.

In the unfairness version, White privilege protected Whites with lower scores from being challenged by the plaintiffs. The lower scoring Whites also were spared the "stigma" of being admitted with lesser qualifications compared to the plaintiffs. In short, White privilege insulated the lower scoring Whites from ever being perceived as "unqualified" and from any questions about their rightful place at the table.

In contrast, the plaintiffs in the (unconscious) racism version were protected by *their* Whiteness. Specifically, the White plaintiffs with higher scores had their rejections nullified solely because some racial minorities, but not numerous Whites, with lower scores were admitted. In this version, the admitted racial minorities' qualifications were successfully challenged. Their lower scores compared to the plaintiffs were central to both courts' conclusions that race had been used to disadvantage the plaintiffs. That the courts did not consider the lower scores of Whites who were admitted, effectively calls the real question regarding the relevance, let alone centrality, of race.

A failure to understand White privilege makes it easier for White denial to thrive. Because Whites ordinarily fail to understand the privilege of Whiteness, they cannot fathom how their anti-affirmative action position promotes racial inequality. As White people of goodwill, they are self-avowed anti-racists. The *Bakke* and *Hopwood* cases highlight how

177. See Strum & Guinier, *supra* note 149, at 962 n.28 (citing to the State of Texas Petition for Certiorari, *Texas v. Hopwood*, 518 U.S. 1033 (1996)).

White people of goodwill (think they) use the rhetoric of equality to protect their status as ordinary people who should be able to compete with racial minorities, also ordinary people, on equal terms.

Interestingly, Mr. Bakke was born in 1940 and grew up in Jim Crow America. I am unable to find accounts of how he felt about de jure segregation. Like most children his age, though, he was indoctrinated during his young life with the most vivid precepts of White superiority and Black inferiority, including segregated public spaces for Whites and Blacks. By the time he applied to medical school, affirmative action threatened (perhaps unconsciously) the "natural order" he had grown up to believe in.

Given what Mr. Bakke and the rest of America had been taught about race from society's lessons of slavery and Jim Crow, it is not surprising that he, many other Whites, and some of the White Justices, felt White applicants to U.C. Davis Medical School were "victimized" by race-based affirmative action. Mr. Bakke and all of his supporters, presumably people of goodwill, did not think of themselves as promoting or condoning racial inequality. Consequently, because Mr. Bakke believed he had not done anything to cause or support the racial segregation at Davis, he felt it would be unfair to force him to participate in remedial efforts to create space for racial minorities in the school.

This perspective promotes a disjunction between affirmative action and racial equality, yet both concepts require the existence of shared racial space. The disjunction arises because individual and institutional racism are not seen as related.¹⁷⁸ Moreover, if the connection was not made by Whites of goodwill who witnessed Jim Crow, one should not be surprised that the connection probably escapes Whites in Ms. Hopwood's generation because that generation believes racism is history and that racial equality is already here. Moreover, the general failure to connect individual and institutional racism is evidenced by an overly narrow focus on what the facts in *Bakke* and *Hopwood* show to be a false sense of entitlement that then is discussed as individual racism by opponents of affirmative action, as though institutional racism were irrelevant in that context. Similarly, a narrow focus on institutional racism in the broader context of racial equality fails to acknowledge how individual White denial promotes institutional racism.

Recall that in the world of goodwill, the two forms of racism are per-

178. For further discussion on the difference between diversity and affirmative action, see Arnold H. Loewy, *Taking Bakke Seriously: Distinguishing Diversity from Affirmative Action in the Law School Admissions Process*, 77 N.C. L. REV. 1479 (1999). See also Lino A. Graglia, *Professor Loewy's "Diversity" Defense of Racial Preference: Defining Discrimination Away*, 77 N.C. L. REV. 1505 (1999). For a discussion of the difference between diversity and equality, see Sharon Elizabeth Rush, *Diversity: The Red Herring of Equal Protection*, 6 AM. U. J. GENDER & L. 43 (1997).

manently linked so long as individual racism is manifested in an individual's unconscious support of institutional racism. Simultaneously, it is difficult for goodwill Whites like Mr. Bakke and Ms. Hopwood to comprehend how their White privilege promotes institutional racism because this is a difficult lesson, as my experiences as a mother highlight. The lesson is especially elusive because of the persistent denial by White society that any individual White person of goodwill supports racism in any form.

In this way, everyone could concede that Mr. Bakke was not guilty of race discrimination at Davis, but it would only be in this context that declaring him "innocent," as the Court did,¹⁷⁹ makes any sense. Moreover, the Court's holding that he is an innocent victim is doubly problematic. First, it implies that *someone* else, not *something* else like White society's historical institutional support of Black subordination through slavery and Jim Crow, is responsible for the exclusion of minorities at Davis. Making rejected White applicants the "innocent victims" of affirmative action policies concomitantly makes the minority applicants the "guilty perpetrators" of an admissions policy Whites, like Ms. Hopwood, call unfair today.

Moreover, the *Bakke* Court's focus on individuals was anything but balanced and equal. For example, the Court's express use of the term "innocent" in relation to Whites and its implied juxtaposition of "guilty" in relation to racial minorities is itself racist: it feeds the stereotype of people of color, especially Blacks, as criminal. Certainly by returning sixteen spaces to the White competition pile, and thereby almost guaranteeing that minority applicants would continue to be excluded from Davis so long as the MCAT continued to be biased, the minority students were in effect "punished" as if they were guilty for Davis officials' efforts to create shared racial space. Because the focus in *Bakke* was always on individual White innocence, the connection between individual racism and institutional racism was ignored. Twenty-five years later, this ignorance made it that much easier for Ms. Hopwood to dismantle the University of Texas Law School's affirmative action policy.

To summarize, less than fifteen years after White society actively began to move toward racial equality as evidenced by passage of the Civil Rights Act, the gradual creation of shared racial space in public schools, and the implementation of affirmative action in the public sector under Executive Order 11246, White society's (unconscious) racism was beginning to show. Efforts to remedy institutional racism have become lost in White society's insistence that individual racism is no longer a problem,

179. See *Bakke*, 438 U.S. at 298 (referring to Bakke as an "innocent person").

meaning racism is no longer a problem. White denial and White privilege are powerful barriers to racial equality, and both are camouflaged by White goodwill.

Thus, repealing affirmative action programs sends a message to Blacks that they are expected to cope with their continued exclusion from many empowering positions in society that historically and currently are held by Whites. In other words, anti-affirmative action proponents expect Blacks to accept their unequal citizenship status even though racism is pervasive. This places the entire burden of managing racial anger on Blacks. A person of goodwill who condones placing the entire burden of coping with racism on Blacks loses part of her self-identity. Additionally, this perspective on how to manage racial anger is a misguided and narrow solution to systemic problems at odds with the values of shared racial space and equality. Yet these are important values to people of goodwill. One way to break the cycle of denial, skepticism, and anger is for Whites to acknowledge that they benefit from White privilege, and to refuse to take advantage of their privileged access to public spaces and allow for the existence of shared racial space. Whites can promote equality by taking advantage of opportunities such as those offered by affirmative action to create shared racial space.

IV. BEYOND GOODWILL: REFUSING PRIVILEGE AND SHARING SPACE

Consider how long it would take for . . . a culture to be obliterated if members of the group were seized, carried to another place, with no records of its former learning, with its language killed, and with its family structure destroyed by separating children from parents. How long would it be before all the cultural strength of that group, acquired and maintained perhaps for thousands of years, was crushed and replaced by its opposite? Two generations, three, four? America still pays for the crimes of slavery. We may never stop paying for them. We never ought to, until the day comes when black children have the same opportunities that others have. Affirmative action is no cure-all. It is only a small effort to do some good.¹⁸⁰

A. *Generally*

Many Whites think abolishing affirmative action will restore peace and peace is attractive in a racially troubled society. Abolishing affirma-

180. Jeb Rubenfeld, *Affirmative Action*, 107 YALE L. J. 427, 471 (1997).

tive action, however, comes at a price that America is not yet able to pay. For example, California recently outlawed affirmative action and within a year, the number of racial minorities in its university system radically dropped. Specifically, the University's Class of 2002 admitted 8,000 students to Berkeley, including 191 Blacks (down from 562 the previous year).¹⁸¹ Berkeley accepted 852 Hispanic students, down from 1,411 the previous year.¹⁸² UCLA accepted 11,000 students: 280 Blacks (down from 488 the previous year) and 1,001 Hispanics (down from 1,497 the previous year).¹⁸³

The picture is even bleaker in California's public law schools. Boalt Law School accepted 14 Black students (out of 792), an 80% drop from the previous year.¹⁸⁴ All fourteen acceptees decided to go elsewhere.¹⁸⁵ UCLA adopted an "economic disadvantage" approach to admissions after Proposition 209, but its Black enrollment also dropped 80%.¹⁸⁶ Michael Rappaport, Dean of Admissions at UCLA stated, "The problem is that [the new focus on economic disadvantage] did not work well in that we will have a class that is not nearly as racially balanced as we had in the past."¹⁸⁷ As critics of such a class based admissions program had predicted "[i]n absolute numbers, there are many more economically disadvantaged white students than blacks."¹⁸⁸ This is consistent with Professor Deborah Malamud's evaluation of substituting economic for race-based affirmative action.¹⁸⁹ Similar patterns arise in other states that mandate color-blind admissions in public colleges and universities as well.¹⁹⁰

California officials quickly realized that abolishing affirmative action left an unwanted void in their educational environments, as evidenced by officials future actions to try to undo the harm. Ironically, now state officials are seeking ways to overcome the harsh effects of the ban because their public educational institutions are suffering from the lack of quality the African-American students brought to their environments.¹⁹¹ Perhaps

181. See Richard Reeves, *Baby Boomers Betray Their Younger Selves*, DENV. POST, April 13, 1998, at B11, available in LEXIS, News Library, Dpost File.

182. See *id.*

183. See *id.*

184. See Freedberg, *supra* note 127.

185. See *id.*

186. See *id.*

187. *Id.*

188. *Id.*

189. See Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 465 (1997) ("[O]ne must remember that minorities are *minorities*: there are more white poor people than black and Latino poor people, even though white poverty rates are lower than black and Latino poverty rates. Most of the poverty-based affirmative action slots will go to whites, by simple force of numbers.") (footnote omitted).

190. See Rowan, *supra* note 128.

191. See *id.*

this confession by state officials can help put to rest the popular notion that affirmative action is about lowering standards. Other positive lessons can be learned from California's premature abolishment of affirmative action. Perhaps the greatest cost of retreating from affirmative action is symbolic; the retreat sends a message to Blacks that White America is giving up on racial equality. This message is particularly harsh because White America has not offered alternative programs that will promote racial equality. The abolishment of affirmative action without a commitment to ending institutional racism may be the ultimate expression of White denial—the ultimate “throwing in the towel.” Understandably, then, Black America hangs on to America's symbolic commitment to racial equality through affirmative action because it offers hope, if little else, that the problem of institutional racism will remain at the forefront of American politics.

California's “failure” at abolishing affirmative action and maintaining a significant number of Black and Hispanic students in its public colleges and universities keeps racial equality in the news. It is a reminder that America must continue to struggle to achieve racial equality. Although affirmative action may not be the best solution to the problem of persistent racial inequality, abolishing it also is not the solution. Perhaps California's experience following Proposition 209 and the abolishment of affirmative action may be a catalyst to snap goodwill Whites out of their denial about racism. In turn, Black skepticism and racial anger will diminish. The need for affirmative action in every sense of the term can become the order of the day. Much needs to be done, and as bell hooks states, racial groups need to work together:

It is our collective responsibility as people of color and as white people who are committed to ending white supremacy to help one another. It is our collective responsibility to educate for critical consciousness. If I commit myself politically to black liberation struggle, to the struggle to end white supremacy, I am not making a commitment to working only for and with black people; I must engage in struggle with all willing comrades to strengthen our awareness and our resistance.¹⁹²

Presumably, if White people of goodwill understood how their anti-affirmative action rhetoric is racist, they would be unable to oppose affirmative action. In other words, they no longer could rely on the privilege of Whiteness in the allocation of public spaces. The following section explores this in detail.

192. HOOKS, *supra* note 4, at 194 (citing GEORGE BREITMAN, *THE LAST YEAR OF MALCOLM X- THE EVOLUTION OF A REVOLUTIONARY* (1967); MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965)).

B. *Exposing the Racism in Anti-Affirmative Action Rhetoric*

The rhetoric associated with affirmative action reflects opponents' efforts to shame potential beneficiaries into rejecting affirmative action. Specifically, opponents of affirmative action focus on two key aspects of the debate to persuade potential beneficiaries that it is shameful to support the programs. First, affirmative action has become synonymous with "lowering standards," and second, beneficiaries are admonished that participating in affirmative action programs "stigmatizes" them. Yale law professor, Stephen Carter, capitulates to these arguments in his book *Reflections of an Affirmative Action Baby*,¹⁹³ and rightfully has been criticized by other Black scholars.¹⁹⁴

1. *The "Lowers Standards" Position*

The "lowering standards" position of affirmative action opponents originated with the *Bakke* Court's sanctioning the unique importance of standardized test scores to measure aptitude.¹⁹⁵ Emphasizing standardized test scores as the perfect measurement of aptitude fails to acknowledge many legitimate and alternative ways it can be measured. Historically, scientists' measurements of intelligence focused primarily on math and verbal skills. Standardized exams, like I.Q. tests and the MCAT, measure these skills. In the 1980s, psychologist Howard Gardner of Harvard introduced the concept of "multiple intelligences,"¹⁹⁶ suggesting that math and verbal acuity play a limited role in measuring intelligence. Dr. Gardner's study led him to conclude that there are multiple ways to measure intelligence, including an assessment of an individual's spatial capacity, kinesthetic genius, musical gifts, and interpersonal skills.¹⁹⁷

At the time of Mr. Bakke's application to Davis, admissions officials were not aware of the undiscovered concept of multiple intelligences. Nevertheless, personal interviews always have served the purpose of highlighting qualities about an applicant that cannot be tested on an exam. In the context of a medical school interviewing process, it is impossible to conclude that White applicants who are interviewed and rejected are more qualified than minority applicants who are interviewed and accepted un-

193. STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991).

194. See Charles E. Daye, *On Blackberry Picking, Generations of Affirmative Action, and Less Dangerous Enterprises: An Open Letter to Stephen Carter*, 45 STAN. L. REV. 485 (1993) (reviewing Carter, *supra* note 193).

195. See *supra* notes 170-171 and accompanying text.

196. See DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* 38 (1995) (explaining the findings of Howard Gardner's study). I explore this in more detail in my article, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 21-24 (1997).

197. See Rush, *supra* note 196, at 22 (citing GOLEMAN, *supra* note 196).

less the interview is irrelevant. It is illogical to suppose that if aptitude for medicine could only be measured by MCAT scores and GPAs that medical schools would incur the expense of and invest enormous time in an irrelevant process. Quite the contrary: the interview is an essential part of the process and can be given as much weight as officials want to give it.

Admittedly, factoring in an applicant's race is more complicated. The *Bakke* Court held, in fact, that admitting someone based on race violates equality principles.¹⁹⁸ Simultaneously, the Court held that race could be a factor among many in public school admissions processes.¹⁹⁹ Recall that the Fifth Circuit in *Hopwood* rejected this principle.²⁰⁰

Admissions officials at public schools generally do not rely solely on numbers to select classes because even the numbers are not comparable from one applicant to the next. Personal statements, letters of recommendation, descriptions of work experiences, and information about disciplinary actions or criminal records are also solicited from applicants. Given this, there is nothing startling about a school's rejection of a White applicant with higher scores than applicants who are admitted. Nor should there be anything startling about a school's acceptance of a racial minority applicant with lower test scores. Yet not only is the latter situation startling to White society, but it also is legally suspicious if the school has an affirmative action policy.

This raises serious questions: Why would additional information be solicited from applicants if it were going to be ignored because only scores and grades mattered? More puzzling, why would reliance on additional information reflect a lowering of standards at all, and why is this conclusion reached *only with respect to racial minority applicants, but not White applicants, who are admitted with lower scores*? Not only is it illogical to assume the additional information is solicited so it can be ignored, but it also is racist to assume the additional information is irrelevant only for racial minority applicants.

2. *The "Stigma" Position*

Closely related, opponents (and even some supporters²⁰¹) of affirmative action also posit that participation in such programs stigmatizes the beneficiaries. They suggest that beneficiaries would not have been ad-

198. See *University of California Regents v. Bakke*, 438 U.S. 265 (1978). See *supra* note 165 for analysis of how the Justices voted. Cases since *Bakke* have concluded that policies that make race a determining factor in admissions decisions in public schools offend the Constitution's guarantee of equal protection. See *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998).

199. See *id.*

200. See *supra* notes 171-173 and accompanying text.

201. See Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. Rev. 1745, 1772 (1996).

mitted to programs if they had belonged to majority groups. This criticism is usually cast in the pejorative way. Opponents of affirmative action suggest that the *only* reason a state program accepts a minority candidate is because of the candidate's race, suggesting the candidate was not *even remotely qualified*. Again, this ignores the complexities inherent in making admissions decisions. Officials and employers look for multiple qualifying characteristics of candidates and given the tough competition for placement in colleges and universities, it defies logic to suppose that admissions officials admit unqualified minority applicants. As long as applicants are selected from the pool of qualified applicants, it is dishonest to suggest that *only* race mattered in the decision.

Moreover, from the beneficiaries' perspectives, the stigma argument is disingenuous. But suppose it were true; that being an affirmative action beneficiary is stigmatizing. It would be equally true, however, that belonging to a group of people who are rarely, if ever, admitted into certain state programs also is stigmatizing. The absence of Blacks and other people of color in many public spaces often seems to be interpreted by Whites as proof that the racial minorities are unqualified to occupy those spaces. In this way, beneficiaries of affirmative action can accept offers to hold public spaces and prove White society wrong, or they can refuse such offers, let the spaces stay all White, and let White society continue to believe Blacks and people of color do not belong in public space. Between these choices, clearly shared racial space is the only choice.

But the "lowering standards" and "stigma" arguments are even more disturbing than simply being disingenuous. They are rhetorical arguments created by White society to manipulate Blacks into rejecting affirmative action by making them feel ashamed to be affirmative action beneficiaries. Shame is a powerful psychological tool invoked by the "shamer" to dishonor or disgrace the "shamee." For example, governments use "shame" to strip people, usually criminals, of their human dignity by publicly humiliating them for their criminal behavior.²⁰² Many scholars debate whether it is "cruel" or otherwise morally appropriate to use "shame" as a method of punishing criminals, which varies in different cultures.²⁰³

Invoking shame in the affirmative action context should also cause concern and its use be even more questionable than it is in the criminal context. When opponents of affirmative action equate it with "lower standards," the Black beneficiary (the shamee) often retreats into a state of

202. See generally James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998) (discussing examples of shame sanctions).

203. See *id.* See also Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) (arguing for shame sanctions); Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880 (1991) (arguing against shame sanctions).

self-doubt and embarrassment, while simultaneously the (usually White) opponent (the shamer) is exalted in intelligence and ability. The shamer is "above" the need for help and would never stoop to the low level of the shamee. Justice Clarence Thomas, for example, has shamefully noted that "[s]o-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence" and that affirmative action "stamp[s] minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."²⁰⁴ In essence, Justice Thomas believes he succeeded without any help from affirmative action²⁰⁵ and is puzzled that other Blacks cannot be as successful as he. In translation, the Black beneficiary is supposed to avoid the shame of affirmative action by not accepting the offer, or even better, by supporting the abolishment of affirmative action that resulted in the candidate's offer to occupy space that historically had been reserved for Whites.

From a different perspective, however, it is not shameful to support and participate in programs that counteract a profound history of Black subordination, reflected in the power of White privilege to this day. Affirmative action merely helps to balance the scales that are so heavily weighted in favor of Whites. White people of goodwill who understand this naturally would insist on the removal of the White thumb of privilege on the scales of justice. Moreover, while there is no shame in being a victim of persistent racial subordination, Professor bell hooks also admonishes that situating Black identity only in victimization denies agency.²⁰⁶ Denouncing the shaming rhetoric of affirmative action, making White society confront the reality of racial inequality, and demanding that White society confront its racism are empowering acts that manifest Black agency.

Thus, affirmative action is stigmatizing only because Whites say it is. Through the "lowering standards" and "stigma" shaming arguments, opponents of affirmative action lay a trap for the unwary person, Black or White. This is how the opponents of affirmative action have persuaded goodwill Whites and even some Blacks, like Stephen Carter, Justice

204. *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

205. It is unlikely that Justice Thomas has succeeded without any help from affirmative action. Most people would agree that when President Bush appointed Justice Thomas to replace the first and only other Black ever to serve on the Supreme Court (Justice Thurgood Marshall), that even Bush, a Republican rhetorically opposed to affirmative action, was likely influenced by an affirmative decision to continue Black representation on the Court. See Sharon E. Rush, *Understanding Affirmative Action: One Feminist's Perspective*, in *AN ETHICAL EDUCATION: COMMUNITY AND MORALITY IN THE MULTICULTURAL UNIVERSITY* 195, 225 n.87 (M.N.S. Sellers, ed. 1994).

206. See HOOKS, *supra* note 4, at 58.

Clarence Thomas, Shelby Steele,²⁰⁷ and Ward Connerly,²⁰⁸ to mention a few, to join the team.

Most Blacks resist these rhetorical "put downs," which can be characterized as modern support for the historical precept of Black inferiority. Nevertheless, simply having to counter this increasingly popular view of affirmative action is demoralizing. Anyone who is constantly and publicly "put down" suffers emotionally and justifiably resents being placed in a compromising position between self-affirmation and self-doubt.

White people of goodwill, naturally, would not condone this shaming rhetoric if they understood it was a mask for the "Black inferiority" theory. For this reason, more concern should be given to its impact on Black children and whether it harms them in ways similar to types of emotional abuse. In fact, the anti-affirmative action position of many White people of goodwill is premised on a paternalistic need to warn Blacks of the stigma associated with affirmative action. In their paternalistic way, goodwill Whites do not want Blacks to suffer the indignity of affirmative action stigma which would not be possible if affirmative action were abolished. However, on realizing that it is they who promote the stigma and inflict the shame and pain, they also must realize that to continue to do it makes them co-conspirators with the "real" racists who unabashedly promote White Supremacy. The only way to avoid this disjunction is to stop promoting these arguments and to start exposing the racism in them.

C. *Exposing the Racism in Affirmative Action Challenges*

White people of goodwill, by definition, are not (consciously) racist and are not individually responsible for racism. Above, we explored how this promotes White denial and translates into a general passivity by goodwill Whites on race issues, except in situations where they think color-blindness is violated.²⁰⁹

Generally, the law does not impose a duty on individuals to help end racism or even to refrain from discrimination on the basis of race.²¹⁰ The

207. See SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (1990).

208. Ward Connerly is the author of Proposition 209 banning affirmative action in California public schools' admissions and is trying to do the same in other states, including Florida. See David Nitkin, *Bush Opposes Vote on Affirmative Action: Ward Connerly is Considering a Ballot Initiative in Florida Similar to California's Proposition 209*, THE ORLANDO SENTINEL, Jan. 22, 1999 at D4.

209. See *supra* Part IIA.

210. Two important exceptions are the employment and public accommodations laws. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

law imposes this duty only on the government, or on certain individuals who engage in specific types of commerce.²¹¹ Nevertheless, White individuals can play significant roles in shaping the future of race relations. For example, as we just explored, a decision to expose the racism in the rhetoric of anti-affirmative action debates reflects a deeper appreciation of the whole dynamic of institutional racism. This also is some evidence that parts of White society are moving beyond denial, which makes Blacks less skeptical, and removes one "anger" issue from public discourse.

Another significant step Whites can take to help society achieve more formal racial equality is to oppose efforts to abolish affirmative action through propositions, constitutional amendments, and court challenges. Recall that affirmative action was created because of the growing dissonance between White privilege and Black subordination. Because Black subordination is no longer a problem in White society's eyes, White society now wants to eliminate tension between its goodwill and its (unconscious) White privilege. Consequently, the sentiment for *Bakke*-type suits like Ms. Hopwood's, and propositions like California's Proposition 209²¹² has only grown since the 1970s.

It is possible to argue that affirmative action policies are fair or unfair depending on one's perspective.²¹³ Mr. Bakke and Ms. Hopwood probably sincerely believed they had been treated unfairly by Davis and Texas, respectively. As Professor Rubinfeld reminds us, law is only partly about fairness and particular decisions may be fair only to parts of society.²¹⁴ Given this reality, the Fourteenth Amendment's equal protection guarantee, at a minimum, would seem to require that Whites share equally in

42 U.S.C. § 2000a(a): "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."

211. For an insightful discussion of the state action doctrine, see generally Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985).

212. California Proposition 209 amended the California Constitution to prohibit the use of race-based and gender-based affirmative action programs in public employment, public education, and public contracting. See CAL. CONST., art. 1, § 31.

213. See Rubinfeld, *supra* note 180, at 456:

Affirmative action surely is unfair to whites, sharply and deeply so. But there is a peculiar notion at work in the conventional moral case for and against affirmative action's constitutionality. Those who argue that affirmative action is unfair and therefore unconstitutional—or moral and therefore constitutional—seem to think the rest of the legal system would not have to be radically overhauled if constitutional law condemned all governmental unfairness.

Cf. Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1342 (exploring role of "virtue" in "rescu[ing] the meaning of [B]lack citizenship from the deformed characterizations of American law found in cases such as *Dred Scott* and *Plessy v. Ferguson*") (footnotes omitted).

214. See Rubinfeld, *supra* note 180, at 456 ("Our society is massively unfair. . . . But constitutional law is not moral philosophy, and unfairness is not unconstitutionality.").

bearing some of the unfairness.

At present, society operates largely on the unstated assumption that White privilege is the "fairness" standard. It may be that the *Bakke* Court was not ready to handle the intellectual challenge posed by "benign" race cases, which came at a time when the Court had struggled and struggled with dismantling racial segregation. For example, the Justices failed to agree on the basic question of the level of review that applies in benign race cases.²¹⁵ Indeed, the Court debated this issue until 1995 when it held that strict scrutiny applies in all race cases.²¹⁶

An evaluation of Davis' policy reveals that the medical school was not interested in denying admission to qualified White applicants, but rather the school was interested in increasing the likelihood that historically excluded and qualified minority applicants were admitted. The Court's failure to acknowledge this significant difference resulted in "backward" reasoning as evidenced in hindsight by the Court's 1992 decision in *United States v. Fordice*.²¹⁷

In *Fordice*, the Court held it was unconstitutional for Mississippi public colleges and universities to rely exclusively on the American College Testing Program (the "ACT") in their admissions.²¹⁸ When Mississippi adopted the ACT in its admissions policy in 1963, Whites scored an average of 18 and Blacks scored an average of 7 on the exam.²¹⁹ As a result, Blacks were automatically rejected from the predominantly White colleges and universities.²²⁰

Black plaintiffs alleged that exclusive reliance on the ACT discriminated against them because the exams were admittedly biased, which resulted in the colleges remaining unlawfully segregated.²²¹ In fact, the *Fordice* Court emphasized that Mississippi adopted the ACT requirement with the intent of remaining segregated, as its school had been under de jure segregation, because officials knew Blacks scored lower than Whites on it

215. Five justices (Rehnquist, Stevens, Stewart, Chief Justice Burger, and Powell) held the set-aside policy unlawful under Title VI of the Civil Rights Act. See *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 281, 307 n.44 (1978). Chief Justice Burger and Justices Stewart and Rehnquist therefore concluded that they did not need to reach the question of the level of review that applies in benign race cases. See *id.* Four justices (Brennan, White, Marshall, and Blackmun) upheld the policy, applying intermediate scrutiny. See *id.* at 359. Complicating matters, Justice Powell joined with the majority to hold that the analysis under the Fourteenth Amendment and Title VI is identical and held that strict scrutiny should apply. See *id.* at 291 (Powell, J., concurring).

216. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

217. 505 U.S. 717 (1992). See generally Sharon E. Rush, *Beyond Admissions: Racial Equality in Law Schools*, 48 U. FLA. L. REV. 373, 393-94 (1996).

218. See *id.* at 737-38.

219. See *id.* at 734-35.

220. See *id.*

221. See *id.* at 723.

and set a cut-off score accordingly.²²² The Court held that Mississippi's admissions policies violated equal protection and ordered the school to look at other indicia and not only ACT scores to evaluate an applicant's ability to succeed.²²³ By taking other factors into account, the Court was persuaded that the schools would become shared racial spaces.²²⁴

Admittedly, U. C. Davis' admissions policy did not rely exclusively on MCAT scores in making admissions decisions; interviews, among other things, were critically important. Nor is there any suggestion in the record that Davis historically relied on MCAT scores to the extent that it did for the purpose of excluding racial minorities. In this way, *Bakke* is different from *Fordice*, but does or should this difference make them distinguishable as a matter of constitutional law?

Consider the corollaries to these points, which may be more significant in discrimination analysis: Davis looked at other indicia in addition to MCAT scores to assess medical aptitude for all applicants, particularly applicants in the set-aside admissions process. Officials did not do this for the purpose of excluding all White applicants. Nor was this the effect of the set-aside policy because 84 spaces continued to be occupied (reserved for) by Whites. Significantly, Davis relied on multiple qualifying factors in order to create shared racial space, the goal Mississippi was expected to achieve by relying on multiple qualifying factors as ordered by the Court. Ironically, as Davis voluntarily set out to create shared racial space in its medical school in the late 1960s, within five or six years the Supreme Court was on it for treating Whites unfairly. In contrast, Mississippi craftily and disgracefully escaped its obligation under *Brown* to treat Blacks equally, and got away with it well into the 1990s even though its discrimination was intentionally undertaken to keep public colleges and universities involuntarily reserved spaces for Whites only. The court-ordered remedy in *Fordice* was exactly what Davis voluntarily tried to do.

Thus, an essential key to dismantling institutional racism, the heart of *Brown*, is to create ways to shift some of the unfairness of exclusive practices to White society as the *Fordice* Court appreciated. During the immediate demise of Jim Crow, sharing space with Blacks made Whites uncomfortable, but the Justice Department and the Supreme Court held fast—at least until *Bakke* when the Court started to equivocate. Similarly, the Davis plan and other affirmative action programs shift a modest part of the racial inequality burden onto White society by slightly diminishing the privilege of Whiteness. Astoundingly, this makes White people of goodwill angry and leads to charges of unfairness resulting in ballot initiatives

222. See *id.* at 734-35.

223. See *id.* at 737-38.

224. See *id.* at 742.

and lawsuits.

Refraining from bringing and opposing "reverse discrimination" suits can be seen as a step toward becoming a "race traitor," to use Noel Ignatiev's term.²²⁵ Specifically, he encourages anti-racists (people of goodwill) to become active abolitionists and believes White privilege can be undermined if "a minority [of whites is] willing to undertake outrageous acts of provocation, aware that they will incur the opposition of many who might agree with them if they adopted a more moderate approach."²²⁶ It may be that Mr. Ignatiev would think opposing "reverse discrimination" suits is not outrageous enough to constitute treason to White privilege, but imagine what race relations discourse might be without the anti-affirmative action rhetoric and sentiment reinforced in cases like *Hopwood*. If Mr. Bakke and Ms. Hopwood (and other Whites who are rejected from state programs) had not sued, perhaps more racial equality would have been achieved in those and other public schools.

A decision to forego a *Bakke*-type lawsuit²²⁷ or *Bakke*-type initiative reflects a deeper understanding of the dynamics of institutional racism. It bears repeating that this deeper understanding of racism as reflected in White support for affirmative action pierces the veil of White denial, reduces Black skepticism, and breaks the cycle of anger. It gives society room for joint and creative problem solving on race issues, particularly the problem of how to create shared racial space.

D. *Sharing Racial Space: Repudiating Privilege in all Areas*

1. *Generally*

Whites can repudiate privilege by sharing space where people of all races participate as equals. I focus on law school dean searches because I am familiar with the process, but suggest the analysis can be extrapolated to other contexts. The purpose of working through an example is to suggest that the act of repudiating privilege is not always so far-fetched as to be preposterous.

Consider the law school community that has winnowed its dean search to a short list of candidates that includes at least one person of color. Candidates who make the short list are qualified for the position and the final selection typically turns on more subjective criteria like personality

225. Noel Ignatiev & John Garvey, *Editorial: When Does the Unreasonable Act Make Sense?*, in *RACE TRAITOR* 35, 36-37 (N. Ignatiev & J. Garvey eds., 1996).

226. *Id.*

227. Some litigants argue that affirmative action should focus on economic disadvantage and not race. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). But see Malamud, *supra* note 189 (critiquing economic-based affirmative action).

matches between the candidates and the President, Provosts, alumni, and others who will be working with the dean. Naturally, top administrators who will supervise the dean want to select someone they respect and someone who will make a good "team player." This aspect of the hiring decision is important and can be crucial to the school's ability to make progress under the new dean's administration.

Understandably, a subjective focus on hiring law school deans all too often results in maintaining the "good old boy" network. As a factor of human nature, people prefer to work with people who are like them.²²⁸ Professor Charles Lawrence has described this as the "mirror, mirror, on the wall, who's the fairest of them all?" phenomenon.²²⁹ Translated from its fairy-tale mode by Professor Stephanie Wildman, she suggests that people who are considering applicants for job vacancies focus on answering these questions: "Will this person fit into our group, fit into our institution? Will this person change it in any way that will make me not fit, or hurt my place in the institution in any way? If someone comes who is not like me, will I still be valued at this place, at other places, or have other opportunities?"²³⁰

Historically, law schools have been enclaves for Whites and men.²³¹ Blacks, people of other colors, and women generally were absent in law schools and law practice until the 1960s and 1970s. Today, people of color and women have made modest gains toward equal citizenship in law,²³² but they continue to suffer negative effects of resistance to their presence in the academy.²³³

228. See, e.g., David E. Bernstein, *Licensing Laws: A Historical Example of the Used of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89, 97 (1994) (discussing how plumbers' groups wanted to stay racially segregated but regulations prohibited their choices).

229. Stephanie Wildman, *The Dream of Diversity and the Cycle of Exclusion*, in PRIVILEGE REVEALED, *supra* note 5, at 109 (thanking Charles Lawrence for making this analogy from the fairy tale to faculty hiring in law schools).

230. *Id.*

231. See Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988).

232. See generally Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997) (reporting findings from the first comprehensive empirical study of the role of sex and race in tenure-track hiring at accredited law schools).

233. See, e.g., Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, in CRITICAL RACE THEORY: THE CUTTING EDGE 409 (Richard Delgado ed. 1995); Deborah Waire Post, *Reflections on Identity, Diversity, and Morality*, in CRITICAL RACE THEORY: THE CUTTING EDGE, *supra*, at 419; Jennifer M. Russell, *On Being A Gorilla in Your Midst, or, The Life of One Blackwoman in the Legal Academy*, in CRITICAL RACE THEORY: THE CUTTING EDGE, *supra*, at 498 (all describing ways the authors have struggled to "fit into" the academy and maintain their identities).

2. Institutional Responses

Because law school is predominantly a White and male environment, people of color and women who aspire to be deans must overcome institutional biases against them. Often it is *uncomfortable* (not just *less comfortable*) for Whites and men to work (or imagine working) with a Black dean, a woman dean, and especially a Black woman dean. For example, in a similar context, my university selected a new president almost ten years ago. The Board of Regents narrowed the list to a Black woman and a White man.²³⁴ For days, the entire state of Florida was absorbed with the selection and the media maximized public interest by portraying the search as if it were a horse race and the candidates were neck-in-neck to the finish line.²³⁵ When the Chancellor selected the White man to be president, the community was not surprised and, in fact, many people seemed to be relieved. The Chancellor's public comment about what the "deciding factor" was between the two candidates was quite telling. As he stated, "Anybody that drives a red pickup truck will do okay in Florida."²³⁶

Unmasked, the Chancellor's message translated into an understanding that the White man was "one of them" and the Black woman was not. The red pickup truck ostensibly made him uniquely attractive. Ownership of a pickup truck told everyone he is a rugged, aggressive, and hardworking man. A *red* pickup truck added the impression that he was progressive, bold, independent, and a standout. Ironically, it was not the new president's unique personality that made him more attractive to the Chancellor and Board, mostly White men. Rather, the new president's red pickup truck symbolized his institutional personality, a personality with which the Chancellor and Board members could identify.

Despite the media coverage that made the selection process seem close, in reality, it reflected years of institutional preferences for Whites and men in top university positions. In the final days before the Chancellor's announcement, many papers reported that alumni were growing concerned that the Black woman might be selected.²³⁷ After all, the University was "an affirmative action, equal opportunity employer," holding out the promise that "all things being equal," the woman or minority would be hired. Apparently, "things" weren't that equal as reflected in some of the embarrassingly racist and sexist comments that were printed in various

234. See Sue Landry, *Praise For UF Finalists Stacks Up Evenly*, ST. PETERSBURG TIMES, Nov. 15, 1989, at 5B, available in LEXIS, News Library, Stpete File.

235. See *id.*

236. Sue Landry, *Lombardi Picked For UF Presidency*, ST. PETERSBURG TIMES, Nov. 15, 1989, at 1B, available in LEXIS, News Library, Stpete File.

237. See *The Call of the Bull Gator*, ST. PETERSBURG TIMES, Nov. 8, 1989, at 16A, available in LEXIS, News Library, Stpete File.

Florida newspapers. These included, "[W]hat some [alumni] most particularly do not want is a new president who is female and black;"²³⁸ [The Black woman's] "gender and race are 'an issue that concerns many people;'"²³⁹ and "Some alumni have said *a she* would have *problems* dealing with UF's old-boy network."²⁴⁰ The ultimate selection of the White man restored goodwill comfort.

Today, it is unlikely that people would openly express their feelings about a candidate in such biased ways. Yet, the chances a law school will hire a minority or woman dean continue to be relatively small.²⁴¹ It is not uncommon, for example, for a school to re-open a search when there is a chance that a minority or a women will be selected, although this would never be the expressed reason for taking that action.²⁴² Moreover, the institutional preferences for Whites and men in top management positions is a nationwide phenomenon and is not limited to law schools. It reflects the lack of formal equality talked about earlier.²⁴³

However, decisions to include racial minorities in power structures promote the important ideals of equality and democracy. Educational institutions are perceived to be the guardians of truth and their missions are to find the truth. All racial and ethnic voices need to participate in this search to avoid a superficial commitment to equality that breeds distrust, causes resentment, and feeds the cycle of denial, skepticism, and anger. The symbolic and practical importance of having university leaders of all colors notifies a state's citizenry that the university is open to them, welcomes them, and values their participation in "searches for the truth," a university's primary enterprise and one they are entitled to construct and mold as equal citizens. This enhances the university's integrity and credibility by adhering to these ideals in practice as well as in theory.

Multi-racial leadership can be a highly successful marketing strategy for progressive-minded public universities who imagine participating in significant ways in tomorrow's increasingly multi-racial world.²⁴⁴ Profes-

238. *Id.*

239. Sharon Elizabeth Rush, *Understanding Diversity*, 42 FLA. L. REV. 1, 7 n.25 (1990) (quoting Evans, *Chancellor Very Influential in Presidential Choice*, INDEP. FLA. ALLIGATOR, Nov. 13, 1989, at 5 (internal citations omitted)).

240. Rush, *supra* note 239, (quoting Lazo, *Regents Decide to Hire UF President Tuesday*, MIAMI HERALD, Nov. 9, 1989, at 26A (emphasis added)).

241. See Jagdeep S. Bhandari et al., *Who Are These People? An Empirical Profile of the Nation's Law School Deans*, 48 J. LEGAL EDUC. 329 (1998).

242. I probably will never find any written support for this and, in completely unorthodox fashion, want to cite to the "good old girls" network for this one. I bet the same information also circulates in the "good old boys" network.

243. See *supra* notes 49-56 and accompanying text.

244. See Michael K. Frisby, *White House Reworks Troubled Race Initiative As President Heads for a Town Meeting in Ohio*, WALL ST. J., Dec. 3, 1997, at A24 (America's population in 1995 was 74%

sor Shipley's research illustrates an example of this strategic approach by the management at Simon & Schuster:

At Simon & Schuster, the publishing house, special attention to hiring and training a diverse staff has been given in the large unit that publishes textbooks for middle and high schools...To appeal to the diverse clientele who will buy and use the texts...the company 'makes sure books are reviewed by a wide variety of reviewers, that products reflect a multicultural experience, that they try to hire from a multicultural point of view.'²⁴⁵

It makes business and educational sense for all public schools to follow Simon & Schuster's policy of promoting multiculturalism. In turn, communities of color and progressive Whites will want to become affiliated with the university that is taking such progressive steps. Creativity and growth come with deliberate moves away from inequality.

3. *Individual Responses*

Individuals also can participate in creating shared racial space. Perhaps one of the most personal and direct ways an individual voice for racial equality can be heard is for the individual to refrain from competing with Blacks in *appropriate circumstances*. Each individual has to evaluate when it is appropriate to sacrifice a personal goal in the struggle for racial equality.²⁴⁶ Relying on individual efforts may seem like an inefficient way to dismantle White privilege. As Mr. Ignatiev responds to the question, "How many will it take," he answers:

No one can say for sure. It is a bit like the problem of currency: how much counterfeit money has to circulate in order to destroy the value of the official currency? The answer is, nowhere near a majority—just enough to undermine public confidence in the official stuff. When it comes to abolishing the white race, the task is not to win over more whites to oppose 'racism'; there are 'anti-racists' enough already to do the job.²⁴⁷

With that understanding, my hypothetical is offered as a way to explore what it can mean for an individual to repudiate White privilege. This exploration offers a plausible perspective on the concept of repudiating White privilege.

White, 12% Black, 3% Asian, and 10% Hispanic. By 2050, the population is projected to be 51% White, 14% Black, 8% Asian, and 26% Hispanic.).

245. SHIPLEY, *supra* note 24, at 496-97 (quoting Michael Carroll, vice president for human resources).

246. See Wildman & Davis, *supra* note 5, at 16-17.

247. Ignatiev & Garvey, *supra* note 225, at 36-37.

Return to the situation where a dean search narrows to the final list, including at least one person of color. Suppose all the White candidates withdrew from consideration to eliminate the institutional preferences for them. In the context of repudiating White privilege, what have they sacrificed?

People who think it is implausible that a candidate would withdraw from consideration to avoid competing with Blacks and other people of color focus on the decision in terms of what the individual loses: the chance to be dean at the particular law school, prestige, career advancement, salary increase, enhanced self-esteem, new challenges, and so forth. The implausibility question surfaces: "Why would anyone voluntarily give that up, especially to help in some abstract principle like racial equality?" Some people who make personal sacrifices for racial equality are motivated by altruism; they enjoy giving to others even when they feel no obligation to do so.²⁴⁸ For others, however, the answer to the implausibility question is that they do not give up opportunities in situations like these because it seems too much to ask of anyone. Even if repudiating privilege were a matter of altruism, to drop out of contention for a job stretches the concept of altruism beyond realistic boundaries for many people.

From a different perspective, what can be learned about repudiating privilege by asking this question: "What does a candidate retain when he or she withdraws from a job search?" Candidates who make final lists for law deanships are especially bright, energetic, capable people who hold powerful and prestigious legal jobs. Some may be full-tenured professors; some may be partners in successful law firms; and others may be highly successful business leaders. When Whites withdraw from consideration in searches where Blacks have made the final list with them, they continue to hold extremely privileged positions in society. Moreover, there will be other dean searches, perhaps equally or even more attractive ones where there are no Blacks in the final list. Repudiating White privilege in this context may seem less implausible.

Naturally, Blacks who are not offered deanships also retain immense privilege, raising the question, why is it "fair" for Whites to step-aside? Whites who voluntarily step-aside in appropriate circumstances draw on their goodwill commitment to racial equality. Significantly, Whites who repudiate privilege act consistently with their goodwill toward others. Their actions break the cycle of White denial because their repudiations evidence their understanding of White privilege and their need to give up

248. For a discussion of altruism in law, see Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering*, 8 GA. ST. U. L. REV. 385 (1992). See also Michelle S. Jacobs, *Pro Bono Work and Access to Justice For the Poor: Reach Change or Imagined Change?*, 48 FLA. L. REV. 509 (1996) (exploring resistance to pro bono work).

what they wrongly inherited. In turn, their act of repudiating White privilege reduces Black skepticism. The advancement of Blacks' formal equality reduces some of the racial anger.

The impact one White person who repudiates privilege can have on a particular law school environment potentially can be dramatic. For example, the individual's action might result in a law school hiring its first Black dean, an historical event. As law schools hire more Black deans, they also will be more likely to advance into other administrative positions beyond deanships. Admittedly, a law school might re-open a search if the Whites drop-out, but that reverts to the institutional responses to White privilege. The individual act of repudiation is significant and should not be understated; repudiating one's role in supporting institutional racism reflects a profound commitment to racial equality.

V. SUMMARY

Until I became the mother of a Black daughter, my fights against racism were largely academic and abstract. My pre-daughter days are not that long ago, and so I can remember what it felt like to be a moderate White, as Martin Luther King described me—the goodwill White as I call myself. I *felt* good, I *felt* noble, I *felt* like I was doing something meaningful with my life to help end racism because I was a law professor who taught about race.

As the mother of a Black child, I have learned that racism is not academic and the solutions to ending it are not hidden in yet to be discovered interpretations of the Constitution. I cannot leave racism at the office any more. It is a constant part of my life even though I am not Black.

Loving across the color line, I *am beginning to understand* what it means to be Black in White America. My experiences tell me racism is beyond my comprehension, in part because I am not Black; in part because it is so irrational. I can state unequivocally, however, that if Whites were to cross the color line and develop meaningful and caring relationships with Blacks, racial justice would happen. Whites could not bear racism as I know it, let alone as my daughter and other Blacks know it.

The profound significance of this observation highlights how impossible it is for most Blacks to understand Whites' resistance to *embarrassingly modest* efforts like affirmative action to achieve some formal racial equality. At best, supporting affirmative action is a modest step toward the color line and supporting it serves several important purposes. First, Professor Jeb Rubinfeld's quotation at the beginning of this section describes affirmative action accurately; it isn't a cure-all, but it does some good. It allows for more formal racial equality than would exist without it.

Moreover, anti-affirmative action rhetoric is chocked full of racism nuggets. If Whites of goodwill understood this, it would be impossible for them to support the abolishment of such a modest attempt to counteract the power of White privilege unless they abandon their goodwill toward Blacks. In the larger context, White society must continue to take affirmative steps to equalize the racial imbalance in America, or give up its image as an anti-racist society altogether. Thus far, affirmative action reflects the only effort by White society to create shared racial space.

EPILOGUE

The evening after softball practice, Mary and I had a long talk about what had happened with the Coach. She wanted to know why he was so mean to her. Whenever I hold her, I am taken aback at how small and fragile she is. Her eyes are so black one cannot see her "peeples" as she would say, but their blackness cannot hide the pain and confusion of being mistreated. She still has the innocent face of a young girl, eager to take in all that life has to offer—always expecting the best of everyone. Although she feels the hurt of racism, she is not old enough always to understand what is happening to her and why.

We talked about quitting the team. It was hard for me, as an adult and a White person of goodwill, to imagine seeing any of those people again. I could feel the pull toward comfort; accepting the Coach's invitation to quit was alluring. I rationalized: Why should she have to endure his disdain? On the other hand, I have learned from being her mother that I must teach her how to cope with unfairness, because it is too much a part of her life not to confront it. Accordingly, I tried to focus my daughter on the future. I told her that there would be many times in her life when people would try to divert her from her goals. In some ways, it did not matter why the Coach did what he did. I tried to help her see that what was important was how she responded to him. Would she quit or stay?

We went through the reasons for quitting. I told her I would not blame her if she decided to quit because she had been treated unfairly. It was only a game and there would be other softball seasons. She could even join another softball team or participate in other sports. Quitting made some sense, I assured her.

But I also stressed that she had worked the entire season for the team, had made many friends, and was only a few games away from being undefeated. How would she feel if she walked away from all that? She deserved to finish the season as part of the winning team she had helped create. "Don't let the Coach or anyone else take that away from you, if that's what you really want," was my motherly advice. I told her to think

about it for a few days and assured her I would support her decision.

She decided to stay on the team and finish the season. Believe me, going to the next practice was not easy. I could see how apprehensive she was and I fully expected we would be shunned. Fortunately, I was wrong. The girls picked up right where they left off, and probably had forgotten everything that happened three days earlier. Young children can be so "here and now" in their orientation to life. And to my amazement, a few other parents were solicitous of me and actually sat with me in the bleachers. The Coach also was very friendly toward Mary and showed more interest in her than he had all season. None of us talked about that afternoon, but I was relieved the Coach and other parents had welcomed her back.

Mary's trophy and team picture from the season sit on our living room shelf, a reminder of the small triumph of one little eight-year-old Black girl who is learning to cope with racial inequality. When the Coach called at the start of the next season to ask her to join the team, however, Mary decided she did not want to play. Fair enough, I thought. I heard her tell the Coach over the phone, "Thank you for asking, but I want to play soccer this year." In the end, she held fast to her dignity.

Mary learned an invaluable lesson from the footrace incident, but she also taught the Coach, other parents, and me something, too. The Coach and parents may be more sensitive to racial differences because of that afternoon. As for me, I am learning day after day what an incredible strength it takes for my daughter and all people of color to survive the challenge of racism.²⁴⁹ White privilege is like a cobweb—a sticky anathema to humanity. Some days, I wish I could get away from the struggle, take a break, let my guard down, sleep peacefully. But racism shapes my daughter's life and now mine, just as it shapes the lives of every Black person and every White person who loves them or cares deeply about racism enough to understand the need to repudiate White privilege. Refuge from racism is rare and only temporary for now. Someday, perhaps White people of goodwill will ensure a safe and equal America for our children by repudiating their own privilege and affirmatively acting to create shared racial space.

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249. See Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (exploring day-to-day effects of racism—ironically this came out the year my daughter was born).