I wish this was my idea, but my friend and immediate past chair of the ABA Section of Civil Rights and Social Justice, Wilson Schooley, beat me to it with his vision to draw our attention to the state of African Americans in America and our current state of race relations. Please do not read this volume II of “Black to the Future” without reading volume I, which starts with an insightful, thought provoking, and compelling introduction from our immediate past chair. Wil brings all his talents as a lawyer, scholar, and teacher to “telling the story” of the African American experience in what the late Maya Angelou called “these yet to be United States of America.”

By reading part I of our Black to the Future series, I am reminded of a lesson I learned years ago that we mistakenly assume “people know history.” Martin Luther King Jr. famously said that the two most dangerous things in society are sincere ignorance or conscientious stupidity. The tension and struggle in race relations today are rooted in these two states of mind. Millions of Americans are sincerely ignorant of the complete and accurate history of race in the United States. They have been miseducated by an American school system that teaches U.S. history from a Eurocentric perspective: Columbus discovered America; George Washington never told a lie; Lincoln freed the slaves; and MLK had a dream. Or those who play the dangerous game of conscientious stupidity, meaning they know the truth but choose to ignore that truth.

Our nation is amid a crisis: a crisis of consciousness, a crisis of competence, and a crisis of character. Much of this crisis is the backlash from the two-term presidency of the first African American, Barack Hussein Obama. Ask any African American where they were on Tuesday night, November 4, 2008, and you will get a smile and an immediate answer. I was at the Chicago Hilton Hotel on Michigan Avenue in a suite with all the “who’s who” in Chicago and Illinois democratic politics. The Chicago Hilton is across the street from Grant Park, where the new president-elect would address a crowd of thousands cheering him and his family because of his election as the first African American president of the United States.
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The contributions of African American attorneys have and should continue to be a tool for creating equality in society. There are countless ways to be a hero, including joining the ranks of the CRSJ and becoming active in one of our committees.
The state of Black America is unchanged since 20 Africans arrived in Jamestown, Virginia, in 1619. Admittedly, that assessment sounds incorrect to describe a nation that prides itself on being exceptional, Christian, colorblind, post-racial, and on its way to becoming a more perfect union. That assessment seems an even less accurate description for a people who have gone from the hulks of cargo ships to the halls of Congress, from chains to CEOs, from property to president, from builders of this nation’s wealth to ballers and shot callers in every field of endeavor. This twenty-first-century observation reflects the one constant in the black experience—the downward white gaze upon blacks as nonhuman others who are to stay in some predetermined lane. After generations of presumed racial progress, we have made few interventions in this area of race and representation. (bell hooks, Black Looks: Race and Representation. Boston: South End Press, 1992.) As a result, we are still pejorative stereotyped and our very presence is routinely policed.

There have always been blacks who fared well comparatively despite the socio-political controls imposed upon us in this country that constitutional law scholar Ian López describes as ideologically white by design through naturalization and immigration laws. (Ian Haney López, White by Law: The Legal Construction of Race. New York: New York University, 2006, 82.) During the time of U.S. chattel slavery, there were blacks who had shoes, a dress, or an extra biscuit. Sally Hemings, for example, traveled abroad. During the time of legally sanctioned Jim/Jane Crow segregation and economic uncertainty, there were blacks who owned land rather than sharecropped on another’s farm. In other words, throughout U.S. history, blacks with a skill, trade, family ties, or education enjoyed more privileges, better working conditions, and a different quality of life than the black masses much like today between the haves, the have-nots, and the have-access-to. One thing, however, has remained unchanged in Black America despite any personal talent, the passage of time, and the passage of civil rights legislation, and that is the perception of sun-kissed flesh as “other” and, therefore, in need of white domination and control to stay in some predetermined place and to behave in a particular way while there.

Whites appointed themselves as the determiner of place and behavior of these othered black bodies. This self-appointing act created a normative white gaze whereby blacks are viewed through a lens of presumed white cultural superiority, which is nothing more than a socio-political construct for hegemonic profit and pleasure. Instances of white entitlement to control blackness abound on social media platforms and in broadcast news. White people have called the police on blacks for sitting in a coffee shop, sleeping in a university common room, mowing a neighbor’s lawn, moving into their own apartment, barbecuing in a park, and leaving an Airbnb without saying hello to some random strangers. These examples of microaggressions exemplify white privilege to control black presence and behavior in so-called “white spaces.”

Even the rich and famous among us do not escape this normative white gaze as evidenced by mocking comments made against Ayesha Curry for dancing in her own restaurant and Fox News host Laura Ingraham telling NBA champion LeBron James to “shut up and dribble” in response to his comments about some Trump administration policies. These high-profile examples evidence a white disdain for black autonomy, disrespect for black presence, and disregard for black intellect irrespective of name or fame and are reminiscent of the Black Codes of years past. These hegemonic responses to Curry and James demonstrate what Carol Anderson calls an anathema to the power structure that requires black subordination—black independence. (White Rage: The Unspoken Truth of Our Racial Divide, New York: Bloomsbury, 2016, 21.)

This contemporary practice of controlling black presence is rooted in an unholy collaboration between colonial-minded faith leaders and legislators that yielded a theo-political dehumanization/disenfranchisement of blacks/blackness and privileged/protection of whites/whiteness. Adopting the racial realism philosophy articulated by critical race theorist and legal scholar Derrick Bell Jr. offers Black America a means of representing ourselves by reclaiming our stolen humanity and thereby demanding our socio-political right to be any place at any time, even in a “white nation” hostile to our very existence. (Derrick Bell Jr., “Racial Realism.” Critical Race Theory: The Key Writings that Formed the Movement edited by K. Crenshaw, N. Gotanda, G. Peller, and K. Thomas. New York: The New Press, 1995.)

In short, Bell asserts that racial equality in U.S. society is not a realistic goal for black people to pursue. In fact, he says that it is unobtainable and leads only to frustration. He, therefore, suggests that blacks adopt what he calls racial realism, a mindset or philosophy where blacks acknowledge the permanence of a subordinate status in order to avoid despair and to free blacks to imagine and to implement racial strategies that can bring fulfillment and even triumph (Bell 1995, 306). At first glance, Bell’s racial realism sounds like surrender to the normative white gaze. However, on closer examination, his philosophy really offers Black America the opportunity to recapture black humanity from white normativity and to redefine black success on black terms and in ways that can subvert the current socio-political system, much like the participants of the Underground Railroad whose efforts did ultimately lead to a change in the state of Black America.

European colonizers of this developing nation theoretically redefined black flesh as nonhuman other, claimed God granted them a divine birthright to determine both the proper place and the acceptable behavior of these newly “othered” beings, then...
In Need of a Revolution

thereby producing a reality into which all else must enter. (J. Kameron Carter, Race: A Theological Account, New York: Oxford University Press, 2008, 5.) To preserve this theological misconception, falsely generated pseudo-science advanced the idea of inherent white superiority/black inferiority in beauty, intellect, and capability.

To further black dehumanization, local, state, and federal laws were instituted to complete the theo-political circle. These racially inspired laws disenfranchised blacks from the socio-political process by denying certain privileges, access, and opportunities otherwise guaranteed by law to persons of European descent whose theological anthropology as beings created “in the image of God” remained intact. According to the laws of the land, blacks were property, not persons, and enslaved with no civil rights in this colonial state. As chattel, blacks were not citizens; they could not vote, serve on juries, or testify in courts, especially against white folk. By contrast, whites were human, free from perpetual servitude with civil rights protected by these same laws. Whiteness actually became the quintessential property right of personhood. (Cheryl Harris, “Whiteness as Property,” in Critical Race Theory: The Key Writings That Formed the Movement, edited by Kimberle Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, New York: The New Press, 1995, 281.)

COLOR STRUCK

Blacks continue to be characterized in terms (e.g., n-word, criminal, and thug) that advance the agenda of hegemonic elites and justify the self-appointed privilege to control black bodies. The unholy alliance from the nation’s colonizing past that created a theo-political racial distinction between whites and blacks prevails today in perceptions of whites as all things good and valuable, and blacks as nonhuman other and thus disposable. Media representations reinforce these racialized created differences through a normative white gaze that yields positive media representations of white/whiteness and pejorative media depictions of blacks/blackness as white/good black/bad stereotypes.

instituted legal protections of these ethnocentric beliefs and practices. Euro-American faith leaders used Christian sacred texts to dehumanize and to justify the land grab and exploitation of darker hued people for capitalist gain. As all exploitation seeks validation with some biblical edict, as French West Indian psychiatrist Frantz Fanon notes (1967), proslavery advocates created the Curse of Ham to claim Africans, as the descendants of this son of Noah, were cursed after the flood to serve his brothers Shem and Japheth (Genesis 9:20–27).

Whites also used this text to make themselves the descendants of Shem and simultaneously proclaimed to have a God-ordained right to be served and to rule. In fact, enslaved blacks were taught that service to whites was mandated by God and that God and the white man were the same. (Jacqueline Grant, “The Sin of Servanthood,” in A Troubling in My Soul: Womanist Perspectives on Evil & Suffering edited by Emilie M. Townes. Maryknoll: Orbis Books, 1997.) This gross misinterpretation and misuse of the Judeo-Christian text theologically sanctioned blacks as nonhuman other, established whites as the divine ruler of this manmade social ordering, and made European beliefs and cultural practices the standard bearer against which the other is judged, expected to emulate, but can never achieve.

Religious studies scholar J. Kameron Carter suggests that whiteness actually functioned as a substitute for Christianity,
Accordingly, cultural critic bell hooks notes that there is a direct and abiding connection between the maintenance of white supremacist patriarchy in this society and the institutionalization via mass media of specific images and representations of race and of blackness that support and maintain the oppression, exploitation, and overall domination of all black people (1992, 2). The media perpetuates these representations even when whites and blacks are doing the same thing for the same reason—hunger. In the aftermath of Hurricane Katrina in 2005, whites who took food from local stores were surviving; blacks who took food from local stores were looting.

The media reports white perpetuators of crime differently than black victims of crime. For example, white mass shooters and domestic terrorists who write “essays” and who are more likely to be arrested (e.g., James Holmes, Dylan Roof, Timothy McVeigh, and Patrick Crusius) than shot, unlike black men who have committed no such heinous act (e.g., Eric Garner, Philando Castile, Botham Shem Jean), are excused as having a mental defect or disorder. A hate-laced white supremacist “manifesto” is not an essay or mental defect! By comparison, pundits or perpetrators often disparage black victims in some pejorative term (e.g., thug, brutal bully, demon) to suggest they are somehow complicit in their own misfortune.

Statistical disparities exist between the races across a broad spectrum of experiences—health care, income, employment, education, mortality, imprisonment, wealth, individual and institutional racism, profiling, voter suppression, sentencing guidelines, and so forth. In fact, like frequent videos of micro-aggressions, multiple reports across multiple disciplines demonstrate the human worth and value of whiteness is perceived as greater than blackness. For example, in the field of medicine, recent University of Virginia research revealed that pain in black patients is routinely underestimated and therefore is under-treated by white physicians (Hoffman 2016). This finding suggests that the discrepancy in treatment is the result of a doctor bias that sees blacks as better able to withstand physical discomfort (translated: chattel) and also as more likely to abuse opioids (translated: criminal).

This report did not suggest that blacks had a higher threshold for pain. Moreover, because opioids are prescribed less frequently for black patients, opioid abuse is a less likely scenario due, in part, to sheer lack of opportunity.

A Georgetown Law report also found differences in human perception between white versus black youth, namely adultification, which adversely impacts education and quality of life. Per the report, black male children are perceived as older, more likely to be guilty, and thus police violence against them is justified, whereas black girls are viewed as loud, imbued with adult-like aspirations, and thus perceived as a threat. (Rebecca Epstein, Jamilia Blake & Thalia González, *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, Washington: Georgetown Law Center on Poverty and Inequality, 2017, 2.) These pejorative perceptions of and policing behavior toward black youth resulted in more frequent and severe disciplinary actions, namely suspensions, in public schools, as compared to whites of the same age and for comparable classroom behavior. Of course, this racial representation of black youth has long-term psychological, physical, even deadly implications for our youth. Repeated suspension can adversely affect academic performance because of days and assignments missed, which in turn can affect graduation rates, college acceptance, and subsequent employability, health, and possible imprisonment. More importantly, these research results as well as the reality reveal that our children are not allowed to be children—that is to play games without risk (Tamir Rice), to listen to music with friends, attend a pool party (Jordan Davis or Dajerria Becton), or to mature into adulthood at a normal pace (Trayvon Martin, Michael Brown).

By comparison, according to this same Georgetown report, white children are estimated to be younger than their actual ages (2017, 2). In addition, excuses are given for white males well into their 20s guilty of youthful indiscretions, unwise choices, and otherwise unacceptable and even criminal behavior. Oklahoma SAE members caught singing about excluding blacks from fraternity membership were just young and immature. A prison sentence for sexually assaulting an unconscious woman would have a severe impact upon Stanford swimmer and white male Brock Turner, according to Santa Clara County Superior Court Judge Aaron Persky. Blacks are incarcerated at six times the rate of whites. I wonder what Persky thinks a prison sentence does to these black men, particularly innocent black men like the Brian Banks and the Exonerated Five (a.k.a. Central Park Five)—all of whom served prison time for rapes they did not commit.

According to the U.S. Bureau of Labor Statistics, the 2018 median income for whites was $907 and for blacks was $683. Yet, sociologist Robin DiAngelo reports that whites see themselves as the new oppressed group. (Robin DiAngelo, *White Fragility: Why It’s So Hard for White People to Talk About Racism*. Boston: Beacon Press, 2018, 3.) Yet racial animus was reportedly a factor in the 2016 presidential election. Charles Gallagher reports that a majority of his white students felt contemporary affirmative action measures were unfair because issues of overt racism, discrimination, and equal opportunity had been addressed in the 1960s (1997, 10).

López records a story in his 1996 version of *White by Law from Andrew Hacker’s book, Two Nations: Black and White, Separate, Hostile, Unequal*, where white college students were asked what compensation they expected to endure if they were suddenly a black person. These students responded $50 million, $1 million for each coming black year, suggesting whites do attach extreme value to their racial identity (López, 140). This exercise also suggests that whites recognize that the racial disparities in this country exist in their favor. This recognition should come as no surprise, as hegemonic elites work to ensure white privilege is maintained.
RECLAIMING OUR BLACKNESS

According to Bell, employing racial realism leads to developing realistic rather than idealist plans for lasting socio-political change. The rationale informing Bell’s position is statistical data regarding black life. He too notes that blacks suffer disproportionately higher rates of poverty, joblessness, and insufficient health care as compared to other ethnic populations in the United States (Bell 1995, 308). Bell suggests that black reliance on racial remedies have prevented recognition that legal rights could do little more than bring about the cessation of one form of discriminatory conduct, for another no less discriminatory form (Bell 1995, 307).

A cursory glance at U.S. history demonstrates merit in his observation. There has been a hegemonic legislative or rhetorical counter-response to any real or imagined civil rights advancement or perceived threat/challenge to the privileged status quo. As I frequently point out, whites created sharecropping exploitation and Jim/Jane Crow segregation in response to the Thirteenth Amendment that freed the enslaved. In response to the civil rights movement of the mid-twentieth century intended to right the wrongs of the colonial past, hegemonic whites advanced a color-blind rhetoric to suggest that a presidential signature on civil rights legislation so altered the socio-political landscape such that race no longer mattered in gaining access to employment, education, housing, and so forth. Such access was now all about merit, and whites, of course, were judged most meritorious for these positions, but, if not, they sued for law school admission or lamented affirmative action as though there were no qualified persons of color.

Hegemonic elites also suggested that the nation instantaneously became a post-racial state, where race does not matter with the election of the first black president, Barack Hussein Obama, despite the rise of birtherism challenging his birthplace, the take my country back (from whom?) Tea Party, and the Make America Great Again (as compared to when?) campaign of his successor. Moreover, when we say Black Lives Matter, whites counter with All Lives Matter. These hegemonic responses demonstrate an attempt to protect white privilege. When former NFL quarterback Colin Kaepernick knelt during the playing of the National Anthem at the suggestion of a former veteran to draw attention to racial injustice, whites co-opted the protest with charges that this black man was being ungrateful, disrespectful, and unpatriotic (translated: Know your place).

These hegemonic countermoves are but morphing manifestations of white supremacy employed to maintain power, domination, and privilege over the nonhuman other. Blacks have responded courageously and creatively to these morphing manifestations of white racial oppression via folktales, the Invisible Institution, the Black Church, black music, the Underground Railroad, the civil rights movement, Liberation Theologies, and Critical Race Theory. Now is the time for another underground movement, and this one is not to be televised on social media, which gives the hegemony advance notice to show up to counter punch.

According to Bell, accepting a racial realism mindset does not mean taking no action to challenge racist ideologies or racist practices. Rather, it means preparing for hegemonic counter measures that will surely rise to maintain the status quo. In fact, Bell says continued struggle can bring about unexpected benefits and gains that in themselves justify continuing the endeavor; thus, the fight itself has meaning and gives us hope for the future (Bell 1995, 308). Bell ultimately likens the fight against racism to that of enslaved blacks—that is a manifestation of black humanity which survives and grows stronger through resistance to oppression, even if that oppression is never overcome (Bell 1995, 308).

Relating Bell’s mindset to the state of Black America means reclaiming black humanity as not defined in terms of whiteness, white gaze, white culture, white privilege, and so forth. Instead, we must abandon what Albert Memmi calls the first ambition of the colonized, which is to become equal to that splendid model (the colonizer). (The Colonizer and the Colonized, Boston: Beacon Press, 1965, 120.) Similarly Brazilian educator Paulo Freire observed, for the oppressor to be is to have, having is an inalienable right. (Pedagogy of the Oppressed, New York: Continuum, 2006, 45.) So by contrast, blacks must recognize our own strength as living, critical thinking human beings capable of distinguishing fact from fiction. In fact, black identity must be seen as totally independent from white racial identity and seen instead in terms of a spiritual connectedness to a Divine Being (for the spiritually/religiously minded), and as being endowed by the Creator with certain inalienable rights according to the U.S. Constitution in this nation of laws.

By employing racial realism, blacks fundamentally reject identification as nonhuman other and no longer see being equal to whites as a goal to be achieved. In fact, according to hooks, it is only as we collectively change the way we look at ourselves and the world are we able to change how we are seen (1992, 6). By seeing ourselves through a different lens, meaning other than through the revisionist history of a stolen humanity and normative white gaze, we are thereby empowered to work differently toward ensuring justice as were black participants in the Underground Railroad (UGRR). We are emboldened by our identity transformation, like UGRR participants, to take personal responsibility and accountability for our beliefs and practices in the public square and to name and use places of privilege(s) to counter oppressive hegemonic practices.

Blacks have been conditioned to believe whites only have privilege when in fact black people are far more powerful than we realize—so much so that people down through the years have sought to control our very presence and belief in self. Blacks who participated in the UGRR heard the same dehumanizing rhetoric yet resisted white challenges to black intellect, beauty, and capability and subversively ushered in a shift in Black America that freed thousands before the final revolution. Blacks today can begin to usher in the next great movement that alters the perception of black as nonhuman other, even if only for our black selves. Let the revolution begin!

Barbara A. Fears is an assistant professor of religious education at Howard University School of Divinity in Washington, D.C., where she teaches courses in the history, theory, and practice of ministry. Her research focuses primarily on race, gender, and critical pedagogy in spiritual formation and praxis of faith.
AFFIRMATIVE ACTION IN HIGHER EDUCATION: RELEVANCE FOR TODAY’S RACIAL JUSTICE BATTLEGROUNDS

By Genevieve Bonadies Torres

Affirmative action has inspired fierce debates and repeated litigation. It is also frequently misunderstood. As a conceptual framework, affirmative action remains relevant for a national racial justice agenda. Its surviving policies are critical for dismantling institutional practices that limit opportunities for highly qualified African Americans and other marginalized racial minorities.

John F. Kennedy first used the term to address racial disparity in March 1961. In Executive Order 10925, President Kennedy ordered government contractors to “take affirmative action” to realize the national goal of “nondiscrimination.” This policy reflected a recognition that centuries-old racism (by law and custom) innately restricted the economic, political, and educational opportunities for African Americans and other minority groups. For instance, colorblind seniority systems protected white workers against job layoffs because senior employees were usually white due to past and present discrimination in hiring. Likewise, a colorblind college admissions process favored white students because of earlier and ongoing educational advantages associated with race. The conceptual thrust behind affirmative action is that proactive efforts are necessary to disrupt an otherwise uneven playing field.

Over time, however, courts have significantly shaved down the contours of permissible affirmative action policies. In the 1960s and 1970s, colleges and graduate schools began developing affirmative action policies to expand access to disadvantaged and underrepresented segments of society, including racial minorities. In 1978, the Supreme Court heard its first challenge to such programs in a lawsuit brought by Allan Bakke, a white man who had been denied admission to the University of California at Davis’s medical school (UC Davis) (Regents of the Univ. of Cal. v. Bakke). UC Davis had set aside 16 of 100 seats for individuals who identified as “economically and/or educationally disadvantaged” and members of a “minority group” (blacks, Chicanos, Asians, American Indians). UC Davis offered several justifications for its program, including that: (1) it rectified past discrimination in medical schools and the medical profession; (2) it countered present societal discrimination; (3) it increased the number of physicians in underserved communities; and (4) it promoted the educational benefits that flow from an ethnically diverse student body.

The Supreme Court was closely divided. Four justices would have upheld the constitutionality of UC Davis’s program under the Equal Protection Clause and Title VI on grounds that it remedied the effects of past societal discrimination. The Court’s four conservative-leaning justices would have barred universities from considering race at all. The deciding vote was cast by Justice Lewis F. Powell Jr. Applying strict scrutiny, Justice Powell rejected UC Davis’s argument that it had a compelling interest in rectifying past discrimination and increasing medical practitioners in underserved communities. Instead, Powell only endorsed UC Davis’s argument that it had a compelling interest in the benefits of a diverse student body. Powell then rejected UC Davis’s race-conscious program based on its operation in practice. Powell found the 16-seat set-aside amounted to a quota that failed to meet the standards of narrow tailoring. In contrast, Powell endorsed the race-conscious plan submitted by Harvard University as part of its amicus brief. Harvard’s plan subjected all applicants to a highly individualized, holistic review process that considered race as one of many factors to admit students who were diverse across a range of dimensions, including socioeconomic status, geography, and race.

In the past two decades, the Supreme Court has repeatedly reaffirmed the
legality of race-conscious admissions to promote racial diversity in higher education. In 2004, the Supreme Court heard a pair of cases brought by white applicants challenging race-conscious admissions policies at the University of Michigan and Michigan Law School (Gratz v. Bollinger and Grutter v. Bollinger). In handing down its rulings, the Supreme Court explicitly embraced Bakke and re-endorsed individualized review processes that consider race as one of many factors to promote diversity. The Supreme Court repeated this refrain as recently as 2013 and 2016, rejecting a lawsuit brought by Abigail Fisher (a white woman) challenging the University of Texas at Austin’s holistic, race-conscious policy on the grounds that the policy “promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races” (Fisher v. Univ. of Texas at Austin).

While race-conscious admissions have survived numerous challenges in court, many civil rights advocates have expressed frustration with the current legal limitations of affirmative action and how it is currently practiced. Critics have expressed frustration with the prevailing diversity rationale for centering white students as the intended beneficiaries who extract educational value from minority students. Others, such as Sheryll Cashin and Sally Chung, have criticized the policy for losing its intended purpose of amending structural disadvantages, arguing it fails to adequately assist minority students from lower-socioeconomic backgrounds and ignores structural inequities.

Even advocates for race-conscious admissions have agreed with such criticisms. They acknowledge a comprehensive vision for racial equity must go beyond admissions and the diversity rationale. But they also argue that race-conscious admissions may not be a panacea for resolving racial inequities, but it also must not be abandoned. It remains a vital tool for ensuring talented students of all backgrounds can access quality higher education. Such advocates often emphasize the immediate, adverse consequences of ending race-conscious policies. Experiences in California and Texas are instructive. When UT-Austin stopped considering race from 1996–2004 due to a contrary decision from the Fifth Circuit (Hopwood v. Texas), the number of African American and Latinx students immediately declined, with African American enrollment dropping by 40 percent and Hispanic enrollment dropping by 5 percent (despite the rapidly increasing number of Hispanics in the admissions pool). California experienced similar declines after the passage of proposition 209, which banned affirmative action in education and employment. When implemented, African Americans experienced a 55 percent decline in admissions offers to UC Berkeley and UCLA, the state’s two most selective universities. Despite significant investment in race-neutral alternatives over 20 years, the UC system has never returned to its previous levels of diversity.

Today, top-tier universities suffer from abysmally low proportions of black, Latinx, and other minority students. A 2017 New York Times analysis observed that “black and Hispanic students are more underrepresented at the nation’s top colleges and universities than they were 35 years ago.” Our colleges cannot afford to scale back programs that expand racial inclusivity.

Unfortunately, a concerted effort is underway to do just that. Over the last decade, Edward Blum—a longtime opponent of civil rights programs—has spearheaded a series of lawsuits with the stated purpose of ending any consideration of race in admissions. Blum was the mastermind behind Fisher v. Univ. of Texas at Austin. After his failure in Fisher, Blum revised his approach to eliminate race-conscious admissions. He created the organization Students for Fair Admissions (SFFA) as a vehicle for his anti-affirmative
He publicly stated that he “needed Asian plaintiffs,” transparently pursuing a racially divisive strategy that tries to pit Asian Americans against other minority groups.

In 2014, SFFA (backed by Blum) filed two new lawsuits against Harvard University and the University of North Carolina-Chapel Hill (UNC) claiming the universities’ use of race exceeded lawful limits set by the Supreme Court under Title VI and the Equal Protection Clause. The Harvard lawsuit was novel in two respects. It was the first affirmative action case against a private university. It was also the first case to claim a university’s race-conscious policy intentionally discriminated against Asian Americans. Beyond these distinctions, the lawsuits largely rehash the same arguments of prior cases, asserting: Colleges should give greater weight to socioeconomic status in lieu of race; standardized tests provide the benchmark for who deserves admission; and there are sufficient levels of racial diversity across campus.

Both lawsuits promote a colorblind framework. The complaints urge the court to prohibit "any use of race or ethnicity in the educational setting" and ban admissions officers from being "aware of or learn[ing] the race or ethnicity of any applicant." Taken to its logical end point, such relief would substantially alter the admissions process. Purging all reference to race would potentially prevent colleges from conducting interviews and recruiting applicants in person. It would also jeopardize students’ ability to submit essays and recommendations discussing how race or ethnicity has impacted their lives; list awards and activities indicating their race or ethnicity; or write about their immigrant stories, regardless of their country of origin. In effect, it would perversely penalize some applicants in the name of equal protection (especially non-white applicants who disproportionately face racial barriers).

Such “race-blind” relief also indicates Blum and SFFA are not genuinely interested in counteracting biases faced by the Asian American community. Research shows that effective methods for combating racial bias involve race-conscious interventions, such as providing implicit-bias trainings to admissions officers or engaging in race-conscious recruiting to cultivate greater diversity among admissions officers. Banning all consideration of race further fuels a white admissions advantage. Evidence submitted during the Harvard trial showed white students would experience the greatest gains in...
admission under a race-blind system, with their share of the admitted class jumping from 40 percent to 48 percent.

A diverse coalition of students at Harvard and UNC—identifying as black, Latinx, Asian American, and Native American—came together to express support for race-conscious programs that promote greater racial diversity and inclusion. Their unified stance rejected Blum’s divisive strategy and recognized that reckoning with race remains necessary in light of our country’s past and present struggles with racial inequalities and overt racism.

In the Harvard lawsuit, the district court permitted this diverse coalition of students to submit testimony in support of race-conscious admissions during the three-week trial held in October 2018. For its part, SFFA did not present a single student to testify on their behalf, nor did SFFA submit a single student file containing implicit or explicit discriminatory statements, nor did SFFA’s experts consult a single student in forming their opinions.

The students’ testimony and application files humanized the reasons why race and racial diversity continue to matter in college admissions, on college campuses, and across our broader society.

To begin, the students explained how race provides critical context for authentically portraying their strengths and for colleges to more accurately evaluate their contributions to campus. For example, Itzel Vasquez-Rodriguez wrote her application essay on her “experiences as a young Xicana [indigenous Mexican-American] in Southern California.” A side-by-side of her personal essay—with and without references to her race—demonstrates how a race-blind system would undervalue her strengths.

The harms would cut just as deep for Asian American students like Thang Diep. In his essay, Diep shared how growing up his Vietnamese identity often felt “lost in translation.” At trial, he described how he was mocked for his accent and called racial slurs. His essay shared how he ultimately reconnected with his Vietnamese identity in high school and excelled in his language-intensive magnet program. Diep testified that erasing his ethnicity would provide an incomplete picture of his strengths and re-inflict the harms of suppressing his identity for so long.

The students also testified to the profound benefits of cultivating sufficient numbers of racial minorities on campus. They described how this diversity across and within racial groups provided indispensable support for Harvard’s students of color who faced overt and subtle forms of...
racial hostility on campus. Sarah Cole, who identifies as black American, explained that she needed other black students to “lean on” on when she was “cursed at or physically assaulted” for marching through campus and asserting that black lives matter. When the campus was shaken by the deaths of Michael Brown, Eric Garner, and the slew of police shootings that followed, it was Cole’s responsibility as the president of the Black Students Association to lead the rest of the campus—white and Latinx, students and administrators—in finding a path forward to mourn and become better allies. Her testimony is a reminder of how students of color perform real and exhausting work every day as they are often tasked with mending the racial fault lines that divide campuses and our country. Such work necessitates a robust peer-support system.

The students’ testimonies also powerfully countered SFFA’s assertion that socioeconomic diversity could serve as a substitute for race. They spoke to how minorities of color face racial biases regardless of socioeconomic class. Their testimony is backed by numerous studies. Black students are more likely to be disciplined than their white peers engaging in similar behavior. This disparate treatment begins early. One study showed African American children are 3.6 times more likely than white students to be suspended from preschool—a disparity that, according to researchers at Yale, is linked to implicit bias among early childhood educators. As another example, those with ethnic-sounding names are less likely to receive callbacks for employment. Another illustration of race’s independent effects: Low-income black and Latinx families are more likely to live in neighborhoods with concentrated poverty as compared to poor whites.

The students’ testimonies also highlighted the distinct benefits derived from racial diversity on campus. As Vasquez-Rodriguez testified: “ethnoracial diversity is more visibly salient.” When she entered a classroom, she “took note mentally of the number of students of color,” and she intentionally sought out spaces with more nonwhite students because there she could “finally breathe.”

The students uniformly declared that SFFA’s race-blind regime resulted in an unacceptable drop in the number of minority students on campus. The undisputed evidence at trial indicated the number of black, Latinx, and other minority students on campus would decline by roughly 1,100 students, cutting their numbers by 50 percent. The students also emphasized that SFFA’s myopic focus on standardized test scores as a benchmark for who deserves admission was wholly misguided. Numerous research studies show tests such as the SATs have no meaningful correlation with college success; instead, they are most strongly correlated with socioeconomic and demographic factors, such as parents’ income, access to high-cost test-prep programs, parents’ education level, and race. Such tests also, by design, under-predict the capabilities of underrepresented minority students. The test creators throw out questions where underrepresented minority students do better and white students do worse. These racial skews, in combination with a phenomenon known as stereotype threat, systematically underestimate the ability of stigmatized minority students including those that identify as black, Latinx, and many lower-resourced Asian American subgroups.

On October 1, 2019, the Boston district court issued its decision upholding Harvard’s race-conscious admissions program on all counts. The decision resonated with the students’ testimony. Of note, the district court cited the students’ testimony to observe:

[I]t is vital that Asian Americans and other racial minorities be able to discuss their racial identities in their applications. As the Court has seen and heard, race can profoundly influence applicants’ sense of self and outward perspective. . . . Removing considerations of race and ethnicity from Harvard’s admissions process entirely would deprive applicants, including Asian American applicants, of their right to advocate the value of their unique background, heritage, and perspective and would likely also deprive Harvard of exceptional students who would be less likely to be admitted without a comprehensive understanding of their background.

The district court’s decision also rightly recognized that race-conscious programs remain vital, given racial disparities in the K–12 system, the inherent limitations of standardized testing, and the non-feasibility of relying on imperfect proxies for race. The decision also observed that Justice Sandra Day O’Connor’s prediction in 2004 that the need for race-conscious admissions programs may expire in 25 years seemed overly “optimistic and may need to change.”

The Harvard case now heads to appeal before the First Circuit. In spite of the significant legal victory and strong trial record in the Harvard case, affirmative action advocates have major work ahead. SFFA has vowed to take the Harvard case all the way up to a newly configured Supreme Court, which no longer includes Justice Anthony Kennedy, who secured the favorable ruling in Fisher (the last lawsuit to challenge race-conscious admissions). Meanwhile, SFFA’s case against UNC will proceed to trial in district court over the upcoming months. SFFA has also resurrected its lawsuit against UT-Austin’s race-conscious admissions program. This time, SFFA has filed in state court, arguing that “student body diversity is not a compelling interest” under the Texas state constitution and remedies code. New lawsuits have also been brought to challenge diversity programs that consider factors correlated with race (so called “race-neutral” programs), which Justice Kennedy expressly encouraged in Fisher and Parents Involved (Christa McAuliffe v. Bill de Blasio).

The civil rights community is prepared to meet these challenges. Today’s education system is rife with racial biases. Affirmative action remains vital for recognizing that race continues to play a role in individuals’ lived experiences and opportunities, and that racial diversity ensures tomorrow’s future leaders come from all walks of life and learn to thrive in our stunningly diverse world.

Genevieve Bonadies Torres serves as counsel for the Educational Opportunities Project at the Lawyers’ Committee for Civil Rights Under Law. She was lead counsel for student amici in the Boston District Court trial defending Harvard’s right to consider race in admissions to promote diversity and inclusive access.
INTRODUCTION: TOWN VS. GOWN

When affluent university campuses sit in the urban core of major metropolitan areas, harmony between these institutions and local community members can be challenging. Deploying university policing authority in neighborhoods adjoining campus also predictably spurs tension and conflict. Likewise, the social soft sell that elite universities remEDIATE area blight complicates stakeholder relationships.

As private universities have sought to expand their patrol and arrest jurisdiction into surrounding residential areas, legitimate questions arise over how non-governmental actors can be given the authority to exercise the ultimate governmental power—the power to use deadly force and to take away freedom—without governmental accountability. This sort of creeping jurisdiction can raise fears about policing and the depth of public knowledge about criminal justice policy and practice.

In recent years, community leaders in Baltimore and Chicago have pressed local private universities for greater transparency in how they exercise policing authority. Civic organizers and grassroots political groups produced noteworthy success in Baltimore, where private Johns Hopkins University was forced to accept transparency concessions in exchange for policing authority, responding to concerns raised by community stakeholders. But transparency gains have proven more challenging to achieve in Chicago. These experiences bring into focus both the importance of public accountability in policing as well as the resistance of non-governmental actors to accepting unaccustomed public oversight.

POLICING PRIVATIZED

Police departments with full arrest authority (known as “sworn” law enforcement) are increasingly common on college campuses. According to the most recently released U.S. Justice Department (DOJ) data, 68 percent of all colleges and universities with student enrollment of 2,500 or greater employ sworn law enforcement officers. Although the practice is somewhat less common among private institutions, the DOJ reports that 38 percent of private postsecondary institutions employ police officers with arrest authority. The practice is not limited to higher education; in 2014, the Columbus Dispatch reported that more than 800 sworn law enforcement officers were patrolling Ohio under supervision from private hospitals and other nongovernmental employers.

At traditional law enforcement agencies operated by cities and counties, open-records statutes afford the public access to documents and data that facilitate oversight over both trends and developments in local crime, as well as how the police are using their authority. Arrest reports, complaint records, jail booking logs, body-cam videos, and other such records regularly are made available to journalists and citizen watchdogs,
serving both a deterrent function against official misconduct as well as an after-the-fact detection function. Savvy community organizers can use social media to broaden scrutiny of law enforcement policies, practices, and decisions by sharing public records online.

Yet, when the police department answers to a private university, it is less certain that the public can obtain the records necessary for meaningful oversight. Private universities, like all other non-governmental entities, are beyond the reach of state freedom-of-information laws, which typically apply only to records maintained by public entities. Consistent with these informational gaps, the American Prospect described university police forces as “one more case of privatization producing more confusion and less accountability.”

Even in states that do afford the public a measure of transparency, that access generally is circumscribed by statute. For instance, in North Carolina, Texas, and Virginia, state statutes provide that police departments operated by private universities must disclose the first page of each “incident report” written by officers responding to the scene of a crime, but nothing more.

The issue is currently before the courts in Utah, where the Salt Lake Tribune is suing Brigham Young University (BYU) for access to reports about how campus police became embroiled in a disciplinary investigation, in which a rape victim faced student conduct charges for violating the university’s prohibition on unwed sexual activity. In response to the case, Utah state legislators enacted Senate Bill 197, making BYU police incident reports clearly accessible to the public in the future.

THE TALE OF TWO CITIES

Community Concerns Needed: The Baltimore Experience

Johns Hopkins University’s (JHU) proposal to create a new police force to patrol the Baltimore campus and surrounding neighborhood landed with a thud in a city still shaken by the acquittal of three officers charged with participating in the 2015 killing of 25-year-old Freddie Gray, who was shaken to death in the back of a police department van. JHU’s proposal ignited civil unrest in a community fearful of unleashing unaccountable private police in their neighborhoods.

In April 2019, the Maryland General Assembly enacted the Community Safety and Strengthening Act. The act empowers JHU to establish its controversial private police force. Indicative of democratic participation, community stakeholders voiced their fears of and belief in this police force. The late U.S. Rep. Elijah Cummings was a key supporter, stating that he lost a nephew to violence. He predicted that without political change in Baltimore, “[More] blood will be spilled.”

The act sets appropriations for the JHU police force and provides increased funding for the recruitment and training of new law enforcement officers. Funding is also appropriated for youth services, including introducing young people from the social margins to potential law enforcement careers.

Before the act became effective, dissent was potent. As the Baltimore Sun reported, protesters staged a nearly one-month-long sit-in in spring at a JHU administration building before escalating tactics. At the tipping point, protesters chained doors and blocked windows to such an extent that administration operations were relocated on campus. Police made arrests. A GoFundMe page attributed to Students Against Private Police and Hopkins Coalition Against ICE, two highly cited organizations in opposition to the JHU force, drew $12,315, more than twice the initial $5,000 goal.

The environment reflected political engagement. Protester marches, sit-in activities, and public comments revived consistent criminal justice concerns. Had Baltimore adequately addressed its police brutality history? Would arming JHU police boost militarization against and
Since 2016, campus police have fatally shot people at Georgia Tech, Portland State University, and the University of Cincinnati.

The private university offered to make limited disclosures, including an annual report to the public containing data and demographic information regarding the size of the police force, stops, arrests, use of force, and complaints against officers. Washington was unsatisfied. In addition to the annual report, she convinced the Senate to add that “the police department shall allow a person or governmental unit to access information in the same manner as a person or governmental unit would be able to access a public record of a [public] law enforcement agency under the Public Information Act,” if the documents relate solely to law enforcement functions (as opposed, for example, to salary data or officers’ personnel files). Governor Larry Hogan signed the act in April 2019, with the transparency wording included.

JHU police protesters pushed several demands: (1) withdrawal of plans to create the private police force; (2) cessation of JHU cooperation with Immigration and Customs Enforcement; and (3) an admission of criminal wrongdoing in the killing of 44-year-old Tyrone West, who died in 2013 after he fled a traffic stop and struggled with police from the city of Baltimore and Morgan State University.

When it became apparent that JHU could not be stopped from creating a police force, opponents turned their focus to making sure that the police force would be subject to meaningful public oversight. They found a ready ally in Senator Mary L. Washington, D-Baltimore, who pushed for pro-transparency amendments to the Community Safety and Strengthening Act.

Community Concerns Unheeded: The Chicago Experience

The relationship between the majority-white University of Chicago (UC) and the majority-black residential neighborhood that surrounds it has been described as “precarious.” WBEZ-FM’s news program, “Curious City,” explored the tension in an April 2019 episode, tracing neighborhood distrust back to the 1930s and ‘40s, when the university supported restrictive covenants that kept black families from buying homes in the West Woodlawn community that adjoins the South Side Chicago campus.

Roughly 100 officers from the UC police department patrol a six-square-mile area in and around the campus, serving as the primary law enforcement agency patrolling a neighborhood of about 50,000 non-campus residents. The university took on full policing authority after enactment of the Private College Campus Police Act in 1992, enabling private postsecondary institutions to apply to the state for law enforcement certification. UChicago United, an organization of multicultural students at the university, has demanded that UC police obey Illinois’s Freedom of Information Act (FOIA), enabling the community to see how the university is using its state-delegated law enforcement authority. A student-led movement, Campaign for Equitable Policing, sought to open the department’s records after hearing multiple complaints about harassment by campus police officers that could not be documented without access to the agency’s files.

As with Freddie Gray’s death in Baltimore, police-community relations in Chicago have been strained by questionables uses of force against people of color, particularly the October 2014 shooting death of 17-year-old Laquan McDonald. Police and the Chicago mayor’s office fought for 13 months to keep the public from seeing the dash-cam video that, when finally released to journalists under court order, showed that officers lied to justify the shooting and exaggerated the threat McDonald posed. Four years after the killing, Chicago police officer Jason Van Dyke was found guilty of second-degree murder and sentenced to prison.

In the UC’s South Side neighborhood, scrutiny of the college’s policing intensified after officers shot and seriously injured a 21-year-old student in April 2018, which UC claimed was the first shooting by its police force in 40 years. Video showed that the student charged at the officer with a pipe, and, as a result, the shooting was deemed justified.

Recent findings from the University of Chicago’s GenForward Survey, which regularly polls a demographically diverse pool of young adults 34 and under, confirm that Chicagoans believe nonwhite people are singled out for unfavorable treatment by police.

Per the July 2019 research, almost half of African American GenForward respondents said they always or often go out of their way to avoid interaction with police. Almost 30 percent of Latinos said the same. A 57 percent majority of respondents, cutting across racial and ethnic lines, agreed that police treat black people worse than white people. Fifty-one percent of respondents agreed that police treat Latino people worse than white people.

In 2015, state Representative Barbara Flynn Currie, D-Chicago, filed legislation to require police at private Illinois universities to adhere to the same public-records standards as police at public universities. The University of Chicago did not support the change. UC was able to take the steam out of the transparency movement by voluntarily agreeing to make additional disclosures beyond the minimum necessary under federal law, which requires colleges to release only a skeletal daily crime log and an annual statistical report of serious
crimes. Representative Currie’s bill never became law.

Even with the benefit of UC’s compromise level of partial transparency, journalists have been able to unearth troubling disclosures. Reviewing the first wave of data released by UC police—about the police department’s use of a pedestrian stop technique called “field interviews”—the Chicago Reporter found that black people made up over 90 percent of the stops but less than 60 percent of the population within the jurisdiction. This data gives a hint of what more the public might find out, if the state FOIA law could be clarified to extend to private entities with state policing power.

CONCERN FOR POLICE ACCOUNTABILITY GALVANIZES COMMUNITIES

The experience of the Johns Hopkins and University of Chicago neighborhoods dramatizes how community members can organize and rally behind the issue of public transparency, even if (as in Chicago) the results are not always satisfying. Additional research would help discern what makes citizen-led transparency movements succeed or fail, and what conditions are most conducive to building enduring community accountability coalitions.

Access to documents and data from law enforcement agencies enables the public and press to discharge essential oversight functions. The information gleaned from police records is at times unflattering, if not downright alarming. Reporters in New Jersey used their state’s Open Public Records Act to build an award-winning database of 72,677 use-of-force cases, concluding that the state’s oversight system for police is “broken,” failing to detect patterns that might help identify problem officers. In Chicago, the nonprofit Invisible Institute used public records to map the location of nearly 250,000 misconduct complaints against police officers—finding that just 7 percent of the complaints resulted in any disciplinary action.

College police have become largely interchangeable with city and county police, often responding jointly to serious incidents in areas of overlapping jurisdiction. Campus police are, for all practical purposes, officers of the state. Case after case has held that they must adhere to Fourth Amendment standards when making searches, seizures, and arrests, despite being nominally non-governmental. Since 2016, campus police have fatally shot people at Georgia Tech, Portland State University, and the University of Cincinnati. Regardless of who signs their paychecks, police officers’ on-the-job behavior is a matter of intense and legitimate community concern.

The law is slowly evolving in the direction of greater public accountability. In 2015, the Ohio Supreme Court ordered private Otterbein University to disclose its campus police records, and the Texas legislature voted to extend the state’s Public Information Act to private police, after Rice University refused to release records about why three campus police officers clubbed an African American man with batons during a stop for misdemeanor bicycle theft.

Police have earned public skepticism in Baltimore, Chicago, and communities throughout the country where overzealous use of deadly force has been well-documented. Secrecy inflames public distrust. A generation raised on smartphones and YouTube will not be satisfied with mere assurances that police are using their power advisedly. Restoring public legitimacy in the integrity of policing requires greater transparency, and police will imperil their legitimacy by continuing in communities like Chicago to resist public oversight.

Imani J. Jackson is a legal fellow at the Brechner Center for Freedom of Information. She earned a B.A. at Grambling State, a J.D. at Florida A&M, and an LL.M. at the University of Florida.

Frank LoMonte is a professor at the University of Florida, where he teaches media law and runs the Brechner Center for Freedom of Information, a think-tank focused on the public’s right of access to civically valuable documents and data. He formerly practiced law with Sutherland Asbill & Brennan LLP and clerked on the Eleventh Circuit U.S. Court of Appeals.
of America. All were there that night (in Grant Park), where we saw Jesse Jackson shed “tears of joy” and where one of my colleagues from the National Bar Association stood, having traveled to witness history all the way from New York City. What a joy to witness history! Our ancestors were rejoicing! We have overcome!!! Or, at least, we sure acted like it.

In the midst of the celebration, there was the systematic effort to halt any effort that would be deemed as Obama’s success: backlash. Again, referencing the history of our country reminds us that this backlash is nothing new. The first white backlash came after the Civil War when African Americans made significant gains politically and economically. In his classic work, Before the Mayflower, Dr. Lerone Bennett Jr. records that the first African American elected to Congress was John Willis Menard, who defeated a white candidate, 5,107 votes to 2,833 votes on November 3, 1868. Menard was elected to fill an unexpired term in the Second Congressional District in the state of Louisiana, but his election was contested, and he was never seated because of the general belief that it was “too early to admit a Negro to the U.S. Congress.”

Starting with the Florida Constitution of 1885, white Democrats passed new constitutions in 10 southern states with provisions that restricted voter registration and forced hundreds of thousands of people from registration rolls. These changes effectively prevented most blacks and many poor whites from voting. Many whites who were also illiterate were exempted from such requirements as literacy tests by such strategies as the grandfather clause, basing eligibility on an ancestor’s voting status as of 1866, for instance.

Southern states and local legislatures also passed Jim Crow laws that segregated transportation, public facilities, and daily life. Finally, racial violence in the form of lynching and race riots increased in frequency, reaching a peak in the last decade of the nineteenth century.

The last African American congressman elected from the South in the nineteenth century was George Henry White of North Carolina, elected in 1896 and re-elected in 1898. His term expired in 1901, the same year that William McKinley, who was the last president to have fought in the Civil War, died. No African American served in Congress for the next 28 years, and none represented any Southern state for the next 72 years.

The second backlash manifested itself after the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act when white southerners left the Democratic Party and became Republicans. President Lyndon B. Johnson is believed to have said to an aide after signing the Civil Rights Act that he had delivered the South to the Republican Party for a generation. In 1968, Richard Nixon’s famous “southern strategy” was focused on obtaining the votes of the southern white majority by appealing to their racist views.

As part of his 1980 presidential campaign, Ronald Reagan made an appearance at the Neshoba County Fair, where he gave a speech on August 3, 1980. Critics claim that Reagan’s choice of location for the speech, the fairgrounds, about seven miles from Philadelphia, Mississippi, a town associated with the murders of James Chaney, Andrew Goodman, and Michael Schwerner in 1964, was evidence of racial bias. During his speech, Reagan said:

> I still believe the answer to any problem lies with the people. I believe in states’ rights. I believe in people doing as much as they can for themselves at the community level and at the private level, and I believe we’ve distorted the balance of our government today by giving powers that were never intended in the Constitution to that federal establishment.

Today, America is facing a “third backlash,” where white nationalists are empowered to openly protest the “browning of America” and want to “Make America Great Again.” Police officers shoot unarmed black men and ask questions later. We have been socially conditioned to believe that white is superior and black is inferior. Still today, African Americans are undervalued, underestimated, and marginalized. Sadly, racism is so engrained into the American ethos that if you call it out, you will be branded unpatriotic (just as Colin Kaepernick has).

Moreover, as one part II contributor, Howard University School of Divinity Professor Dr. Barbara Fears notes, if “Black Lives Matter,” white critics’ response is “All Lives Matter.” Any effort to focus on black people is seen as exclusive or offensive to whites, or it is called “reverse racism.”

Matthew Delmont, who is now the Sherman Fairchild Distinguished Professor of History at Dartmouth College, wrote in The Atlantic in 2016 that as more groups—evangelicals, gays and lesbians, and gun owners, among them—lobby for specific policies, black voters have seen their interests deemed too ‘special’ for consideration by a democratic administration. President Obama has felt the pressure to connect with black voters while distancing himself from black interests. Although his signature accomplishment, the Affordable Care Act, will surely benefit black Americans, he has been reluctant to endorse policies that cannot be pitched as universal. In a 2012 interview with Black Enterprise Magazine he said, ‘I want all Americans to have opportunity. I’m not the president of black America.’ I’m the president of the United States of America.’

Each year, the National Urban League (NUL) produces a report titled “The State of Black America.” In it, the NUL provides a detailed analysis of the progress or lack of progress (or perhaps, the “current state of affairs”) in Black America. The NUL released its 2017 report titled “Protect Our Progress, The State of Black America.” Since 2013, the NUL has provided the rankings of unemployment and income equality between whites, blacks, and Hispanics in the nation’s largest metropolitan areas. Comparisons of the 2016 and 2017 Metro Unemployment Equality Index rankings reveal that some of the lower-rankinl metro areas from the 2016 Index rose to the top of the 2017 Index as the recovery finally started reaching people of color in some of America’s hardest hit communities. In both the black-white and Hispanic-white rankings, no more than half of the cities in the 2016 top 10 were also in the 2017 top 10. At the same time, many of the metro areas at the bottom of the 2016 rankings remained at the bottom of 2017 rankings.
The report shows the black unemployment rate in all metropolitan areas listed (22 in all) continues to be significantly higher than whites. In the Chicago-Naperville-Elgin, Illinois, metro area, the unemployment rate for blacks was 16.2 percent, compared to whites’ 4.7 percent. In the Detroit-Warren-Dearborn, Michigan, metro area, the unemployment rate for blacks was 17 percent, compared to 5.4 percent for whites. In the Milwaukee-Waukesha-West Allis, Wisconsin, metro area, the unemployment rate for blacks was 13.8 percent, compared to 2.7 percent for whites.

Perhaps even more perplexing is that the African American unemployment rate is higher than the Hispanic unemployment rate. Again, in the Chicago-Naperville-Elgin metro area, the Hispanic unemployment rate was 7.6 percent (black unemployment rate was 16.2 percent). In the Miami-Fort Lauderdale-West Palm Beach area, the unemployment rate for Hispanics was 5.9 percent, while the black unemployment rate in this area was 12.9 percent, and in Los Angeles the rate of Hispanic unemployment was 7.3 percent, while for blacks it was 11.2 percent.

Accordingly, the 2017 NUL report showed that income levels for blacks continue to lag far behind whites. In the Chicago-Naperville-Elgin metro area, the median black family’s income was $34,937, whereas for whites, the median income was $76,869. In the New York-New Jersey City metro area, the median black family income was $47,173, compared to whites, for which it was $87,186. Even in the Atlanta-Sandy Springs-Roswell, Georgia, metro area, the median income for blacks was more than $26,000 lower than whites: $72,792 for whites and $45,799 for blacks. As this report demonstrates, economic indicators show that while our country continues to make progress since the Great Recession, for many African Americans and others in urban and low-income communities, wide gaps of inequality in income, housing, and education remain.

These statistics are not new and continue to shed light on the fact that we are not in a post-racial America. The current “State of Black America” is a result of what Jim Wallis calls America’s Original Sin: racism. Wallis argues that the heart of racism was and is economic. America suffers from a two-tiered economy: one tier is mostly white and is composed of lucrative high-paying jobs in law, medicine, financial services, technology, and business. In the other tier, African Americans make up a disproportionate number and are underemployed, unemployed, or hold unskilled labor jobs.

Dr. Noel Leo Erskine, who is a professor of theology and ethics at the Candler School of Theology at Emory University, would agree with Wallis in his analysis of the conditions that created the economic gap between African Americans and whites. Erskine contends that the basic fact of our existence for African Americans in the United States is poverty. He maintains that even though African Americans live in a country of abundance, their rate of unemployment in many cities is twice that of whites. If the color line was the Negro problem of the twentieth century, then, according to Erskine, the problem for black people in the twenty-first century is poverty.

In late March 2015, I traveled to St. Louis, Missouri, to attend the National Bar Associations of Governors Spring Meeting. While there, I, along with approximately 60 other African American lawyers and judges, traveled to Ferguson to the location where 18-year-old Michael Brown was shot and killed on August 9, 2014, by 28-year-old Darren Wilson, a white Ferguson police officer. Teddy bears, cards expressing condolences, and pictures of Michael and his family still laid in the middle of the street where Michael laid under the heat of an August sun for nearly four hours before an ambulance arrived to retrieve his body.

What was not heavily reported during the nights of protest that followed Michael Brown’s shooting was that Ferguson had been suffering from a dramatic economic decline in recent years. The city’s unemployment rate rose from less than 5 percent in 2000 to over 13 percent between 2010 and 2012. For those residents who were employed, inflation-adjusted average earnings fell by one-third. The number of households using federal Housing Choice Vouchers climbed from roughly 300 in 2000 to more than 800 by the end of 2010. Amid these changes, poverty skyrocketed. Between 2000 and 2012, Ferguson’s poverty population doubled. By the end of that period, roughly one-fourth of the residents lived below the federal poverty line ($23,492 for a family of four in 2012), and 44 percent fell below twice that level. As Professor Kimberly Jade Norwood powerfully argues in her book, Ferguson’s Fault Lines: The Race Quake That Rocked a Nation, poorly trained police officers were not the only dilemma that led to Michael Brown’s death. Systemic issues fostered by a collapsed local economy, a declining tax base, unemployment, and underemployment in this St. Louis suburb played a significant role in creating a hostile environment of hopelessness, injustice, and inequality. Ferguson did not simply have a policing problem; it had a jobs problem.

Ferguson is no different than thousands of communities across the country. Clear and convincing evidence shows that economic disparities continue to exist in America, and African Americans are disproportionately at the bottom of the economic ladder. Leading economists and social scientists state that there has been little to no investment in communities of color since the turn of the twentieth century. This historic lack of economic investment in schools, businesses, and housing has created inequalities in African American communities that remain evident today.

There was a belief that in August 2005 New Orleans had been spared the worst of the Category 4 hurricane that had already destroyed the towns of Biloxi, Gulfport, Waveland, Pass Christian, and Bay St. Louis. But then two levees cracked that had held the waters of Lake Pontchartrain back from the city of New Orleans. In the Lower Ninth Ward, which was home to some of the poorest people in the region, water began to fill the area first, and residents were displaced to their rooftops. People who did not evacuate, some believing they didn’t need to, others unable to, were forced to climb to their attics and finally break through to their roofs, some with pocket knives, and desperately wait for someone to rescue them. Over time, what became apparent was that Hurricane Katrina, in New Orleans anyway, was a man-made disaster. At least
MARIAN WRIGHT EDELMAN TO RECEIVE 2020 THURGOOD MARSHALL AWARD

The ABA Civil Rights and Social Justice Section is honored to announce that the 2020 Thurgood Marshall Award will be given to Marian Wright Edelman, founder and president emerita of the Children’s Defense Fund. Ms. Edelman’s tireless, groundbreaking, and distinguished leadership and advocacy on behalf of disadvantaged Americans, children, and families throughout her career demonstrate her deep commitment to equality and justice for everyone.

**The Award** The ABA Thurgood Marshall Award was established by the Section of Civil Rights and Social Justice in 1992 to honor U.S. Supreme Court Justice Thurgood Marshall, who epitomized individual commitment, in word and action, to the cause of civil rights in this country. The award recognizes similar long-term contributions by members of the legal profession to the advancement of civil rights, civil liberties, and human rights in the United States.

**Additional Details** The Award Dinner will take place on Saturday, August 1, at the Fairmont Hotel, Millennium Park, during the 2020 ABA Annual Meeting in Chicago, Illinois.

**Sponsorship is Available at a Variety of Levels** Additionally, individual tickets will be sold through the ABA Annual Meeting registration page. All are encouraged to attend and celebrate the renowned recipient, Marian Wright Edelman.

Please contact the Section office at crsj@americanbar.org or 202-662-1030 with any questions.
The United States’ Hollow Commitment to Eradicating Global Racial Discrimination

By Maya K. Watson

For 25 years, the United States has been a party to an international racial discrimination treaty whereby it committed to “adopt all necessary measures for speedily eliminating racial discrimination.” Yet, the United States has consistently failed to meaningfully uphold this mandate.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

ICERD is the oldest of the nine core international human rights treaties, and it is the principal treaty aimed at eliminating racial discrimination globally. The U.N. General Assembly unanimously adopted ICERD in 1965 and it took effect on January 4, 1969. Nearly 93 percent of United Nations member states are parties to ICERD. By ratifying ICERD, these States condemn racial discrimination, segregation, and apartheid, and they agree to pursue policies to eliminate racism and promote racial understanding.

ICERD’s passage, initially, sparked hope of addressing global racism. U.S. civil rights organizations, like the Student Nonviolent Coordinating Committee (SNCC), which was once led by U.S. Congressman John Lewis, appealed for ICERD’s immediate application. In a 1967 U.N.-organized position paper, SNCC wrote how blacks in the United States sympathized with the struggle against South African apartheid because they had endured their own version of
apartheid. SNCC likened the prisons cells of Robben Island, where Nelson Mandela was once incarcerated, to the jails of Mississippi and Alabama and pushed for ICERD's immediate implementation. Sadly, the initial hope that ICERD would remedy issues affecting marginalized communities in the United States has subsided.

The United States and ICERD

The goal of eradicating global racial discrimination is one tailored toward U.S. involvement. The United States signed ICERD in 1966, but did not ratify it for nearly three decades—until October 21, 1994. A 1994 Senate report spoke of the United States using its position to lead the world in bringing an end to racial discrimination. But 25 years of evidence shows little appreciable U.S. effort to use its position to end racial and ethnic discrimination globally or domestically.

Instead, the United States has failed to materially adhere to its ICERD obligations by (1) submitting reservations that nullify the treaty’s effect, (2) failing to enact implementing legislation, (3) preventing citizens from bringing claims under ICERD, and (4) failing to deliver timely reports of measures it has taken to address racial discrimination. These failures constitute a watered-down commitment, at best, toward ICERD’s goal of eliminating global racial discrimination, and it makes the United States a treaty party in name only, and not in spirit.

The United States’ ICERD Reservations

State parties may attach reservations, understandings, and declarations (RUDs) to a treaty at the time of ratification. RUDs modify or clarify a treaty’s text or alter its legal effect for that ratifying State. But RUDs that are incompatible with a treaty’s object and purpose are deemed impermissible.

The United States ratified ICERD subject to several RUDs. In ratifying ICERD, the United States said it would not accept any obligation under ICERD to restrict U.S. freedom of speech, expression, and association. The United States further asserted that, to the extent ICERD seeks to regulate private conduct in a stricter manner than what already exists under U.S. law, the United States would not be obliged to take any such measures. These RUDs reflect a posture that U.S. laws prevail over multilateral, negotiated international human rights treaties, even if the treaty in question provides broader protections against racial discrimination.

This sentiment is emphasized in the United States’ final ICERD RUD, which provides that the treaty is non-self-executing. This final RUD prevents litigants from bringing independent ICERD claims into U.S. courts. A U.S. citizen cannot bring a claim into a U.S. court solely alleging that ICERD provisions have been violated, unless that claim also implicates a U.S. law. While self-executing treaties are equal to domestic law and enforceable in U.S. courts, non-self-executing RUDs often are perceived as the biggest obstacle to a treaty’s effectiveness in the United States because the provisions of that treaty cannot be enforced, on its own terms, domestically.

Of course, international human rights law must be balanced with sovereignty principles. ICERD provisions impact State Parties’ authority over their domestic affairs. ICERD Article 4 mandates, for example, that State Parties make hate speech and the dissemination of racist materials illegal. Free speech is a well-settled U.S. constitutional principle and considered one of the country’s most prized civil liberties. However, racism, hatred, racial superiority, and state-sponsored racial subjugation are also among the country’s well-settled practices. The U.S. RUD stating it does not accept any obligation under Article 4 to restrict freedom of speech plainly confirms which side of the balance the United States values more. Protecting speech—namely hate speech—is more sacred to the United States than abolishing the evils of racism. This does not reflect a sincere commitment to uphold ICERD’s primary purpose of eliminating racial discrimination.

If a country aims to enforce only its own laws, why join ICERD at all? Reservations that reasonably modify a treaty’s text are one thing, but completely usurping the law of a treaty for a State’s own domestic laws, arguably, defeats the purpose of ratifying an international treaty.
Implementing Legislation
The nullifying effect of the United States’ RUDs could be mitigated by fully implementing ICERD into the United States’ domestic legal framework. Implementing legislation will give ICERD legal effect in the United States and provide for domestic enforcement of the treaty. ICERD parties agree to end racial discrimination, through all appropriate means, including legislation. So, ICERD parties are encouraged to enact legislation implementing the treaty domestically. ICERD requires that State Parties review their national and local policies and revise or repeal laws that have the effect of advancing racial discrimination.

Despite repeated requests, the United States has still not enacted legislation allowing for ICERD to have legal effect in the United States. The United States claimed that its laws already provide comprehensive protections against discriminatory conduct. The United States further explained that racial discrimination can be addressed both by U.S. constitutional and statutory law, including the Equal Protection Clause and the Civil Rights Act of 1964.

But one reason for the ICERD Committee’s insistence that the United States enact legislation implementing ICERD lies in how racial discrimination is defined. Racial discrimination under ICERD does not require proof of discriminatory intent; if a policy’s impact is disparate, then it is discrimination under ICERD. Unlike ICERD, U.S. law, generally, requires that racial discrimination claims prove discriminatory intent. Disparate impact often will not suffice. Consequently, the burden of proof for legal claims of discrimination in the United States is difficult to satisfy, making remedies for racial discrimination rare.

Given that ICERD offers broader protections against racial discrimination, the U.S. government should enact legislation to fully implement the treaty domestically.

Individual Complaints
ICERD permits individuals to file a complaint against a State Party after local remedies have been exhausted, if the State recognizes the competence of the ICERD Committee to hear the case. Individual complaints are optional, and States must agree to submit themselves to such claims. The Russian Federation, South Africa, France, Brazil, Germany, and Hungary all permit the Committee to hear individual complaints.

The United States has not agreed to do so. The United States argues that U.S. law already provides adequate opportunities to remedy racial discrimination. But U.S. laws do not go as far as ICERD mandates. Permitting the ICERD Committee to hear individual complaints will provide marginalized individuals with opportunities to voice how unaddressed racial and ethnic discrimination has affected them. As ICERD requires that local remedies be exhausted first, U.S. judicial means and administrative agencies must still be the routes of first resort. The ICERD complaint mechanism will only be used where U.S. racial discrimination laws fall short. To fully embrace ICERD, the United States should recognize the Committee’s competence to hear individual complaints.

U.S. Periodic Reports
Under ICERD, all State Parties must submit reports on the legislative, judicial, administrative, and other measures they’ve adopted to give effect to ICERD. States issue their first report one year after joining ICERD and every two years thereafter. The reporting process gives the ICERD Committee the opportunity to examine implementation and compliance. It also allows the U.N., other State Parties, and the international community to examine a State’s laws, to commend any progress made and to recommend corrective action where necessary. When States fail to submit their reports, this compliance monitoring process is undercut.

The United States has routinely submitted its periodic reports late. The most recent reports were due in 2017, and the United States still has not delivered these reports.

Conclusion
The rich and enduring legacy of state-sponsored discrimination that has burdened U.S. citizens warrants the United States’ unwavering compliance with its ICERD obligations. Yet, the United States has failed to fully endorse and implement ICERD’s goals. Given the nullifying RUDs, the failure to enact implementing legislation, the failure to allow for individual complaints, and the failure to deliver timely reports work counter to the goals of ICERD and prevent international oversight on the United States’ continuing struggles with racial discrimination.

The author would like to thank Professor Destiny Peery for her generous contributions.

Maya K. Watson is an attorney licensed in California and Michigan and is a candidate for a 2019 Master of Laws degree in international human rights law from Northwestern School of Law in Chicago.
The Intersection of Race and Rape: Viewed through the Prism of a Modern-Day Emmett Till

By Chelsea Hale and Meghan Matt

Emmett Till’s name sparks immediate emotion and often sends chills down the spine of any American with a beating heart. Fourteen-year-old Till was murdered in 1955, but his name and story still conjure emotions today. Perhaps that’s because many of us are aware of the unspoken reality surrounding Till’s story—aspects and versions of it live on through the lives of many other African American men, such as the one that inspired this work.

This modern Emmett Till, whose name we intentionally left out of this article for confidentiality, was convicted as a teenager and is presently serving a 100-year sentence in Louisiana for the attempted rape of two white teenage girls in the 1970s. A group of lawyers and activists are currently advocating his case and we did not want any publicity in the article to adversely affect their efforts.

Emmett Louis Till was a 14-year-old African American who was lynched in Mississippi in 1955 after being accused of offending a white woman in her family’s grocery store. Photo taken on December 25, 1954.

Mammie Till changed the course of history with her decision to “let the world see” the brutalized body of her young son, we have similar ambitions. We wish to disrupt a disturbing narrative surrounding the intersection of race and rape, specifically, how African American defendants accused of raping white women are treated differently under the law than white men accused of raping African American women.

The practice of exploiting and violating the bodies of African American women with impunity is an ancient one. During America’s chattel slavery system, white slave owners freely and legally raped the women whom they enslaved, often in front of their families. (Danielle Mcguire, “It Was like All of Us Had Been Raped’: Sexual Violence, Community Mobilization, and the African American Freedom Struggle.” Journal of American History (2004).) They used rape to assert their power and authority over their property without accountability. The offspring of enslaved women were then also considered their master’s property, giving these men more economic power and further stripping African American women of the rights to their own bodies and babies. Id. The legal system enforced this by the sin of omission. No Louisiana law made rape of a black woman, slave or free, a crime. Rape was specifically limited to white women under the state’s law. (Judith Kelleher Schafer, Slavery, the Civil War, and the Supreme Court of Louisiana (1994), 85–87.) However, Louisiana’s provisions mandated capital punishment for both the rape and the attempted rape of a white female by a slave.

In 1845, James Marion Sims, the father of modern gynecology, began experimenting on enslaved women without consent and without any anesthesia, causing untold suffering. Operating under the mere racist notion that African American people did not feel pain, patients were completely naked and asked to perch on their knees and bend forward onto their elbows so their heads rested on their hands. After 30 operations and four years spent experimenting on a 17-year-old enslaved woman, he finally “perfected” his method. Only then did he begin to practice on white women, to whom he freely administered anesthesia. Sims’s heinous acts were legally permissible because enslaved women were only considered their master’s property and were allowed no autonomy of their own bodies.

This continued into the lynching era, where the most common reason for public lynching was the perception that white women needed to be protected from African American rapists and attempted rapists. (Jeffrey J. Pokorak, “Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities,” 7 Nev. L.J. 1, 23–24 (2007).) Black men were painted as sexually deviant monsters. In fact, writer and politician Rebecca Latimer Felton said, “If it needs lynching to protect woman’s dearest possession from the ravening human beasts, then I say lynch...
a thousand times a week if necessary.” Between 1880 and 1950, around 5,000 people were lynched in the United States, nearly six people every month for 70 years.

During the Jim Crow era, white men used rape and rumors of rape not only to justify violence against African American men, but also to remind African American women that their bodies were not their own. Here, once again, white men in positions of power over African American women, such as police officers and employers, used sexual assault and rape to dominate them. In early 1930 in New Orleans, a 14-year-old African American girl named Hattie McCray repeatedly fought off the police officer attempting to rape her. In response to her bravery, he shot and killed her. Patricia Hill Collins observed of this continuing practice, “No longer the property of a few white men, African American women [and girls] became sexually available to all white men.”

Next, America moved to the period of legalized lynching. It is during this time that we moved from extrajudicial execution—lynchings—to judicially enforced lynchings, also known as capital punishment. Here, courts applied what is best described as situational reasoning. If the accused was African American and the victim white, the jury was entitled to draw the inference, based on race alone, that he intended to rape her. This helps to explain very troubling sentencing patterns. According to the U.S. Department of Justice, between 1930 and 1972, 455 people were executed for rape, with 405 of those being African American. Moreover, according to the Wolfgang and Riedel study, African American defendants whose victims were white were sentenced to death approximately 18 times more frequently than defendants in any other racial combination of defendant and victim. Notably, no white man has ever been executed in the United States for the non-homicide rape of an African American woman or child.

A recent study concluded that African American men convicted of raping white women receive more serious sanctions than all other sexual assault defendants. (LaFree, “The Effect of Sexual Stratification by Race on Official Reactions to Rape,” 45 AMBR. SOC. REV. 842, 852 (1980)). Another study in Dallas found that the median sentence for an African American man who raped a white woman was 19 years, whereas a white man who raped an African American woman received a 10-year sentence. (Katharine K. Baker, “Once a Rapist? Motivational Evidence and Relevancy in Rape Law,” 110 HARV. L. REV. 563, 586 (1997)). Furthermore, African American defendants are subjected to a disproportionate number of wrongful convictions for rape. (Brandon L. Garrett, “Judging Innocence,” 108 COLUM. L. REV. 55, 66–67 (2008)).

Statistically, African American women are much more likely to be victims of rape than are white women, and often they are subsequently revictimized by the judicial system. If these facts don’t cause alarm, perhaps the truth will. In a 1971 study on judges’ attitudes toward African American rape victims, a judge was quoted as saying: “With the Negro community, you really have to redefine rape. You never know about them.” (C. Bohmer, "Judicial
Attitudes Toward Rape Victims,” 51 JUDICATURE 303 (1974).)

There is a heavy imbalance of justice between African American defendants accused of raping white women and white men accused of raping African American women. Despite changes being made to current laws, the interpretation of the law, or the law as it is applied, has not. For instance, in Coker v. Georgia, the defendant was convicted of rape and sentenced to death (97 S.Ct. 2861). In 1977, the United States Supreme Court ruled that a “sentence of death for [the] crime of rape of an adult woman was grossly disproportionate and excessive punishment forbidden by the Eighth Amendment as cruel and unusual punishment.” Id.

Another imbalance of justice involves the trial experiences of rape victims. The case of Betty Jean Owens is a perfect illustration of this. Armed with switchblades and shotguns, four white boys from Florida made a pact to “go out and get a nigger girl” and have an “all-night party.” On May 3, 1959, four white males crept up to the car, pointed a shotgun at the driver, and forced the black students out of the car. After one fled and two were ordered to leave, Betty Jean Owens was left alone with the four white males. She was forced into a car belonging to one of the boys. After the four males drove her to a different side of town, Betty Jean Owens was forcibly raped seven times. Later that evening, an officer found Owens bound and gagged, lying on the backseat floorboards. When he attempted to help Owens out of the car, she collapsed once her feet touched the floor.

Owens testified in front of an all-white jury and 400 witnesses who gathered in the courtroom. Not only was she violently raped seven times by her four attackers, she was also psychologically raped by the defense while testifying on the witness stand. Though her attackers confessed in writing to kidnapping and raping Owens, they entered a plea of innocent and their defense attorney portrayed them as respectable citizens. As a result, the four men were granted leniency and given a life sentence, instead of being sentenced to death. However, one of the men was paroled after serving only four years. Betty Jean Owens is a profound demonstration of an African American woman having a surplus of proof—confessions from her attackers, eyewitness testimony, and physical evidence—showing her white attackers’ guilt, yet not receiving justice. Alternatively, in the case of the African American man serving a 100-year sentence, his accusers only needed the power of a white woman’s word to certify an African American man’s guilt.

Samuel Shepard, Walter Irvin, Charles Greenlee, and Ernest Thomas—known as the Groveland Four—were accused of raping a white woman in 1949 in Groveland, Florida. At the age of 17, Norma Padgett informed police she had been abducted and raped by four men. Greenlee, Irvin, and Shepard were charged, jailed, and beaten on the night of their arrest. Subsequently, an all-white jury sentenced 16-year-old Greenlee to life in prison, while Irvin and Shepard, both World War II veterans, received the death penalty. Unlike the other three men, Ernest Thomas was shot to death before he could be charged or tried for the alleged crime. Prior to his death, Thomas was “hunted for more than 30 hours . . . by an armed, deputized posse of approximately 1,000 men with bloodhounds.” (Ian Stewart, Accused of Florida Rape 70 years Ago, 4 Black Men Got Posthumous Pardons. 11, January 2019.)

Irvin’s and Shepard’s appeals reached the United States Supreme Court, which upon review, ordered a retrial. Instead of following the judgment rendered by the Supreme Court, Sheriff Willis McCall handcuffed the two men, drove them to the countryside, and shot them. Although McCall would argue his actions were in self-defense, Irvin was wounded and Shepard died. When Irvin was retried, he was sentenced to death; however, that sentence was later converted to life in prison. Just one year after being released on parole, Irvin passed away in 1969. Greenlee was released in 1962 and lived until his death in 2012. Seventy years after the Groveland four were wrongfully accused of raping a white woman, they received a pardon from Governor Ron DeSantis, who labeled this tragedy a “miscarriage of justice.” Id. Along with their posthumous pardon, the city of Groveland issued an apology to the men and their families.
In 2016, Malik St. Hilaire, along with another African American student from Sacred Heart University, was falsely accused of raping a white student, Nikki Yovino. Initially Yovino claimed the two African American students raped her in a bathroom during an off-campus party. Investigators stated that they believed Yovino’s initial story and appeared to have witness statements to corroborate her claims. However, another student came forward to police and reported explicit text messages between Yovino and the two accused students. After being confronted by police, Yovino admitted to making up the story because she worried her “consensual encounter” with the two students would damage her relationship with a different student. Because of her lies, the two African American students were left to suffer the consequences of a guilty party in the court of public opinion. One of the male students lost his football scholarship after the allegations by Yovino were made, and both students withdrew from Sacred Heart University.

Even though a criminal trial was never held, the two young black males were given the excessive sentence of guilt before a thorough investigation was ever conducted. Even with Yovino’s lenient penalty for falsely reporting a crime, these two young men’s lives have been forever altered because the color of their skin was different from that of their wrongful accuser.

These examples illustrate a legal shortcoming when it comes to the legal concepts of “presumption of innocence.” The “presumption of innocence,” although not expressly enumerated in the U.S. Constitution, comes from the Bill of Rights. The general theory is that every defendant charged with a crime is presumed innocent until proven guilty beyond a reasonable doubt. However, there is a preconceived notion that a man of color accused of rape, by a white woman, is presumed guilty beyond a reasonable doubt. In the case of a white man accused of raping an African American woman, the presumption of innocence shifts from the white defendant to the African American female victim. Here, there is a presumption that a woman is unchaste because the color of her skin is black. Alternatively, the standard applied to the white defendant is the presumption that he is innocent until the African American victim is proven pure, innocent, and deserving of the law beyond a white person’s reasonable doubt.

Research shows laws and procedural mechanisms applied in cases involving African American men accused of raping African American women voids the presumption of innocence, or applies a different standard of the law when compared to a white man accused of raping an African American woman. In the case of Betty Jean Owens and others, the white attackers confessed to raping African American women. Even with the confessions of her white attackers and the detailed testimony of these African American victims, juries responded with leniency and mercy. The outcome of the Groveland Four, Gregory Counts, and VanDyke Perry, however, is the word of their white accusers, alone, being sufficient enough to find them guilty of rape simply because they were African American men.

When it comes to rape, African Americans theoretically receive equal protection under the law, but do not actually receive equity in the application of the law. Equality without equity provides a pathway for African Americans to continuously find themselves lynched and victimized by the justice system, time and time again. Although the date of Emmett Till’s death was over 60 years ago, the physical slaughter and disregard for his body is emblematically carried out by the social and judicial nullification of African Americans’ lives today.

In 1955, the imbalance of justice prevented Till—whose eye was beaten from its socket, who was fatally shot, and whose body was weighed down by a 75-pound fan—from receiving justice. Today, the scales of justice continue to weigh down reoccurring reinforcement of power and ownership when it comes to the bodies of African American women, accompanied by the presumption of guilt when it comes to African American men. Regardless of laws that sit on the books today, the realities are unchanging.

A legal scholar once commented, “While white women have been spared at all costs, African-American women’s bodies have always been like a buffet for white men to have, and take, and come back as often as they wanted.” Both history and our present legal system prove this to be true. When a woman comes forward with an accusation of rape against any man, the issue shouldn’t be the law treating her as it did when she was property because of her race. By altering the application of the law, all women, especially African American women, should be seen as human in the eyes of the law, and therefore deserving of protection under the law.

Then, and only then, can we begin to call our system “just.”

Chelsea Hale and Meghan Matt are 2L students at the Southern University Law Center in Baton Rouge, Louisiana. Both women plan to practice in the areas of civil rights litigation and criminal law.

No white man has ever been executed in the United States for the non-homicide rape of an African American woman or child.
engineers committed to these causes dismantling these institutions, our plight is far from over. Black America is still currently faced with so many adverse disparities that either remain from slavery or have evolved into new methods of oppression in the form of mass incarceration, health disparities, unconscious bias encounters in all areas of life, wealth disparities, the school to prison pipeline, inequality in housing, and the persistent killing of unarmed black people, to name only a few. In short, we need more heroes to continue the fight for equality.

Even though our actions may not directly cause these societal plagues, our silence or our failure to act may be viewed as complicity. When we don’t object to an unjust law or policy, aren’t we sending a subliminal message that implies support? When we fail to act, are we unconsciously consenting to the wrongdoing? An indifferent response to the ills of society can be as damaging as directly causing those ills yourself, especially when you have the education, skillset, and resources to help remedy those ills. This, I believe, is what Charles Hamilton Houston meant by “parasite on society.” There is still no in between.

I’m not suggesting that you go argue the next Brown v. Board of Education landmark case before the Supreme Court. I’m not even suggesting that you change your practice area to civil rights (although we would welcome it). I am, however, suggesting that we have an ethical obligation to be a part of the solution.

In addition to issues that directly harm African Americans, the African American voice lends value to the advancement of equality in areas that affect all Americans. Regardless of how or what you choose to contribute, our collective voices are necessary to the implementation of positive change. The heroes—the social engineers of our time—are among us. They are us.

Lending your voice to these conversations is essential. Have the courage to speak up. And while some may be uncomfortable having these conversations, these discussions are crucial nevertheless. Progress and positive change are never easy, and they certainly are never comfortable.

I’ll leave you with one last quote from the great Charles Hamilton Houston. “A social engineer [is] a highly skilled, perceptive, sensitive lawyer who [understands] the Constitution of the United States and [knows] how to explore its uses in the solving of problems of local communities and in bettering conditions of the underprivileged citizens.”

How can you be a social engineer? How can you be a hero? Serve on a committee within the ABA Civil Rights and Social Justice (CRSJ) Section. Organize or participate on an educational panel/webinar; take on a civil rights pro bono matter; draft an ABA resolution; author a white paper on a compelling legal issue; draft model legislation that can be utilized by state legislatures all over the country; write an amicus brief for a social justice case; submit comments to a proposed regulation. Mentor a young lawyer; volunteer as an election protection attorney; become civically engaged. Problem-solving comes in many forms and there are countless ways to contribute. There are countless ways to be a hero. For those of you looking for a way to become or continue to be the social engineer you were trained to be, there is plenty to do within CRSJ. I welcome you to join us!

This article is written in the author’s personal capacity and the views, thoughts, and opinions expressed herein do not necessarily represent those of the U.S. Department of Health and Human Services or the United States government.

Angela J. Scott is chair-elect of the ABA Civil Rights and Social Justice Section. She is a former prosecutor and currently serves as a civil rights attorney-advisor for the U.S. Department of Health and Human Services (HHS).
Human Rights Hero:
The African American Social Engineer

By Angela J. Scott

Known as “the man who killed Jim Crow,” the great Charles Hamilton Houston once said to his Howard University Law School students that “a lawyer is either a social engineer or a parasite on society.” And the Honorable Thurgood Marshall, his mentee, credited Houston with teaching him that “the practice of law could and should serve as a tool for creating equality in society.” As these wise words from two prominent and heroic African American social engineers indicate, the contributions of African American attorneys have and should continue to be a tool for creating equality in society.

In recent times, from the late Congressman Elijah E. Cummings and the late Congresswoman Barbara Jordan to the great Bryan Stevenson and Marianne Wright Edelman, countless African American attorneys have remained in the fight for equality and continue to fight for civil rights, social justice, and meaningful progress. They, too, are our heroes. In fact, to every social engineer who has contributed equal justice in some way, shape, or form—you are a hero too. We are our heroes. But Charles Hamilton Houston believed that attorneys were one extreme or the other, either helpful or harmful, and that there is no in between. I agree.

It’s not my intention to judge or critique what an attorney has been doing and whether it’s enough. Whatever the contribution—large or small, public or private—efforts are heroic if they contribute in some way to positive change in our society. Acknowledging that many African American lawyers nowadays did not seek a legal education to be heroic or to contribute to eliminating inequality, I believe that there is still an obligation to do so. But I realize that life often and inevitably gets in the way. How do you give back while trying to balance a demanding job, fulfill family responsibilities, and “live your best life” at the same time?

I’m asking you to consider that your best life (and the best lives of the generations behind you) might only be achieved when our collective lives are at their best—and we still have a long way to go. While we have made tremendous progress since slavery and segregation, thanks to the hard work of the social

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