



---

Fall 9-1-2002

## The Law and Culture-Shift: Race and the Warren Court Legacy

John O. Calmore

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Civil Rights and Discrimination Commons](#), [Courts Commons](#), and the [Law and Society Commons](#)

---

### Recommended Citation

John O. Calmore, *The Law and Culture-Shift: Race and the Warren Court Legacy*, 59 Wash. & Lee L. Rev. 1095 (2002).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol59/iss4/4>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# The Law and Culture-Shift: Race and the Warren Court Legacy

John O. Calmore\*

## Table of Contents

I. Introduction . . . . .	1096
II. Race Law: The View from Culture . . . . .	1104
III. <i>City of Memphis v. Greene</i> : The Legal Construction of "Unwanted Traffic" . . . . .	1112
IV. The Expanding Regulation of "Unwanted Traffic": Vignettes Beyond the Bench . . . . .	1120
A. Public Accommodations at the Adam's Mark Hotel Chain . . . . .	1122
B. Dubuque, Iowa, and the Failed Recruitment of a Few Good Blacks (a.k.a. "Unwanted Traffic") . . . . .	1125
C. Latino Day Laborers: Handy "Visual Pollution" in Brewster, New York . . . . .	1126
D. Bad Asian Neighbors: "Model Minority" Be Damned . . .	1128
V. Reclaiming a Place in the Humanizing Struggle of the Civil Rights Community and Moving Toward Racial Comity .	1128
VI. Conclusion: Keep Hope Alive! . . . . .	1133

---

\* John O. Calmore. Reef C. Ivey II Research Professor of Law, University of North Carolina at Chapel Hill. This Article extends remarks that were delivered as part of a Symposium on the Jurisprudential Legacy of the Warren Court, March 22-23, 2002, at the Washington and Lee University School of Law. I would like to thank Dorothy Brown, Ronald Krotoszynski, and Blake Morant for having invited me to participate. I received sterling research assistance from Tasha L. Winebarger, University of North Carolina School of Law, Class of 2004. Additionally, I appreciate the substantial support for scholarship that I have received from Dean Gene Nichol and the law school's summer research grant program.

*When we believe it, we'll see it.*

*Saul Alinsky<sup>1</sup>*

*The questions which one asks oneself begin, at last, to illuminate the world, and become one's key to the experience of others.*

*James Baldwin<sup>2</sup>*

### *I. Introduction*

On June 17, 1968, the very last day of the Warren Court, Justice Potter Stewart delivered the majority opinion in *Jones v. Alfred H. Mayer Co.*,<sup>3</sup> a case involving a black couple who alleged that they were denied an opportunity to purchase a home in the Paddock Woods community of St. Louis County solely because of their race.<sup>4</sup> Interpreting the Thirteenth Amendment and a provision of the Civil Rights Act of 1866<sup>5</sup> to prohibit not only governmental discrimination, but also private discrimination in housing, Justice Stewart declared:

Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.<sup>6</sup>

On that day, the Court empowered and liberally applied Supreme Court precedent construing the Thirteenth Amendment to include "badges and incidents of slavery,"<sup>7</sup> and it constitutionally endorsed congressional power

---

1. Vincent Harding, *Community as a Liberating Theme in Civil Rights History*, in *NEW DIRECTIONS IN CIVIL RIGHTS* 17, 28 (Armstead L. Robinson & Patricia Sullivan eds., 1991).

2. James Baldwin, *Nobody Knows My Name*, in *COLLECTED ESSAYS* 130, 136 (The Library of America 1998) (1961).

3. 392 U.S. 409 (1968).

4. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 (1968) (noting that plaintiffs sued defendants who allegedly refused to sell house to plaintiffs because they were black).

5. See Civil Rights Act of 1866, 14 Stat. 27 (1866) (codified at 42 U.S.C. § 1982 (1994)) (providing that all citizens have same right enjoyed by whites to inherit, purchase, lease, sell, hold, and convey real and personal property). As a result of the decision in *Jones*, this provision does not require state action.

6. *Jones*, 392 U.S. at 442-43.

7. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

to pass legislation that would enforce the Thirteenth Amendment.<sup>8</sup> The Court decided the case during a time of civil unrest and shortly after the assassination of Martin Luther King, Jr., on April 4, 1968. One week after that traumatic event, Congress passed the Fair Housing Act, Title VIII of the Civil Rights Act of 1968.<sup>9</sup> Complementing Title VIII, the *Jones* decision marked the beginning of the modern era of fair housing, although the decision was met with strenuous opposition – an example of "judicial activism run riot" in the view of North Carolina's Senator Sam Ervin.<sup>10</sup> Dissenting, Justice Harlan characterized the decision as "most ill-considered and ill-advised."<sup>11</sup> Indeed, "*Jones* was the only Supreme Court civil rights decision of this period to come close to a congressional override."<sup>12</sup>

Far removed from those "riotous" jurisprudential times, this Article explores the devastating metaphor of African Americans as "unwanted traffic." I take this cultural construction from the Supreme Court's 1981 decision in *City of Memphis v. Greene*,<sup>13</sup> in which the Court endorsed a street closing that blocked traffic from a black neighborhood through a white one.<sup>14</sup> Thirteen years after the final Warren Court term, a different Supreme Court took back the empowerment, hope, and promise of the decision in *Jones*.<sup>15</sup>

8. Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 1 n.1 (1995) (stating that *Jones* reaffirmed Congress's power under Thirteenth Amendment to enforce laws aimed at preventing race discrimination).

9. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (1994)).

10. See Sam Ervin, Jr., *Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot*, 22 VAND. L. REV. 485, 501 (1969) (asserting that *Jones* decision was inconsistent with purposes of Thirteenth Amendment and Civil Rights Act of 1866); see also Note, *The "New" Thirteenth Amendment: Preliminary Analysis*, 82 HARV. L. REV. 1294, 1320-21 (1969) (criticizing Court for unnecessarily creating new constitutional doctrine). Commentary supporting the decision includes Arthur Kinoy, *Jones v. Alfred H. Mayer Co.: An Historic Step Forward*, 22 VAND. L. REV. 475, 476 (1969) (suggesting that "it is impossible to overstate the potentially profound importance" of *Jones* decision); Robert L. Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co.*, 55 VA. L. REV. 272, 300 (1969) (concluding that Court's decision was clearly correct in view of legislative history); Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019, 1056 (1969) (lauding *Jones* as necessary first step).

11. *Jones*, 392 U.S. at 449 (Harlan, J., dissenting).

12. William N. Eskridge, Jr., *Reneging on History?: Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 622 (1991).

13. 451 U.S. 100 (1981).

14. See *City of Memphis v. Greene*, 451 U.S. 100, 129 (1981) (concluding that street closing was "routine burden of citizenship" and did not violate Thirteenth Amendment).

15. Because the *Jones* decision came two months after the Fair Housing Act of 1968, critics mistakenly argued that the decision had neither constitutional nor policy significance.

In this Article, however, I depart from the doctrinal analysis of the Warren Court's jurisprudence and direct the inquiry along interdisciplinary lines that I hope will provide insights regarding the institutional performance and legitimacy of the Supreme Court in reckoning with race/ism.<sup>16</sup> I attempt to demonstrate how, in a racist culture, it is very hard to litigate, negotiate, and maintain antiracist legal remedies, let alone employ them to shift culture.<sup>17</sup> In other words, law reform is necessary, but not sufficient.<sup>18</sup> I incorporate insights drawn from the field of cultural studies to provide a scene-setting function to broaden the context of legal analysis and enlarge our sense of hope and possibility. For a brief moment, the Warren Court did precisely that.<sup>19</sup>

---

But the Act and § 1982 provided complementary rather than parallel remedies. Eskridge points out, "The Supreme Court's dynamic interpretation of sections 1982 and 1981 effectively gave more liberal remedies for racial discrimination in housing and workplace discrimination than those afforded by [Title VIII and Title VII of the Civil Rights Act of 1964], respectively." Eskridge, *supra* note 12, at 622; see also Michael W. Combs, *The Supreme Court and African Americans: Personnel and Policy Transformations*, 36 HOW. L.J. 139, 158 (1993) ("As interpreted in *Jones*, the 1866 statute provided a much broader base of civil rights protection than that provided by the more recently enacted 1968 law.").

Today, the 1968 Act, as amended in 1988, is the principal claim lodged against housing discrimination. Until the 1988 amendments, however, the Act was pretty toothless. Shortly after the amendments, James Kushner wrote, "The inability to abate widespread discriminatory practices within the real estate industry is attributable to the weak enforcement tools and efforts of the past, as well as to the national preferences for segregated lifestyles." James Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1050 (1989).

16. I refer to "race/ism" to underscore the need to connect race and racism, contrary to the current trend of discussing "race" as a vague force or matter that is separate from human agency and accountability. See Joe R. Feagin, *White Racism: The Foundation of Racial Tensions and Conflict*, 1 UMOJA L.J. 1, 1-2 (1996) (discussing role of racism "in perpetuating the black-white division").

17. DAVID THEO GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING*, at viii (1993) (noting that contemporary views of racism primarily are limited to seeing it as "something that belongs in the past").

18. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 301 (2000) ("As hard as it was for litigators to understand, the problems facing America at the end of the 1960s could not be solved by more law, however quick and satisfying it might be to think so").

19. See Robert L. Carter, *The Warren Court and Desegregation*, in *THE WARREN COURT: A CRITICAL ANALYSIS* 46, 56 (Richard H. Saylor et al. eds., 1968) (discussing postmortems of *Brown*). Carter, one of the primary NAACP attorneys in the litigation campaign that resulted in *Brown*, recognized the mixed legacy of the case: "[T]he psychological dimensions of America's race relations problem were completely recast . . . [and] *Brown's* indirect consequences . . . have been awesome." *Id.* He notes, however, that "*Brown* has promised more than it could give, and therefore has contributed to black alienation and bitterness, to a loss of confidence in white institutions, and to the growing racial polarization of our society." *Id.*

Writing from the perspective of a gay activist and legal scholar, the late Tom Stoddard wrote an engaging essay that seeks to provide a better understanding of the interrelationship between law and culture and, from that, how the law can be used to promote social justice.<sup>20</sup> Stoddard describes two aspects of lawmaking: "rule-shifting" and "culture-shifting."<sup>21</sup> Together these represent the five general goals of lawmaking: "(1) To create new rights and remedies for victims; (2) [t]o alter the conduct of the government; (3) [t]o alter the conduct of citizens and private entities; (4) [t]o express a new moral ideal or standard; and (5) [t]o change cultural attitudes and patterns."<sup>22</sup> The first three goals make up the traditional function of lawmaking – altering and enforcing rules – whereas the last two goals make up the culture-shifting aspect of law.

I think that the real value of the Warren Court's race jurisprudence lies in its force as a culture-shifting tool and, more importantly, in its inspiration to advocates of social justice.<sup>23</sup> In Stoddard's view, cases such as *Brown v. Board of Education*,<sup>24</sup> *Baker v. Carr*,<sup>25</sup> and *Roe v. Wade*,<sup>26</sup> and the gains he associates with the civil rights movement and its "companion movements for political change," inspired many lawyers of his generation.<sup>27</sup> Based on this inspiration, these lawyers have increasingly used the law to accomplish their culture-shifting goals. In elaborating on the concept of law's culture-shifting capacity, Stoddard explains:

---

20. See Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 970 (1997) (discussing possibilities of using law to force social change).

21. *Id.* at 973.

22. *Id.* at 972.

23. See J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 804 (1971) (stating that "one of the greatest legacies of the Warren Court has been its revolutionary influence on the thinking of law students"). Graduating from law school shortly after this publication, I was one of the law students to whom Judge Wright referred. In his view, the law students of the day "were inspired by the dignity and moral courage of a man and an institution that was prepared to act on the ideals to which America is theoretically and rhetorically dedicated." *Id.* Although Judge Wright's description of the Warren Court seems almost quaint today, I think it accurately describes the time.

24. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (declaring "separate but equal" school segregation unconstitutional).

25. See *Baker v. Carr*, 369 U.S. 186, 208 (1968) (stating that citizen's right to vote may not be arbitrarily impaired by state action).

26. See *Roe v. Wade*, 410 U.S. 113, 164 (1973) (declaring unconstitutional state statute that imposed criminal sanctions on women who received abortions).

27. Stoddard, *supra* note 20, at 973.

We have, in the last half of this century, adapted the law's traditional mechanisms of change to a newfangled end: making social change that transcends mere rulemaking and seeks, above and beyond all the rules, to improve society in fundamental, *extralegal* ways. In particular, we have sought to advance the rights and interests of people who have been treated badly by the law and by the culture, either individually or collectively, and to promote values we think ought to be rights.<sup>28</sup>

According to Stoddard, four factors are essential for rulemaking to produce a cultural-shift: a broad and profound change in the law, public awareness of the change and its significance, a general sense that the change is legitimate or valid, and continuous enforcement of the change.<sup>29</sup> All four of these must exist; anything less reduces the result to mere rule-shifting.<sup>30</sup> According to Nan Hunter, a fifth necessary factor for culture-shift is public engagement.<sup>31</sup> The culture-shifting framework, as an extension of legal advocacy – in the courts, in the legislature, and in society – provides an introductory backdrop for the current Article.

Legal scholars tend to assess the Warren Court's legacy without giving sufficient consideration to the culture-shifting aspects. However, contestation over these aspects, is where the action is. Promoting values that ought to be rights was the hallmark of the Warren Court's jurisprudence.<sup>32</sup> Because values were so central to the advancement of lawmaking as culture-shifting, the reaction to the Court was driven not only by material interests, but also by differences over values that define "simple justice" in America.<sup>33</sup> Today, this

---

28. *Id.* (emphasis added).

29. *Id.* at 978.

30. *Id.*

31. Nan Hunter, *Lawyering for Social Justice*, 72 N.Y.U. L. REV. 1009, 1019 (1997). Hunter argues that public engagement is more than consciousness, passive support, or even legitimacy: "Unless there is significant public engagement in some form, beyond a small cadre of litigators or lobbyists, in the effort to change the law, there is no basis for culture-shifting." *Id.* Thus, Hunter rebuts Stoddard's argument that legislation, such as the Civil Rights Act of 1964, offers the best chance of culture-shifting.

32. *But see* Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 75 (1998) (noting that as California's Attorney General and gubernatorial candidate in 1942, Warren was "a key actor in the anti-Asian movement that culminated in the 1942 internment of over 120,000 persons of Japanese ancestry"). I will not trivialize Warren's actions as a mere regulation of unwanted traffic.

33. *See* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION, THE EPOCHAL SUPREME COURT DECISION THAT OUTLAWED SEGREGATION, AND OF BLACK AMERICA'S CENTURY-LONG STRUGGLE FOR EQUALITY UNDER LAW* 710-14 (Vintage Books 1977) (1975) (cataloging wildly disparate reactions to *Brown*).

cultural terrain remains a ground of contestation between the Right and the Left.<sup>34</sup>

At this point I must refer, briefly, to the reality that we live in a racist culture. It is important, however, to acknowledge that in referring generally to white people, I realize the risks of this overinclusive categorization. Even as I impugn the integrity of America for its racist ways, I am trying to write carefully to avoid coming across as anti-white, lest I reduce all white individuals to fungible parts of a collective personification of evil, injustice, and oppression.

Undeniably, however, a stubborn racial divide marks the complex legacy of the Warren Court's civil rights jurisprudence. According to a recent *New York Times* poll, over forty-five years after *Brown v. Board of Education* struck down legally sanctioned segregation, "a majority of Americans maintain that race relations in the United States are generally good, but blacks and whites continue to have starkly divergent perceptions of many racial issues and they remain largely isolated from each other in their everyday lives."<sup>35</sup> As the poll suggests, "even as the rawest forms of bigotry have receded they have often been replaced by remoteness and distrust in places of work, learning and worship."<sup>36</sup> Moreover, in writing an introduction to the *New York Times* poll compilation, Joseph Lelyveld notes a profound detachment from race among whites:

That blacks are oversensitive, that race is something that needs to be purged from their consciousness, that the problem of race is now mainly in their heads, is a leitmotif of white conversation captured in these articles – the first response of whites who, knowing themselves to be well meaning and guiltless by definition, find no connection between the persistence of race as a fundamental category in American life and their own individual lives. In simplest terms, race and issues of race make no obvious demand on them.<sup>37</sup>

---

34. For example, one of today's prominent conservatives, Ralph Reed, declares, "We are not revolutionaries, but counterrevolutionaries, seeking to resist the left's agenda and to keep them from imposing their values on our homes, churches, and families." DAVID BROCK, *BLINDED BY THE RIGHT: THE CONSCIENCE OF AN EX-CONSERVATIVE* 122 (2002); see also David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 315-20 (2001) (claiming that "conservative" Rehnquist Court disfavors claims of racial minorities).

35. Kevin Sack with Janet Elder, *The New York Times Poll on Race: Optimistic Outlook But Enduring Racial Division*, in *HOW RACE IS LIVED IN AMERICA: PULLING TOGETHER, PULLING APART* 365, 365 (2001).

36. *Id.*

37. Joseph Lelyveld, *Introduction*, in *HOW RACE IS LIVED IN AMERICA: PULLING TOGETHER, PULLING APART*, at ix, xv (2001).



As long as race makes no obvious demands on whites in these terms, ironically, their everyday racism will continue to manifest itself in interpersonal relations, institutional arrangements, and cultural expression. Certainly, we have no chance to effectuate a real cultural-shift through lawmaking. Nor is there an advancement of an anti-racist moral ideal or standard. Perhaps most disconcerting, a stasis in current cultural attitudes and patterns exists that hampers progress towards the goal of overarching justice for all peoples.<sup>38</sup>

When I hear about scandals in the corporate world or within the priesthood, I ask: What about the scandal of racism?<sup>39</sup> Where is the bipartisan indignation?<sup>40</sup> Where is the shame?<sup>41</sup> Is it true, as Albert Memmi says of racism, that "[w]here everyone tolerates and condones scandal, scandal disappears"?<sup>42</sup> Consider the aftermath of the 2000 presidential election, for example. In Florida, a statewide poll of African American opinion on the matter was conducted. One reader wrote the following letter to the editor of the *St. Petersburg Times*, and whether his candid view is more typical than not defines the culture-shifting issue:

Why is it that each day when I open your paper it seems I'm confronted with some problem the blacks are having and, as usual, the cause of their problem is white racism? Do you really believe that promoting this idea with your constant preaching will accomplish some worthwhile goal?

You are accomplishing two things at least. One: You're instilling in blacks the notion all their troubles stem from something whites have done to them. They're learning to enjoy their victimhood and they become paranoid, looking everywhere for evidence of racism to blame for their own inability to compete in an industrialized, technology-heavy society. Two: You're boring the hell out of whites who are tending to tune out the

---

38. Some argue that my narrative of progress understates the racial improvement that marks the nation's cultural-shift on matters of race and racism. The most influential work holding this view is STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE* (1997). They claim that "[i]n the years before the civil rights revolution, hard-core white racism was ubiquitous; in the 1990s, it is largely a thing of the past." *Id.* at 499.

39. Here, I use scandal to mean a "circumstance or action that offends propriety or established moral conceptions or disgraces those associated with or involved in it." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2024 (unabridged ed. 1993).

40. Adam Nagourney, *Corporate Abuses Cause Bipartisan Indignation*, N.Y. TIMES, July 29, 2002, at A16.

41. Frank Bruni, *Pope Tells Crowd of "Shame" Caused by Abusive Priests*, N.Y. TIMES, July 29, 2002, at A1.

42. ALBERT MEMMI, *RACISM* 179 (Steve Martinot trans., rev. ed. 2000) (1968).

constant whining. The result is you're compounding the racial problem rather than helping to solve it.<sup>43</sup>

Against this perplexing backdrop, I situate this Article within the evolving field of "critical race studies."<sup>44</sup> I consider the current post-civil rights era to examine how much of the Warren Court's liberal legacy remains, more in culture than in law, and how sufficient were its premises of equality and freedom, again, more in culture than in law. Part II discusses certain aspects of cultural studies as an interdisciplinary approach that helps us make sense of that jurisprudential legacy as culture-shifting law. Part III examines the importance of the cultural representation of race, within the context of *City of Memphis v. Greene*,<sup>45</sup> largely reviewing the contrasting racial narratives of Justice John Paul Stevens, who wrote for the majority, and Justice Thurgood Marshall, who wrote a dissenting opinion. Through a series of four vignettes, Part IV considers how the cultural representation of people of color as unwanted traffic extends beyond jurisprudence. Finally, Part V takes up a prescriptive call for well-intentioned whites to engage in the serious work of advancing a cultural shift that facilitates their movement from racial ambivalence to racial comity and a sincere embrace of our common humanity.

---

43. Bob Luckman, Letter to the Editor, *Compounding the Racial Problem*, ST. PETERSBURG TIMES, Feb. 24, 2001, at 17A. One reader complained that an article, which reported African Americans' opinions of the 2000 presidential election, was "outrageous . . . perpetuating hate and unrest . . . like a scab that's healing and your newspaper is scraping and scratching at it to keep it from healing." Dorothy E. Karkheck, Letter to the Editor, *Picking at a Sore Spot*, ST. PETERSBURG TIMES, Feb. 24, 2001, at 17A. Another reader wrote that a similar article was "one of the most inflammatory and irresponsible pieces . . . ever done." J.L. Rasmussen, Letter to the Editor, *Fanning the Flames of Racism*, ST. PETERSBURG TIMES, Feb. 24, 2001, at 17A. This letter writer further advised, "Instead of sticking with these phonies [Jesse Jackson and Rep. Alcee Hastings], blacks ought to turn instead to men like Rep. J.C. Watts, Justice Clarence Thomas and commentators like Dr. Walter Williams and Thomas Sowell. These are literate, logical black men of integrity, who encourage self-sufficiency and do not just spew a party line. The *Times* should be ashamed for trying to fan the flames of racism through this horrible journalism." *Id.*

44. As Cheryl Harris explains:

From this vantage point, the issue is not simply how societal bias is reflected in the legal system or how the law manages disputes that implicate race: The objective is to map the mutually constitutive relationship between race and the law. The law produces, constructs, and constitutes race, not only in domains where race is explicitly articulated, but also where race is unspoken or unacknowledged.

Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1216-17 (2002). The UCLA Law School has developed the Critical Race Studies concentration as a field of study – "the first of its kind anywhere." *Id.* at 1216. This issue of the *UCLA Law Review* contains a number of insightful pieces from a rich diversity of authors. See generally *Critical Race Studies*, 49 UCLA L. REV. 1215-1610 (2002).

45. 451 U.S. 100 (1981).

## II. Race Law: The View from Culture

Exploring the meaning of "culture" and relying on "cultural studies" is a perilous adventure. As Naomi Mezey remarks, "The notion of culture is everywhere invoked and virtually nowhere explained."<sup>46</sup> Worse, regarding "cultural studies," she warns that although it is "the engine" of her investigation, "cultural studies suffers from the same definitional distress as culture itself: No one is exactly sure what it means to others and everyone is loath to offer their own working definitions."<sup>47</sup> In this Article, I use culture primarily to refer not only to signifying or symbolic systems and the social meanings that these generate, but also to a certain kind of an oppositional practice that challenges a dominant hegemony that is subordinating. Although I travel with unfamiliar maps, this Article is something of a move both within and beyond a "cultural turn" in the social sciences and history.<sup>48</sup> I focus on the controversy over how African Americans and other nonwhites are represented in society through cultural constructions.<sup>49</sup> Cultural studies facilitates a focus on power,<sup>50</sup>

46. Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 35 (2001).

47. *Id.* at 36.

48. As Victoria Bonnell and Lynn Hunt explain, cultural studies is associated with a realignment of disciplines and the accompanying collapse of explanatory paradigms such as case law. Thus, they claim, "The most important characteristic of cultural studies is that it depends on a range of explanatory paradigms and deals fundamentally with issues of domination, that is, contestations of power . . . . In cultural studies, causal explanation takes a back seat . . . to the demystification and deconstruction of power." Victoria E. Bonnell & Lynn Hunt, *Introduction*, in BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE 1, 10-11 (Victoria E. Bonnell & Lynn Hunt eds., 1999).

49. This continues my work begun in John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2182-91, 2219-28 (1992) (discussing, respectively, tie between cultural orientation and liberating practice, and need to attack cultural racism). This was one of the earliest works of legal scholarship that relied on the theories of Michael Omi and Howard Winant. *Id.* at 2160 n.105. See generally MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S (1986) (assessing contemporary racial theory and asserting that significance of race has been reduced in public debate by conservatives' hiding of racial issues under rhetoric of economics and individualism); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994) (updating first edition and providing more detailed description of racial formation theory); see also John O. Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free,"* 15 LAW & INEQ. 25, 37-41 (1997) (discussing various "racial projects" that connect culture (discourse) and structure (political agendas)).

50. Tony Bennett discusses the elasticity of the term "cultural studies":

It now functions largely as a term of convenience for a fairly dispersed array of theoretical and political positions which, however widely divergent they might be in other respects, share a commitment to examining cultural practices from the point

which is important to my analysis because an imbalance in power between whites and blacks is at the root of racism.<sup>51</sup>

An important theme in this Article is the need to understand the varied and complex experiences of racial subordination.<sup>52</sup> The discipline of cultural studies enhances that understanding. One aspect of the experience of racial subordination is the social and cultural construction of people – of human beings – as "unwanted traffic." Because black images are constructed largely without benefit of sustained interpersonal contact between blacks and whites,<sup>53</sup> the "reality of race" and its significance, at least within the black-white paradigm, may now be more culturally constructed than socially constructed, although both constructions continue to operate in tandem. As one black male journalist has stated, "To almost all cops and most of society, I am a criminal

---

of view of their intrication with, and within, relations of power.

Tony Bennett, *Putting Policy into Cultural Studies*, in *CULTURAL STUDIES* 23, 23 (Lawrence Grossberg et al. eds., 1992). A dominant white universe of norms, masked as cultural neutrality, imbues everyday practices of white people with power. See Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331, 1379 (1988) (referring to the "white norm . . . as a statement of the positive social norm, legitimating the continuing domination of those who do not meet it").

51. For an insightful consideration of this point, see Chéla Sandoval, *Theorizing White Consciousness for a Post-Empire World: Barthes, Fanon, and the Rhetoric of Love*, in *DISPLACING WHITENESS: ESSAYS IN SOCIAL AND CULTURAL CRITICISM* 86, 101 (Ruth Frankenberg ed., 1997) (quoting author Franz Fanon as saying that blacks are "exploited, enslaved, despised by a colonialist, capitalist society that is *only accidentally white*"); see also Peniel E. Joseph, *Black Liberation Without Apology: Reconceptualizing the Black Power Movement*, *BLACK SCHOLAR*, Fall-Winter 2001, at 2, 14-15 (analyzing history and struggles of Black Power movement and concluding that movement was strongest at time when white racism was most fierce and overt); Gary Peller, *Race Consciousness*, 1990 *DUKE L.J.* 758, 790 ("The mainstream reactions to black nationalism were so vociferous not because the Black Power movement presented any real threat of racial domination by blacks, but rather because [it] embodied a profound rejection of the reigning ideology for understanding the distribution of power and privilege in American society.").

52. See generally Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 *CORNELL L. REV.* 1258 (1992) (listing historical examples of racism towards various people of color).

53. See, e.g., PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* 139-44 (1997) (analyzing racial and economic makeup of neighborhoods); DOUGLAS MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 84-93 (1993) (describing spatial isolation of blacks from whites and reluctance of members of both races to integrate neighborhoods); JOHN YINGER, *CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION* 51-61, 136 (1995) (describing phenomenon of racial steering, noting that whites are minority in public schools in many areas, and quoting a white student as claiming that "[w]e don't start out as racist. We are all racist now.").

who happens not to have committed his first crime."<sup>54</sup> As this predicament suggests, today a significant cultural legacy of *Brown v. Board of Education*'s failure is what Leonard Steinhorn and Barbara Diggs-Brown call "rhetorical integration" in which "[s]ymbolism becomes truth [and] image becomes reality."<sup>55</sup>

The characterization of African Americans and other people of color as unwanted traffic is one of today's most powerful metaphors of exclusion and aversion. As a racist euphemism, more than a metaphor, its power lies in its eliding race from the equation of oppression. Once nonwhites are racialized<sup>56</sup> as unwanted traffic, they are subjected to the structuring of hierarchical systems of group inequality that impede, or even deny completely, their access to material betterment, group power, and social status. The particularly insidious power of racialization, therefore, is its pretextual displacement of race so that claims of racial discrimination appear to be beside the point. White America's denial of "race/ism"<sup>57</sup> is the nation's acute (color)blind spot. Fundamental to the analysis of subordinated people as so-called unwanted traffic is David Chaney's observation that "[r]epresentation, far from being pictures of the social world, is more profoundly understood as the endlessly negotiable ways in which that world is being constituted and articulated."<sup>58</sup> From this point of view, then, culture not only provides meaning to our experience, it also provides the very terms of experience.<sup>59</sup> Unfortunately, the mass media drive various aspects of the negative imagery and "terms of experience."<sup>60</sup> For a significant number of African Americans, Asians, and

54. LEONARD STEINHORN & BARBARA DIGGS-BROWN, *BY THE COLOR OF OUR SKIN: THE ILLUSION OF INTEGRATION AND THE REALITY OF RACE* 40 (1999).

55. *Id.* at 199-200.

56. I use the word "racialization" to mean the dialectical process of signification whereby race-natural references take on racial significance. ROBERT MILES, *RACISM* 73-76 (1989).

57. *See supra* note 16 (explaining use of term "race/ism").

58. DAVID CHANEY, *THE CULTURAL TURN: SCENE-SETTING ESSAYS ON CONTEMPORARY HISTORY* 71-72 (1994).

59. *See* CHARLES P. HENRY, *CULTURE AND AFRICAN AMERICAN POLITICS* 8-11 (1990) (discussing culture of black language and how media representations, along with poorly-developed ideological structures, reflect on black experience).

60. According to Jannette Dates and William Barlow:

Racial representations help to mold public opinion, then hold it in place and set the agenda for public discourse on the race issue in the media and in the society at large. Black media stereotypes are not the natural, much less harmless, products of an idealized popular culture; rather, they are more commonly socially constructed images that are selective, partial, one-dimensional, and distorted in their portrayal of African Americans. Moreover, stereotyped black images most often are frozen, incapable of growth, change, innovation, or transformation.

Latina/os, one telling term of experience is their representation as "unwanted traffic."

Hence, I am trying to track how culture operates within the context of "race making."<sup>61</sup> According to Stuart Hall, the British scholar who has greatly influenced the development of cultural studies, the word culture refers to "the actual grounded terrain of practices, representations, languages and customs of any specific society . . . [and] the contradictory forms of common sense which have taken root in and helped to shape popular life."<sup>62</sup> Thus, the culture is concerned with issues that revolve around shared – perhaps hegemonic – social meanings that constitute the variety of ways in which we make sense of the world.<sup>63</sup> As such, culture is an arena of contestation, subject to negotiation. In this regard, Mezey views culture as "any set of shared, signifying practices – practices by which meaning is produced, performed, contested, or transformed."<sup>64</sup> Mezey observes that "law and culture are mutually constituted, and legal and cultural meanings are produced precisely at the intersection of the two domains."<sup>65</sup> She observes that "the negotiation of legal meaning is always a cultural act."<sup>66</sup> This is precisely the point of my analysis of *City of Memphis v. Greene* in Part III of the Article. The exercise in that

Jannette L. Dates & William Barlow, *Introduction: A War of Images*, in *SPLIT IMAGE: AFRICAN AMERICANS IN THE MASS MEDIA* 1, 5 (Jannette L. Dates & William Barlow eds., 2d ed. 1993).

61. "Race making" is a term coined by Edgar Thompson and is used to explain how racial segregation and classification result in racial identities, attitudes, and prejudices. David R. James, *The Racial Ghetto as a Race-Making Situation: The Effects of Residential Segregation on Racial Inequalities and Racial Identity*, 19 *LAW & SOC. INQUIRY* 407, 413 n.19, 422 (1994) (citing EDGAR T. THOMPSON, *PLANTATION SOCIETIES, RACE RELATIONS AND THE SOUTH* 115-17 (1975)).

Here I mean to draw attention to Anthony Marx's important work and his particular observation that, "to the extent that those dominated retain their own agency, their actions must be explained in terms of structural and cultural forces." ANTHONY W. MARX, *MAKING RACE AND NATION: A COMPARISON OF SOUTH AFRICA, THE UNITED STATES, AND BRAZIL* 18 (1998). Progressive race scholars have criticized the failure of the individualist paradigm of discrimination to focus more effectively on structural racism. Increasingly, as well, these scholars, particularly Asians and Latina/os, are drawing attention to "cultural forces" as well. While this Article focuses on the latter, I am well aware of the importance of the former. See John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 *U. MIAMI L. REV.* 1067, 1074 (1998) (noting that general perception that racism is disappearing is actually empowering racist forms and expressions).

62. CHRIS BARKER, *CULTURAL STUDIES: THEORY AND PRACTICE* 8 (2000).

63. *Id.*

64. Mezey, *supra* note 46, at 42.

65. *Id.* at 57.

66. See *id.* at 47 (asserting that negotiation of legal meaning is always cultural, but law and culture are distinguishable in terms of how power is assigned).

section of the Article expresses a severe criticism of racial representations that "distort, ignore, or displace important aspects of the lives of subordinate groups."<sup>67</sup>

As intimated earlier, it is impossible to mark clearly the boundaries of cultural studies; there are no precedents or statutes. The genre of cultural studies means different things to different people, but we can initially adopt the following definition:

[O]ne may begin by saying that cultural studies is an interdisciplinary, transdisciplinary, and sometimes counter-disciplinary field that operates in the tension between tendencies to embrace both a broad, anthropological and a more narrowly humanistic conception of culture. Unlike traditional anthropology, however, it has grown out of analyses of modern industrial societies. It is typically interpretative and evaluative in its methodologies, but unlike traditional humanism it rejects the exclusive equation of culture with high culture and argues that all forms of cultural production need to be studied in relation to other cultural practices and to social and historical structures. Cultural studies is thus committed to the study of the entire range of society's arts, beliefs, institutions, and communicative practices.<sup>68</sup>

For those who think like lawyers, engaging in cultural studies is daunting because it represents such an eclectic tool kit of theory and practice. The discipline of cultural studies has developed, with all its complexities and self-contradictions, against the backdrop of major shifts in the social world that have changed many people's lives. I think the Warren Court "revolution"

67. OSCAR H. GANDY, JR., *COMMUNICATION AND RACE: A STRUCTURAL PERSPECTIVE* 11 (1998).

68. Cary Nelson et al., *Cultural Studies: An Introduction*, in *CULTURAL STUDIES* 1, 4 (Lawrence Grossberg et al. eds., 1992). Other elements of a definition of cultural studies that I adopt include the following:

1. Cultural studies is an interdisciplinary field in which perspectives from different disciplines can be selectively drawn on to examine the relations of culture and power.
2. Cultural studies is concerned with all those practices, institutions, and systems of classification through which there are inculcated in a population particular values, beliefs, competencies, routines of life and habitual forms of conduct.
3. The forms of power that cultural studies explores are diverse and include gender, race, class, colonialism, etc. Cultural studies seeks to explore the connections between these forms of power and to develop ways of thinking about culture and power that can be utilized by agents in the pursuit of change.
4. The prime institutional sites for cultural studies are those of higher education, and as such cultural studies is like other academic disciplines. Nevertheless, it tries to forge connections outside of the academy with social and political movements, workers in cultural institutions, and cultural management.

BARKER, *supra* note 62, at 7.

regarding race relations, if not race law, constitutes one of those shifts. As Elizabeth Long observes, "These same social changes refracted through the academy have made many scholars – perhaps especially those somewhat on the edges of traditional academic communities, disciplines, or careers – feel quite keenly the distance between their own disciplinary traditions and what seems in need of understanding."<sup>69</sup> I see the turn to cultural studies as both necessary and proper because social injustice seems to have overwhelmed the ability of law to redress it. Further, legal scholarship, in the narrow sense, seems quite inadequate to address what we need to know to open our society, to promote a multiracial democracy, and to establish a more just order. These values were the primary culture-shifting ambitions of the Warren Court's race jurisprudence.

An additional feature of cultural studies that supports my value orientation is its identification with progressive and Leftist politics. I find a firm connection here because the theoretical approaches and substantive concerns of cultural studies are conditioned by that identification.<sup>70</sup> In particular, cultural studies has employed its theoretical aspects to engage in a critical commentary on social and cultural life. As Craig Calhoun notes in a different context, cultural studies seeks an "engagement with the social world that starts from the presumption that existing arrangements . . . do not exhaust the range of possibilities."<sup>71</sup> Cultural studies "seeks to explore the ways in which our categories of thought reduce our freedom by occluding recognition of what could be."<sup>72</sup> Thus, cultural studies fits within the critical tradition's imperative to examine the regnant frameworks, categories, and assumptions about our world.

At the end of the day, cultural studies represents a response to social change that simply makes more sense to me than the law's response to that change. The large shifts in society and culture over the nearly fifty years since *Brown v. Board of Education* have outpaced the rights and remedies that are part of the Warren Court's legacy. Cultural studies is a tool to bridge this gap. Thus, as I am drawing on cultural studies, it reflects a realignment of disciplines. Particularly, the intersection of law and cultural studies provides an analytical framework that responds to the collapse of various explanatory

---

69. Elizabeth Long, *Engaging Sociology and Cultural Studies: Disciplinarity and Social Change*, in *FROM SOCIOLOGY TO CULTURAL STUDIES: NEW PERSPECTIVES* 17 (1997).

70. See *id.* at 14 (characterizing cultural studies as identified with theoretical approaches and substantive concerns of progressive or leftist politics).

71. CRAIG CALHOUN, *CRITICAL SOCIAL THEORY: CULTURE, HISTORY, AND THE CHALLENGE OF DIFFERENCE*, at xviii (1995).

72. *Id.*



paradigms that we associate with antidiscrimination law's ability to advance social justice.<sup>73</sup>

Teaching in North Carolina and writing within the pages of this Law Review, I am acutely aware that civil rights jurisprudence developed initially and primarily in response to race relations in the South. This history has continuing significance for both law and culture. Caroline Walker Bynum is an historian who was born and raised in the South, although she is currently a professor at Columbia University. For her, southern roots mean more than just a curiosity about the past; they also mean "a coming to terms with one's past."<sup>74</sup> She observes, "I think the American South is part of the United States with the strongest sense of history[,] . . . the strongest sense of being rooted in a past, and the strongest sense of a complex relationship with the past . . . ." <sup>75</sup> She adds,

After all, if you have Southern ancestors, you grow up in a defeated country and you grow up in a country that was defeated for what you think was the right reason; you come from a region that lost a war, and you *should* have lost the war; you were fighting for the wrong thing. You have a very complicated relationship with the past because you're always thinking, "What can I preserve, but what do I give up?"<sup>76</sup>

What can be preserved and what must be given up are fundamental issues yet to be resolved for the nation, not merely the South. Moreover, the influence of the South, both politically and culturally, transcends regional geography.<sup>77</sup> The federal laws that prohibit discrimination because of race must be situated within this context of evolving tensions and questions.

We recognize that the Warren Court's 1954 decision in *Brown v. Board of Education* set the stage – the constitutional authority and ambition – for laws prohibiting several forms of discrimination, including the Civil Rights Act of 1964,<sup>78</sup> the Voting Rights Act of 1965,<sup>79</sup> and the Civil Rights Act of

73. See GEORGE E. MARCUS & MICHAEL M.J. FISCHER, ANTHROPOLOGY AS CULTURAL CRITIQUE: AN EXPERIMENTAL MOMENT IN THE HUMAN SCIENCES 8-9 (1986) (discussing "crisis of representation" in which traditional paradigms for solving social problems are inadequate and how debate in several fields is shifting toward alternative interpretations of social reality).

74. Mary Jungeun Lee, *A Southern Medievalist*, COLUMBIA COLLEGE TODAY, Nov. 2001, at 9 (quoting from interview with Carolyn Bynum).

75. *Id.*

76. *Id.*

77. See PETER APPLEBOME, DIXIE RISING: HOW THE SOUTH IS SHAPING AMERICAN VALUES, POLITICS, AND CULTURE 16 (1996) (concluding that southern political and cultural influence has made understanding "the South" critical to understanding America).

78. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000-2000h-3 (1994)) (prohibiting discrimination in employment, public

1968.<sup>80</sup> The description of the Warren Court as "revolutionary" should be associated, *inter alia*, with this development. Today, however, as this body of law is rigorously contested, a number of questions arise. Did the Warren Court promise too much or not enough? If the Court's promise is less than it ought to be, then what alternative means are available to aggrieved parties? What is the nation's antidiscrimination culture? What is the nation's culture of social justice, equality, and multiracial democracy? What role do the law and the Supreme Court in particular play in constituting these cultural components of the national ethos?

If "revolutionary" aptly describes the Warren Court's antidiscrimination jurisprudence, its law-making legacy faces premature death. This premature death results from a politics and culture of race/ism that represent society's *wrong* answers to Caroline Bynum's profound question regarding what must be preserved and what must be let go from our racial history. Although the reach of the Warren Court's jurisprudence extended to many areas, race and racism are central to the evaluation of its legacy. In part, it was the times. In part, it was the recognition made clear by Charles Black that "[r]acism is a special subject in the United States, whether in or outside the law; it is the special subject in the United States."<sup>81</sup> Dealing with this special subject would have been revolutionary, but no institution in government or society has ever adequately done so. Indeed, much of the promise of *Brown* has now disappeared. Today's jurisprudence of race/ism represents a retreat from the Warren Court's egalitarianism, a retreat that is fueled by a reactionary backlash. Today's Supreme Court is in the vanguard of constitutional backlash and retrenchment.<sup>82</sup> In terms of race/ism, the features of contemporary judicial retrenchment include: (1) an imposition of a heavy burden to prove the elusive intent to discriminate; (2) an adoption of race neutrality, or colorblindness, as a paramount principle; (3) a rejection of societal discrimination as a wrong to be redressed; (4) a rejection of race-based group rights, primarily in the areas of affirmative action and voting rights; (5) a judicial

---

accommodations, and government assistance).

79. See Voting Rights Act of 1965, Pub. L. No. 89-110, Title VII, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971-1974 (1994)) (prohibiting discrimination in voting).

80. See Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3631 (1994)) (prohibiting discrimination in housing).

81. Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 25 (1970).

82. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1092-93 (2001) (arguing that judicial activism of Warren Court has been replaced by harsher, more conservative activism of today's Court).

affirmation of white "self-congratulation" and "self-absolution" regarding the nation's racist history and present; and (6) a judicial alignment with the political Right-wing's merger of conservative themes and racist ideology. These features represent the current Court majority's attempt to exorcise the ghosts of the Warren Court. Hence, Jeffrey Rosen argues that the Court's race decisions during the 1995 term, for example, "reveal the conservative judicial project to be unprincipled at its core."<sup>83</sup>

### III. *City of Memphis v. Greene: The Legal Construction of "Unwanted Traffic"*

Stepping back from the present unfortunate jurisprudential moment, I turn now to an examination of the Court's decision in *City of Memphis v. Greene*, viewing it through the lens of cultural studies. This case is illustrative, not exhaustive. A significant number of race cases could be subjected to a more rigorous analysis by looking beyond doctrine to the law's intersection with culture.<sup>84</sup>

83. Jeffrey Rosen, *The Color-Blind Court*, NEW REPUBLIC, July 31, 1995, at 19 (commenting that conservative Justices apply judicial restraint and strict constructionism only when politically convenient).

84. See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 366 (describing racially discriminatory effect of *Rogers v. American Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981), which upheld right of employers to prohibit braided hairstyles in workplace); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER, RACE & JUST. 177, 178 (1997) (exploring sexual harassment case of university professor who sought out Japanese women because he believed them to be sexually submissive); Laura E. Gomez, *Race Mattered: Racial Formation and the Politics of Crime in Territorial New Mexico*, 49 UCLA L. REV. 1395, 1415-16 (2002) (describing application of "racial formation" theory to specific legal context of nineteenth century territorial New Mexico); Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1690 (2000) (arguing that popular treatment of Wen Ho Lee as suspected spy was indicative of racial bias against Asian Americans); Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1482 (2002) (discussing rise of new civil rights issues resulting from growing foreign-born population in United States); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1330 (1991) (addressing application of antidiscrimination laws to bias against people with certain types of accents); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND L. REV. 297, 298-99 (1990) (criticizing anti-affirmative action rhetoric for its focus on "innocent white victims" rather than on broader goals of racial progress); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575-76 (2002) (analyzing roots of hate violence incidents against persons who appear "Middle Eastern, Arab or Muslim" after September 11, 2001); Eric Yamamoto, *Practically Reframing Rights: Culture, Translation, and Judging*, 33 U.C. DAVIS L. REV. 875, 875 (2000) (discussing cultural frameworks that color how decisionmakers understand hard

In *City of Memphis v. Greene*, the Supreme Court of the United States legitimized the adverse representation of blacks as "undesirable traffic."<sup>85</sup> The Court upheld the city's decision to close West Drive at the boundary point between black and white neighborhoods.<sup>86</sup> The Court held that the black plaintiffs did not suffer an injury to their property interests under the Civil Rights Act of 1866, now codified at 42 U.S.C. § 1982,<sup>87</sup> and that the closure did not violate the Thirteenth Amendment.<sup>88</sup> Residents of the black neighborhood had claimed that the city violated both the Thirteenth Amendment and § 1982 because the street closing created racially separate neighborhoods, constituted a "badge of slavery," and diminished the property value of homes in the black neighborhood for the benefit of those in the white neighborhood.<sup>89</sup>

The dispute in *City of Memphis v. Greene* was largely about factual inferences and symbolic messages. The case involved a street barrier that the city ostensibly built to prevent the flow of traffic, but that just happened to fall on the dividing line between black and white neighborhoods.<sup>90</sup> The use of street closings and dividing walls are part of our country's history of racial discrimination.<sup>91</sup> In this case, the economically privileged, exclusively white neighborhood of Hein Park lobbied the Memphis city government to close West Drive.<sup>92</sup> Most of the traffic consisted of residents of a predominantly underprivileged black neighborhood who used West Drive as a primary

---

evidence and social context in legal cases).

85. See *City of Memphis v. Greene*, 451 U.S. 100, 115-16 (1981) (viewing unwanted traffic flow as factor supporting decision to close street).

86. See *id.* at 128-29 (concluding that impact of West Drive's closing is routine burden of citizenship regardless of residents' race).

87. See 42 U.S.C. § 1982 (1994) ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").

88. See *Greene*, 451 U.S. at 124, 128-29 (concluding that injury to black citizens did not impair their property interests or civil rights).

89. See *id.* at 105-10 (describing litigation issues, including street closure's alleged disparate racial effect with respect to privacy and property rights and claims that closing was "badge of slavery" under 42 U.S.C. § 1982 and violative of Thirteenth Amendment).

90. See *id.* at 103 (characterizing Hein Park as predominantly white and neighborhood north of Hein Park as predominantly black).

91. See Comment, *City of Memphis v. Greene: A Giant Step Backwards in the Area of Civil Rights Enforcement*, 48 BROOK. L. REV. 621, 643 (1982) (comparing Memphis's decision to close West Drive with "ghettoization of blacks" and creation of "racial enclave").

92. See *Greene*, 451 U.S. at 103 (stating that residents of Hein Park asked city to close four streets leading to their neighborhood).

thoroughfare to a public park.<sup>93</sup> The *Greene* decision drew substantial criticism as an endorsement of subtle racism.<sup>94</sup>

Writing for the Court majority, Justice Stevens reversed the decision of the United States Court of Appeals for the Sixth Circuit, which had invalidated the city's decision to close West Drive.<sup>95</sup> According to the appellate court, the city's decision was invalid because:

(1) the closing would benefit a white neighborhood and adversely affect blacks; (2) a barrier that was to be erected precisely at the point of separation of these neighborhoods would undoubtedly have the effect of limiting contact between them; (3) the closing was not part of a citywide plan but rather was a unique step to protect one neighborhood from outside influences which the white residents considered to be undesirable; and (4) there was evidence of an economic depreciation in the property values in the predominantly black area.<sup>96</sup>

In overruling the Sixth Circuit, Justice Stevens explained that the factual record simply did not support these conclusions.<sup>97</sup> Given the long history of discrimination and residential segregation in Memphis and the association of the street closing with past badges and incidents of slavery, Justice Stevens's understanding of what was happening in Memphis was quite different from that of the appellate court. He devoted over half of his opinion to examining meticulously the facts of the case and the proper inferences to be drawn from the circumstances. He concluded:

[T]he critical facts established by the record are these: the city's decision to close West Drive was motivated by its interest in protecting the safety and tranquility of a residential neighborhood. The procedures followed in making the decision were fair and were not affected by any racial or other impermissible factors. The city has conferred a benefit on certain white property owners but there is no reason to believe that it would refuse to confer a comparable benefit on black property owners. The closing has not

---

93. *See id.* (noting that significant amount of traffic continued to Overton Park).

94. *See, e.g.,* Note, *Constitutional Law – Civil Rights – Memphis Street Closing: Minimal Inconvenience or Monument to Racial Hostility?*, 22 SANTA CLARA L. REV. 931, 941 (1982) (arguing that Memphis's history of racial discrimination raises doubts about Court's reasoning); Comment, *Dead-End Street: Discrimination, the Thirteenth Amendment, and Section 1982 – Memphis v. Greene*, 58 CHI.-KENT L. REV. 873, 903-04 (1982) (arguing that decision allowed "subtle instances of discrimination caused by facially neutral procedures" to "pass judicial muster").

95. *See Greene*, 451 U.S. at 102 (concluding that factual record did not support court of appeals holding).

96. *Id.* at 109 (quoting *Greene v. City of Memphis*, 610 F.2d 395, 404 (1979)).

97. *Id.* at 102.

affected the value of property owned by black citizens, but it has caused some slight inconvenience to black motorists.<sup>98</sup>

In many ways, the opinion of Justice Stevens simply endorsed Judge Celebrezze's dissent in the Sixth Circuit. In Judge Celebrezze's view, the dispute was not a matter implicating racial justice or the equal protection of the laws, but was primarily a straightforward question of whether a city had properly exercised its police powers to close a street.<sup>99</sup> According to Judge Celebrezze, the closure did not violate § 1982 because it did not "deprive black citizens of their right to hold property free from racial discrimination."<sup>100</sup> Moreover, the closure did not violate equal protection principles because the decision did not involve any intent to discriminate against the black resident plaintiffs.<sup>101</sup> Judge Celebrezze indicated that "[w]hile distinctions based on race are inherently suspect, distinctions between residents and non-residents of a local neighborhood are not invidious."<sup>102</sup>

In reformulating the factual questions, Justice Marshall's dissent in *City of Memphis v. Greene* provided the context that Justice Stevens had overlooked or avoided. First, he agreed with the district court's finding that the Hein Park neighborhood "was developed well before World War II as an exclusive residential neighborhood for white citizens and these characteristics have been maintained."<sup>103</sup> Second, Justice Marshall noted that the "undesirable traffic" that Hein Park wanted to exclude was predominantly black.<sup>104</sup> Third, the closing of West Drive was directly responsive to the efforts of the whites residing in Hein Park.<sup>105</sup> From these facts, Justice Marshall sharpened his disagreement with Justice Stevens's opinion by supporting the trial court's conclusion at the close of the evidence that the case was basically "a situation where an all white neighborhood is seeking to stop the traffic from an overwhelmingly black neighborhood from coming through their street."<sup>106</sup> Ac-

98. *Id.* at 119.

99. *See Greene v. City of Memphis*, 610 F.2d 395, 406 (6th Cir. 1979) (Celebrezze, J., dissenting) (arguing that municipality does not violate 42 U.S.C. § 1982 by exercising its police powers to close street when decision is not based on race).

100. *Id.* (Celebrezze, J., dissenting).

101. *See id.* (Celebrezze, J., dissenting) (arguing that showing of discriminatory intent should be made to establish § 1982 violation).

102. *Id.* at 407 (Celebrezze, J., dissenting).

103. *Greene*, 451 U.S. at 137 (Marshall, J. dissenting) (quoting App. 148).

104. *See id.* (Marshall, J., dissenting) (recognizing that area north of Hein Park was "predominantly Negro").

105. *See id.* (Marshall, J., dissenting) (stating that closing of West Drive "stems entirely from the efforts of residents of Hein Park").

106. *See id.* (Marshall, J., dissenting) (disagreeing with Justice Stevens's characterization

ording to Justice Marshall, the plain and powerful symbolic message of the street closing told blacks in essence that "[y]ou must take the long way around because you don't live in this 'protected' white neighborhood."<sup>107</sup> Just as blacks symbolically represent "undesirable traffic," the protected white neighborhood symbolically represents the "good neighborhood" whose tranquility must be preserved.<sup>108</sup> In Justice Marshall's view, Justice Stevens's "slight inconvenience" was in reality "a monument to racial hostility."<sup>109</sup>

The Sixth Circuit had interpreted the street closing as "one more of the many humiliations which society has historically visited" on blacks.<sup>110</sup> The appellate court, moreover, viewed the city's decision as representing a badge or incident of slavery in violation of the Thirteenth Amendment.<sup>111</sup> It quoted the concurring opinion of Justice Douglas in *Jones v. Alfred H. Mayer Co.*: "Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this court depict a spectacle of slavery unwilling to die."<sup>112</sup> To the appellate court, the closing of West Drive represented such a spectacle, another device leading to the same result.

By endorsing this view in his dissent, Justice Marshall revealed his palpable agitation over Justice Stevens's discounting the real and symbolic harms in the case.<sup>113</sup> Argued Justice Marshall, "It is simply unrealistic to suggest, as does the Court, that the harm suffered by respondents has no more than 'symbolic significance,' and it defies the lessons of history and law to assert that if the harm is only symbolic, then the federal courts cannot recognize it."<sup>114</sup> In focusing so sharply on symbolic harm, I do not want to understate the importance of structural inequality and material deprivation.<sup>115</sup> I see

of evidence) (quoting Tr. 323).

107. *Id.* at 138 (Marshall, J., dissenting) (describing perceptions of black residents who testified at trial).

108. *See id.* (Marshall, J., dissenting) (suggesting that true goal of Hein Park residents was to preserve access for their own vehicles and exclude those operated by blacks).

109. *See id.* at 139 (Marshall, J., dissenting) (describing barrier as reinforcing feelings about city's "favoritism towards whites").

110. *Greene v. City of Memphis*, 610 F. 2d 395, 404 (6th Cir. 1979).

111. *See id.* at 405 (concluding that erection of barrier constituted badge of slavery adversely affecting ability of plaintiffs to hold and enjoy their property).

112. *Id.* at 403 (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (1968)).

113. *See* HOWARD BALL, *A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA* 240 (1998) (stating that Justice Marshall was enraged by what he saw as his colleagues' insensitivity).

114. *Greene*, 451 U.S. at 152-53 (Marshall, J., dissenting).

115. *See, e.g.*, Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279, 2295-96 (2001)

a packaged, interlocking subordination that includes symbolic harm, structural inequality, and material deprivation wherein each of the packaged components of injury symbiotically reinforces the other. To put it in Iris Young's words, we must "pluralize concepts of injustice and oppression so that culture becomes one of several sites of struggle interacting with others."<sup>116</sup> In a different view, by reducing the harms of structural inequality and material deprivation to merely representational harms, the Court's opinion in *Greene* blocked avenues of adequate redress and reduced the reach of rights and remedies far short of what a racially just society would require.<sup>117</sup>

Since *Greene*, the Supreme Court has continued its retrenchment of civil rights and other antidiscrimination laws that blacks and other people of color have relied upon to open society.<sup>118</sup> It is very difficult to challenge the Court's race-neutral explanation and justification of its decisions without doing the kind of work that Justice Marshall did – deep digging into context and digesting law and society – in his dissent. Much of that work is cultural, a matter of setting the record straight by reinterpreting facts and attaching proper significance to representations in a manner that expands legal analysis to a broader setting. In that setting, we think about culture as an arena for struggles that directly implicate collective interests and political power. In that setting, we destroy representations of African Americans that are really myths. We reclaim our moral authority because, as Sonya Rose argues, "morality . . . is elaborated in struggle over symbolic power, which is ultimately the power to define social categories and groups and to establish as legitimate a particular vision of the social world."<sup>119</sup>

The difference between Justices Marshall and Stevens implicates what Peter Berger and Thomas Luckmann call the "conceptual machineries of

(preferring inquiry into whether structure contributes to material oppression rather than focusing on cultural meaning); Nancy Fraser, *Recognition or Redistribution? A Critical Reading of Iris Young's Justice and the Politics of Difference*, 3 J. POL. PHIL. 166, 166 (1995) (arguing that political struggle for recognition based on race, gender, or sexuality should not ignore realities of inequality in access to property and material benefits).

116. Iris Marion Young, *Unruly Categories: A Critique of Nancy Fraser's Dual System Theory*, 222 NEW LEFT REV. 147, 160 (1977).

117. See, e.g., DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 396 (4th ed. 2000) (arguing that Court's acceptance of adverse racial impacts on basis of racially-neutral grounds imposes barrier to racial equality).

118. See DAVID E. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* 456 (1992) (arguing that Rehnquist Court has history of misinterpreting civil rights legislation by restricting scope of antidiscrimination laws).

119. Sonya O. Rose, *Cultural Analysis and Moral Discourses: Episodes, Continuities, and Transformations*, in *BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE* 217, 230 (1999).



universe maintenance."<sup>120</sup> They argue that the "symbolic universe provides order for the subjective apprehension of biographical experience."<sup>121</sup> At bottom, this ordering function, by defining "reality," serves to put everything in its "right place."<sup>122</sup> Here, then, the legitimizing function of the symbolic universe not only justifies things, but also explains things. After all, regulating traffic is quite different than excluding people on the basis of their race.

In this light, the substantial difference of opinion between Justice Stevens and Justice Marshall was not a simple factual dispute. In a sense, the disagreement was about power – not naked power, but something more subtle and masked. As Berger and Luckmann point out, the power issue boils down to "which of the conflicting definitions of reality will be made to stick."<sup>123</sup> Justice Stevens trivialized the harm of racism by focusing on slight inconvenience, and he reduced black people to actual and metaphorical "unwanted traffic." Justice Stevens, in his majority opinion, asserted the power to name reality. He wielded the power to put everything in its proper place – whites in Hein Park and blacks excluded from Hein Park. Justice Stevens had that power; Justice Marshall did not. Justice Marshall could only "respectfully dissent."

However, Berger and Luckmann indicate that dissent in this context at least demonstrates empirically that the dominant universe is less than inevitable.<sup>124</sup> Thus, Justice Marshall concluded:

I end, then, where I began. Given the majority's decision to characterize the case as a mere policy decision of the city of Memphis to close a street for valid municipal reasons, the conclusion that it reaches follows *inevitably*. But the evidence in this case, combined with a dab of common sense, paints a far different picture from the one emerging from the majority's opinion. In this picture a group of white citizens has decided to act to keep Negro citizens from traveling through their urban "utopia" and the city has placed its seal of approval on the scheme.<sup>125</sup>

Generally, the dissenting opinions of Justice Marshall tell the story of repressed memories and missed opportunities to provide racial justice because

120. PETER L. BERGER & THOMAS LUCKMAN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 96 (1966) (explaining cognitive construction in which insiders live without questioning institutional order that arises from process of subjective reflection).

121. *Id.* at 90.

122. *See id.* at 91 (describing function of symbolic universe in encompassing reality within strict definitions that ward off feelings of "madness and terror").

123. *Id.* at 100.

124. *See id.* (explaining that appearance of alternative symbolic universes poses threat to dominant universe).

125. *Greene*, 451 U.S. at 155 (Marshall, J., dissenting) (emphasis added).

the dominant sense of reality is too narrow to serve the task. Justice Marshall's dissent in *Greene* is typical of his role as the Court's conscience; he, more than any other Justice, was able to see through legal complexities and grasp real human suffering underneath the abstraction. The dissent demonstrates how racism gets renamed as something else – something that is facially neutral, or "colorblind," and easily translatable into something other than "forbidden discrimination." The *Greene* decision symptomatically is just the tip of the iceberg. In fact, the decision may have legitimated the development, during the 1980s and 1990s, of many communities that have built iron gates and neighborhood barricades.<sup>126</sup> Recently, the Court's conservative majority has come to adopt the same abstract approach of facial neutrality and equality – the colorblindness that Patricia Williams aptly characterizes as "racism in drag" – to severely decontextualize the matter of racial subordination.<sup>127</sup> This approach extricates the racial question from the political, historical, social, and cultural context in which the legal claim of discrimination arose. The Court's *Greene* opinion completely ignored the differentiated powers and privileges that existed between blacks and whites. Its inquiry was not deep enough.

Why was Hein Park an exclusively white neighborhood, and why did black citizens predominantly live in separate urban neighborhoods? In evaluating the closing of West Drive, was the Court to erase patterns of housing segregation – or to disregard such patterns? How could the Court separate one action of government – the street closing – from all that surrounded it in terms of race-based discrimination patterns and then declare it neutral and inconsequential? How reminiscent is this of Justice Brown's opinion in *Plessy v. Ferguson*,<sup>128</sup> in which he interpreted the separate-but-equal railroad car rule as if it affected blacks and whites equally and with no acknowledgment of the history of race-based power and privilege the rule represented?<sup>129</sup> As Justice Harlan, in his dissent in *Plessy* reminded the majority, separate cars have

---

126. See, e.g., Rebecca J. Schwartz, Comment, *Public Gated Residential Communities: The Rosemont, Illinois, Approach and Its Constitutional Implications*, 29 URB. LAW 123, 124 (1997) (noting that demand for gated communities "has increased dramatically since the early 1980s"); see also EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED AND WALLED COMMUNITIES IN THE UNITED STATES* 152 (1997) (describing gated areas as concrete metaphor for exclusion of immigrants and minorities).

127. PATRICIA L.J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 116 (1991) (describing recent Supreme Court holdings based on "equality" and "neutrality" as "racism in drag").

128. 163 U.S. 537 (1896).

129. See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (equating argument that legally enforced separation of races places "badge of inferiority" on blacks with unlikely argument that, should blacks control legislature, law would place whites in inferior position).

symbolic meanings in the social and political contexts.<sup>130</sup> Similarly, Justice Marshall reminded the majority in *Greene* of the symbolic barrier between black and white neighborhoods that prevents the flow of traffic from the black neighborhood through the white neighborhood to the public park.<sup>131</sup> Justice Stevens's brief acknowledgment and quick dismissal of the residents' argument that this case was about symbolic meanings and stigma are made all the worse by his claim that the black citizens' use of that argument trivialized the purposes of the Thirteenth Amendment.<sup>132</sup> Unfortunately, in law and society, so much of today's world is reflected and symbolized by this 1981 decision.

#### *IV. The Expanding Regulation of "Unwanted Traffic": Vignettes Beyond the Bench*

The complexity of racism involves more than individualized prejudice or bias. The most difficult racism to overcome is that which is manifested widely as socialized ideologies and omnipresent practices that are rooted in a racialized belief system that is embedded in the nation's white-centered culture and institutions. Philomena Essed conceptualizes "everyday racism," which advances our understanding of the contemporary predicament of African Americans and many other people of color.<sup>133</sup> She contends that we must understand racism as a "system of structural inequalities and a historical process, both created and recreated through routine practice."<sup>134</sup> More precisely, racism is "defined in terms of cognitions, actions and procedures that contribute to the development and perpetuation of a system" in which one racial group dominates another.<sup>135</sup> Further, racial domination necessarily implicates the exercise of racial power.<sup>136</sup> Although individuals from the dominant group can exercise power over individuals of the dominated group, that power is dependent on the structural relationship of the two. "[T]he integration of racism into everyday situations through practices (cognitive and

130. See *id.* at 562 (Harlan, J., dissenting) (characterizing separation of citizens on basis of race to be badge of servitude inconsistent with civil freedom and equality).

131. See *Greene*, 451 U.S. at 138 (Marshall, J., dissenting) (reasoning that majority ignored symbolic message of inconvenience as being wholly wedded to prevention of blacks from traveling through "protected white neighborhood").

132. See *id.* at 128 (stating that inconvenience did not amount to actual restraint on liberty of blacks in violation of Thirteenth Amendment).

133. PHILOMENA ESSED, UNDERSTANDING EVERYDAY RACISM: AN INTERDISCIPLINARY THEORY 1 (1991) (introducing study of pervasive impact of racism on blacks in everyday life).

134. *Id.* at 39.

135. *Id.*

136. See *id.* (arguing that conceptualization of everyday racism may benefit from domination as exercise of power).

behavioral) that activate underlying power relations" manifests the process of racism.<sup>137</sup> Essed's theory enables us to understand how individual events and acts may be virtually insignificant in isolation because each "instantiation of everyday racism has meaning only in relation to the whole complex of relations and practices."<sup>138</sup> Moreover, to the degree that everyday racism becomes normalized and widespread, we can associate it with institutional and cultural manifestations of racism.<sup>139</sup> Thus, in terms of jurisprudence, prohibiting individual acts of disparate treatment may force a somewhat positive shift in our culture of discrimination without really advancing much of a shift in our culture of racism.

The vignettes presented below illustrate everyday racism within the larger context of what Andrew Kernohan describes as "cultural oppression," by which he means "the social transmission of *false* beliefs, values, and ideals about how to live, and the attitudes, motivations, behavior patterns, and institutions that depend on them."<sup>140</sup> The construction of nonwhites as unwanted traffic illustrates how cultural oppression is an articulation and practice of white power, something that the liberal paradigm of human agency seems unwilling to accept.<sup>141</sup> While that paradigm can recognize power within the hands of individuals and institutions, it fails to recognize it within

137. *Id.* at 50.

138. *Id.* at 52.

139. See JAMES M. JONES, PREJUDICE AND RACISM 13-15 (2d ed. 1997) (describing relationship among individual, institutional, and cultural racism that makes "colorblind" approach unlikely to eradicate racism); Anthony Cook, *Cultural Racism and the Limits of Rationality in the Saga of Rodney King*, 70 DENV. U. L. REV. 297, 300 (1993) (noting that individuals and institutions "engage in both overt and covert racism"); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1560 (1989) (favoring claim that unconscious racism is pervasive in American culture); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (arguing that traditional notions of intent do not reflect fact that subconscious cultural ideas and attitudes often influence racial decisions); Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1723 (2000) (offering theory of racism focusing on how organizational activity creates institutional racism even when individual group members lack any conscious discriminatory intent).

140. ANDREW KERNOHAN, LIBERALISM, EQUALITY, AND CULTURAL OPPRESSION 13 (1998).

141. According to Kernohan, the concept of cultural oppression

connect[s] liberalism's theoretical discourse to the theoretical discourse of those movements for social change that are fighting for a type of equality that liberal theory has had trouble understanding. The first task is to make these concerns visible in liberal theory . . . . Cultural oppression is a form of power, and liberal theorists have generally given up on using the concept of power in their analyses.

*Id.* at 14.

cultural practices.<sup>142</sup> However, our understanding of racist practices must situate them within the latter as well as the former. Everyday practices that are manifestations of cultural oppression reflect subtle, diffuse manifestations of racism.<sup>143</sup> Within the white world of routine, the realm of everyday practices in which whites "simply [do] their jobs [and live] their lives,"<sup>144</sup> their negative images of people of color are ridiculously over-inclusive, representing "a wide range of misconceptions and myths," which some scholars characterize as "sincere fictions" that serve as "the make-believe foundation . . . for white dominance and supremacy."<sup>145</sup> In the following four vignettes, this phenomenon plays out in concrete settings.

#### A. Public Accommodations at the Adam's Mark Hotel Chain

On May 20, 1999, plaintiffs filed a federal lawsuit in Florida that charged the Adam's Mark Daytona Beach Resort, one of the more luxurious hotels in the area, with discrimination against African Americans who were in Daytona Beach as part of the Black College Reunion.<sup>146</sup> The lawsuit claims that in providing public accommodations, the hotel engaged in disparate treatment of blacks and whites.<sup>147</sup> Among other things, the suit alleges that the hotel overcharged the event's participants for rooms and required full payment in

142. See Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 949-58 (2001) (criticizing liberal defense of affirmative action for not challenging ways in which traditional notions of merit perpetuate race and class distinctions).

143. As Iris Marion Young explains:

I have suggested that oppression is the inhibition of a group through a vast network of everyday practices, attitudes, assumptions, behaviors, and institutional rules; it is structural or systemic. The systemic character of oppression implies that an oppressed group need not have a correlate oppressing group. While structural oppression in our society involves relations among groups, these relations do not generally fit the paradigm of one group's consciously and intentionally keeping another down . . . . The conscious actions of many individuals daily contribute to maintaining and reproducing oppression, but those people are usually simply doing their jobs or living their lives, not understanding themselves as agents of oppression.

KERNOHAN, *supra* note 140, at 16-17 (internal quotations omitted) (quoting Iris Marion Young, *Five Faces of Oppression*, in *RETHINKING POWER* 3 (T.E. Wartenberg ed., 1992)).

144. *Id.*

145. JOE R. FEAGIN ET AL., *WHITE RACISM: THE BASICS* 4 (2d ed. 2001).

146. See Sue Schultz, *Justice Department Files Discrimination Suit Against Hotel Chain*, DURHAM HERALD-SUN, Dec. 17, 1999, at A13 (reporting that Justice Department filed federal discrimination suit against Adam's Mark Hotel chain alleging it discriminated against black guests in twenty-one hotels nationwide).

147. *Id.*

advance by check or money order, a \$100 refundable damage deposit, a \$25 deposit to have room telephones activated, and a \$300 deposit for access to minibars.<sup>148</sup> The lawsuit contends that none of these policies applied to whites.<sup>149</sup>

Perhaps worst of all, the lawsuit asserts that Adam's Mark required blacks who stayed at the hotel during the reunion to wear bright orange wristbands to indicate that they were guests and to buy an additional wristband, at \$50 each, for anyone who wanted to visit them.<sup>150</sup> The lawsuit asserts that uniformed officers from the Daytona Beach Police Department and Volusia County Sheriff's Office were out in force at the hotel to make sure blacks were wearing their wristbands.<sup>151</sup> In one report, twenty-eight year-old hotel guest Napoleon Berian said, "I felt like I was in county jail the whole weekend."<sup>152</sup> Another guest, Latoya Straughn, also twenty-eight, said she attended the reunion with three female friends and that they opted to wear the "cheap plastic" orange bands on their ankles, rather than on their wrists where they would have clashed with their clothes.<sup>153</sup> As a result, Straughn said, "every five feet, and/or every ten minutes," an officer would ask her for proof that she was a registered guest.<sup>154</sup> Unsurprisingly, many plaintiffs claimed that during the weekend they repeatedly noticed that white guests were not wearing wristbands and were not being challenged.<sup>155</sup>

The actions of the hotel followed an earlier attempt by the City Council to implement a plan that would have authorized the police to stop all traffic heading over the six bridges leading onto the commercial beach strip.<sup>156</sup> Officers were to allow only those who held passes – residents, employees of city businesses, and hotel guests – to drive across the bridges.<sup>157</sup> The NAACP sued the city, and federal district judge Patricia Fawcett issued an injunction barring the city from instituting its so-called traffic plan on the grounds that it violated the right to assemble.<sup>158</sup>

---

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

According to lawyers representing the black guests in the lawsuit against Adam's Mark, executives of the hotel were among the most vociferous in demanding that the city act to halt the Black College Reunion.<sup>159</sup> The lawyers claim that after the judge threw out Daytona Beach's traffic plan, the hotel executives decided to make the event so unpleasant that black people would not come back.<sup>160</sup> The mental anguish, humiliation, and embarrassment that result from this kind of racism has been described as "spirit murder."<sup>161</sup> The Adam's Mark incident illustrates the advanced application of the symbolic representation of black people as "unwanted traffic" – unwanted even as young professionals who were paying customers at a luxurious hotel.<sup>162</sup> As a matter of justice, however, the hotel has agreed to pay \$8 million to settle the various lawsuits.<sup>163</sup>

---

159. *Id.*

160. *Id.*

161. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 128 (1987) (recounting incident in which black law professor was not buzzed into Benetton store in New York City during regular business hours even though white shoppers were inside).

162. See Regina Austin, "A Nation of Thieves": *Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147, 148 ("There can hardly be a black person in urban America who has not been denied entry to a store, closely watched, snubbed, questioned about her or his ability to pay for an item, or stopped and detained for shoplifting."); Loren Page Ambinder, Note, *Dispelling the Myth of Rationality: Racial Discrimination in Taxicab Service and the Efficacy of Litigation Under 42 U.S.C. § 1981*, 64 GEO. WASH. L. REV. 342, 359-60 (1996) (presenting results of study of taxi service in Washington, D.C., that showed blacks were more likely than whites to be denied taxi service and had to wait longer than whites when given service); Stephen Labatton, *Denny's Restaurants to Pay \$54 Million in Race Bias Suits*, N.Y. TIMES, May 25, 1994, at A1 (describing lawsuit in which restaurant kept black Secret Service agents waiting for table while seating and serving white agents); Courtland Milloy, *Teen Stripped of More than Just a Shirt*, WASH. POST, Nov. 15, 1995, at D1 (reporting that black teenager, shopping in Eddie Bauer, had to surrender shirt that he purchased day before because he had no receipt); *Avis to Pay \$3.3M in Discrimination Case*, FT. LAUDERDALE SUN SENTINEL, Dec. 23, 1997, at 2D (reporting that company settled discrimination lawsuit alleging that it placed extra restrictions on black drivers).

163. Michael J. Sniffen, *Hotel Chain Agrees to Pay \$8M to Settle Racial Bias Lawsuits*, DURHAM HERALD-SUN, Mar. 22, 2000, at A5 (reporting that Adam's Mark hotel chain agreed to pay damages, revise policies, and seek minority customers in settlement of racial discrimination lawsuits). With the Bush administration now overseeing the settlement, the Justice Department is considering lifting some provisions of the settlement order at the request of Fred S. Kummer, the chairman of HBE Corporation, which operates Adam's Mark Hotels and Resorts, a chain of twenty-four hotels, including the one in Daytona Beach. See Neil A. Lewis, *Justice Dept. Weighs Lifting an Anti-Bias Order on Hotels*, N.Y. TIMES, Mar. 22, 2002, at A16 (reporting Justice Department's statement that it was considering "ending" order forcing Adams Mark to comply with settlement order). Mr. Kummer is "a longtime friend and supporter of Attorney General John Ashcroft." *Id.*

*B. Dubuque, Iowa, and the Failed Recruitment of a Few Good Blacks (a.k.a. "Unwanted Traffic")*

In the spring of 1991, the Dubuque, Iowa Human Rights Commission unanimously approved a plan proposed by the local Constructive Integration Task Force.<sup>164</sup> The title of this plan was "We Want Change," and it was designed to attract about 100 black families over a five-year period, bringing in twenty families per year.<sup>165</sup> Blacks constituted less than one percent of the city's total population of about 58,000, and "the task force members felt the city should make a symbolic gesture of recruiting black families to overcome Dubuque's lack of diversity."<sup>166</sup> Moreover, the plan was a response to the burning of a black family's garage in October of 1989, in which a cross and the words "KKK lives" were found.<sup>167</sup> The very modest recruitment plan entailed an intention to have employers "lure black workers to fill vacant jobs in the city."<sup>168</sup> Additionally, the task force explicitly supported the desire to attract black professionals to the city.<sup>169</sup>

Two things stand out in viewing the events in Dubuque: the modest nature of the plan – twenty black families a year for five years to fill vacant jobs – and the extraordinary backlash that the plan generated. As reported by Joe Feagin, Herán Vera, and Pinar Batur, "Aggressive white responses included a dozen cross-burnings and bricks thrown through the windows of black homes. Cross-burnings also occurred in other Iowa cities, including Des Moines, Waterloo, Jefferson, and Iowa City."<sup>170</sup> The white men who were arrested for the Dubuque incidents viewed the burning crosses "as symbols of the white community's alarm at the job losses that the perpetrators assumed would result from the recruitment plan."<sup>171</sup> In addition to the cross-burnings and incidents of vandalism, hate letters and racist graffiti were sent to local black residents and white supporters of the recruitment plan.<sup>172</sup> The dozen or so black students at the local Dubuque Senior High School (which had 1,471 white students) were racially harassed, and police officers had to patrol the

---

164. The following account of the Dubuque, Iowa story draws upon the case study in FEAGIN ET AL., *supra* note 145, at 36-53.

165. *Id.* at 37.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 38.



hallways to protect the black students from white violence.<sup>173</sup> Moreover, in 1991 and 1992, the local *Telegraph Herald* carried a number of angry letters by people who were "opposed to the recruitment of, or even the presence of, black families."<sup>174</sup>

In the Adam's Mark hotel case, white reaction to blacks was probably driven by aversion and resentment at their temporary presence in sharing the hotel accommodations. In Dubuque, the driving force behind the white reaction was probably fear. But who or what did many of the whites fear? The few black recruits were no real threat to white jobs or centers of dominance. Recall that the few black recruits – 300-400 people in 100 families – were to be professional people, not the stereotypical criminal or welfare recipient. As Feagin, Vera, and Batur point out, some of the white fear of blacks was based on stereotypes and the unknown rather than actual experience or relationships with blacks.<sup>175</sup>

*C. Latino Day Laborers: Handy "Visual Pollution"  
in Brewster, New York*

During the 1980s, my wife, our two children, and I often traveled to the suburb of Brewster, New York, to visit my sister-in-law, Jane. The town was beautiful, and the people were always cordial. I enjoyed my visits to the town, which was an hour's train ride north of New York City and mostly populated by whites. I was therefore surprised to read of recent incidents involving Latino day laborers. Reportedly, the town's sidewalks have become "impromptu hiring halls where [Latino] immigrants gather each morning [to wait] for contractors to hire them for the day."<sup>176</sup> The immigrants often help resi-

173. *Id.*

174. *Id.* at 39.

175. *See id.* at 50 (discussing probable cause of whites' fear of blacks in Dubuque). Other scholars have noted that fear of the unknown black is often a case of isolation of whites from blacks. For a telling figure of the extent of some whites' isolation from blacks, consider that in 1990 half of the nation's counties were 99% white. *See* JIM MYERS, *AFRAID OF THE DARK: WHAT WHITES AND BLACKS NEED TO KNOW ABOUT EACH OTHER* 44 (2000) (exploring race issues in America). Moreover, according to the 1990 Census, the following nine states had a less than 1% black population: Vermont (0.3), Idaho (0.3), Montana (0.3), Maine (0.4), South Dakota (0.5), North Dakota (0.5), New Hampshire (0.6), Utah (0.7), and Wyoming (0.8). *Id.* Oregon's population was only 1.6% black. *Id.* To counter fear and ignorance, some scholars have suggested human relations training. *See generally* JUDITH H. KATZ, *WHITE AWARENESS: HANDBOOK FOR ANTI-RACISM TRAINING* 3 (1978) (presenting group training program designed to alter racist attitudes and encourage behavioral change).

176. Matthew Purdy, *Where Laborers Are Handy but Shunned*, *N.Y. TIMES*, Nov. 21, 1999, at 45.

dents with odd jobs such as mowing grass or building stonewalls.<sup>177</sup> According to Tony Hay, the chairman of the Legislature in Putnam County, a county that is ninety-five percent white, "There's a cultural difference between Americans and Latinos. We don't stand on the street looking for work. The average person will wake up at 8 o'clock and go to work. *They* wake up and go stand on the street corner and look for work. I call it visual pollution."<sup>178</sup> This expression of "suburban xenophobia"<sup>179</sup> translates unwanted traffic into visual pollution.

Hay has asked federal immigration officials to address what he sees as an "illegal immigration problem" to keep it from "plagu[ing] our community."<sup>180</sup> Hay's vision is downright cataclysmic: "The World Trade Center blew up [referring to the 1993 attack], planes are blown out of the sky," he said.<sup>181</sup> "I'm not saying it's Latinos, but they're all immigrants. The West Nile virus, they laugh at me, but we don't know where that came from. If Saddam Hussein shaved his mustache and spoke Spanish, he could come here and stand on the streets of Brewster. Muammar Qaddafi, he could come here."<sup>182</sup> Here, Latino people looking for work are characterized as intruders who spread disease and engage in terrorism. Unwanted traffic, indeed.

Another town citizen, Tom Opdyke, the owner of Bagel Depot opposite the train station, said, "Until Tony Hay made a statement, everybody else had their head in the sand."<sup>183</sup> He added that women are afraid of being harassed and that some of the immigrant job seekers urinate in public.<sup>184</sup> Some in Brewster seem to want Latinos to do their chores, but they do not want Latinos to live around them. Many in Brewster find Hay's statements to be "very hateful" and reflective of "big-time prejudice."<sup>185</sup> But, of course, Hay's bigotry probably causes the deepest injury to the area's minority groups themselves. A gentleman named Lone Hawk of White Plains and the Gwich'in Nation of Native Americans said that the debate over Latino immigrants grieved him: "This is our land. We lived in peace until the white man

---

177. *Id.*

178. *Id.* (emphasis added).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

came.<sup>1186</sup> As reporter Matthew Purdy wryly concludes, Lone Hawk "was generous enough not to ask everyone to leave."<sup>1187</sup>

*D. Bad Asian Neighbors: "Model Minority" Be Damned*

Because Asians have been relatively successful in their access to the mainstream opportunity structure, it is difficult for some to see how they might constitute "unwanted traffic." Paradoxically, however, many in society view Asians not only as "a model minority" that is well positioned to assimilate successfully, but also as permanent foreigners who threaten the nation's social fabric. These images clashed in dramatic fashion in a case of housing discrimination that involved Asian American students at Stanford University.<sup>188</sup> When the students sought to rent off-campus housing in the neighboring suburb of Menlo Park, their Stanford, model-minority credentials did not enable them to avoid being denied housing, although they recovered \$300,000 in settlement of their fair housing claim.<sup>189</sup> The landlord allegedly told the women students that she already had "good, white American applicants" and that "you people are ruining this country."<sup>190</sup>

*V. Reclaiming a Place in the Humanizing Struggle  
of the Civil Rights Community and Moving Toward Racial Comity*

In addressing this discussion to whites, I am not trying to reach hard-core racists or those who lie about their true racist feelings. Even milder references to "modern" or "aversive" racism still implicate racism as a scary term, better left unmentioned, that may alienate my audience and cause them to stop hearing whatever I say after I utter the term racism. Indeed, Paul Wachtel argues compellingly that in lieu of the vague characterizations of modern racism, we should instead focus on white indifference.<sup>191</sup> I, however, do not

186. *Id.*

187. *Id.* Small town xenophobia, such as that found in Brewster, is not an isolated occurrence. A state legislator in Kentucky recently blamed so-called illegal Hispanic immigrants residing in Kentucky for the spread of disease. See Laura M. Padilla, "But You're Not a Dirty Mexican": Internalized Oppression, *Latinos & Law*, 7 TEX. HISP. J.L. & POL'Y 59, 62 n.10 (2001) (stating that legislator accused illegal Hispanic immigrants of being responsible for spread of disease in state and for emptying food stocks of local charities (citing John Cheves, *Legislator Slams Illegal Immigrants*, LEXINGTON HERALD-LEADER, Mar. 14, 2000, at A1)).

188. See Carolyn Zinko, *Stanford Students Settle Housing Suit Over Racial Slurs*, S.F. CHRON., Feb. 11, 1998, at A17 (reporting settlement of lawsuit in which landlord agreed to pay \$300,000 to five Asian American victims who were object of landlord's racial slurs).

189. *Id.*

190. *Id.*

191. See PAUL L. WACHTEL, RACE IN THE MIND OF AMERICA: BREAKING THE VICIOUS

really see the bright-line distinction between aspects of racism and race-neutral indifference. I think that when we ask why so many whites are indifferent to blacks, some variant of racism will creep back into the story. Unlike Wachtel, who seems to neutralize indifference as it is directed to otherness, I tend to see indifference as racialized, as driven by bias, prejudice, and stereotype – by cultural and institutional racisms – all leading to an anti-black sentiment that divides. But I really do not know. What I would most like to know is how to recruit better-intentioned whites – the innocent bystanders – to fight against racism and for a more open society, a more inclusive multiracial democracy, and a world of social justice.

In another attempt to facilitate conversations about race/ism, Robert Entman and Andrew Rojecki's study of race and the media in Indianapolis convinced them that whites have "a complex amalgam of ideas and feelings better labeled as ambivalence or animosity than racism."<sup>192</sup> Set out below is Entman and Rojecki's table titled: "Spectrum of White Racial Sentiment."<sup>193</sup> Racial progress is represented as one reads from the table's right-hand column to that on the left. I invite white readers, as well as Asian and Latina/o readers, to situate themselves within the different columns along the spectrum.

The table characterizes white racial sentiment in terms of comity, ambivalence, animosity, and racism regarding the beliefs that are associated with the four references that run down the far left side of the table: the degree of black negative homogeneity, the degree to which structural impediments exist to black opportunity, and the existence and degree of group conflict between blacks and whites. Also at bottom left, sentiment is measured in terms of white emotional responses to blacks, ranging from comfort, disquiet, fear and anger, to hatred.

---

CIRCLE BETWEEN BLACKS AND WHITES 35 (1999) (exploring psychological underpinnings of continuing racial divisions). He contends:

What is perhaps most important of all for whites to acknowledge and understand is *indifference*. A great deal of what is often characterized as racism can be more precisely and usefully described as indifference. Perhaps no other feature of white attitudes, and of the underlying attitudinal structure of white society as a whole, is as cumulatively responsible for the pain and privation experienced by our nation's black minority at this point in our history as is indifference. At the same time, perhaps no feature is as misunderstood or overlooked . . . . It severs the sinews and nerves of society without announcing itself. Its effects are devastating, but its tracks are hidden in the overall attitude of "each man for himself" that is so prominent a part of our society's ethos.

*Id.* at 35-36.

192. ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* 16 (2000).

193. *Id.* at 18 tbl.2.1.

Table 1: *Spectrum of White Racial Sentiment*

	Comity	Ambivalence	Animosity	Racism
	Individual Diversity	Negative Tendencies	Stereotyping	Hierarchy
Negative Homogeneity	Individual Blacks, like Whites, vary widely in traits	Black individuals tend more than Whites to exhibit negative traits	Most Blacks share a syndrome of negative traits	Blacks are a lower order of humanity than Whites, with consistently negative traits
	Empathy	Underestimation	Denial	Separation & Discrimination
Structural Impediments	Discrimination remains prevalent, causing great harm to equal opportunity	Discrimination may occur in isolated individual instances	Anti-Black discrimination is a thing of the past; Whites now experience more racial discrimination	Blacks cannot attain equality no matter what society does; discrimination is therefore necessary
	Political Acceptance	Political Concern	Political Rejection	Political Aggression
Conflicting Group Interests	Fundamental interests of Blacks and Whites do not differ; cooperation possible and desirable	Black political power sometimes creates trouble for Whites as a group; cooperation suspect	Black political power extracts advantages at White expense; cooperation rarely to mutual advantage	Black political power poses grave dangers to Whites as a group; cooperation dangerous
	Comfort	Disquiet	Fear & Anger	Hatred
Emotional Responses	Low intensity, positive or neutral feelings	Low intensity oscillation from neutral to positive to negative	Largely negative, moderately intense emotions	Intensely and globally negative emotions toward Blacks

In looking at the racial thinking that runs across the spectrum from racial comity and understanding to flat-out racism, Entman and Rojecki find that most whites express either the sentiment of ambivalence or animosity and more express the former than the latter. Whites in the far right column, the racists, are beyond help and stand outside my analysis. I worry that their number is underestimated, but I leave that discussion for another time. The hope for a better day lies in trying to move whites from ambivalence to comity, while preventing whites moving from left to right along the spectrum, that is, from ambivalence to animosity and, worse, from animosity to racism. At one point, I thought that I might want to recruit those who feel animosity toward blacks, but upon a closer reading I do not see that as viable.<sup>194</sup>

Entman and Rojecki urge that we seek the dictionary meaning of comity, which is "courtesy, civility; kindly and considerate behavior towards others."<sup>195</sup> In their view, "Comity would allow Whites and Blacks [and other racial and ethnic groups as well, I presume] to see common interests and values more readily and thus to cooperate in good faith to achieve mutually beneficial objectives."<sup>196</sup> The move toward comity would help to present a context that could "nurture a virtuous circle of respect, empathy, and generosity to replace the vicious circle of suspicion, separation, and stinginess."<sup>197</sup> Thus, I direct my attention to the ambivalent majority of whites. As Entman and Rojecki note, this group of whites "are people with good intentions who are somehow stymied from achieving them."<sup>198</sup> As we review column two (ambivalence) of the spectrum of white racial sentiment, we note that emotionally this group oscillates from neutral to positive to negative. Although those in this group perceive negative traits among blacks, they also at least

---

194. According to Entman and Rojecki:

Racial *animosity* occupies an important step short of racism. Although those exhibiting animosity often get labeled as racists, they do not see their stereotyped anti-Black generalizations as adding up to a natural racial order that places Whites on top and legitimizes discrimination. Rather, animosity . . . boils down to stereotyping, denial, political rejection and demonization, and fearful, angry emotions.

*Id.* at 19.

As I look down column three, I would place in this category Mr. Luckman, the letter writer to the *St. Petersburg Herald*. See *supra* text accompanying note 43 (containing Luckman's complaint that newspaper was exacerbating racial problem). Entman and Rojecki, more optimistic than I, feel that those with racial animosity can change because the animosity is not rooted "in intense personal needs and motivations," but rather in "ignorance, confusion, and anxiety." ENTMAN & ROJECKI, *supra* note 192, at 21.

195. ENTMAN & ROJECKI, *supra* note 192, at 11 (quoting Oxford English Dictionary).

196. *Id.* at 11-12.

197. *Id.* at 12.

198. *Id.* at 33.

acknowledge that racial discrimination occurs (albeit in isolated individual instances). They reject stereotypes and racial hierarchy, and they view conflicting interests between whites and blacks as occasional. I think ambivalent whites would include "aversive racists," whites who consciously embrace egalitarian, non-racist ideals, but who also possess unacknowledged negative sentiments about blacks. They might vote for Colin Powell to be President, but would be reluctant to sit next to a black on the subway or bus.<sup>199</sup> According to Rupert Brown, aversive racists hold, along with liberal principles of equality and tolerance, "some residual anxiety in their dealings with minority group members, an unease stemming from culturally socialized negative images associated with them."<sup>200</sup> This anxiety colors interaction between whites and nonwhites, leading to avoidance, detachment, coolness, and general fatigue over issues of race.<sup>201</sup> I would include aversive racists among the whites I am recruiting to the cause of social justice, although I realize that the description of whites as any kind of racist is problematic.

In looking at the interviews presented by Entman and Rojecki, the ambivalent whites appear generally to move back and forth between ambivalence and animosity rather than between ambivalence and comity. Interviewees would often express sentiments that reflected a conflict with their experiences. Typical is the response of a forty-five year-old teacher's aide:

Q: What kind of picture do you think TV news gives of Black people? What do we learn about Blacks from TV news?

A: I think most of it's a lot of negatives.

Q: In what way?

A: Just the violence and the welfare stories are always negative about Blacks. And I think they get a lot of bad press. Because I don't see that in the people that I deal with. And I think that's unfair that they do get a lot of negative press.

But then a lot of the violence and stuff they do to themselves!

Q: So you think those stories are accurate?

---

199. Malcolm Gladwell, *The Subtler Shades of Racism: Private Emotions Lag Behind Public Discourse*, WASH. POST, July 15, 1991, at A3 (describing aversive racism as "the subconscious, discriminatory acts and feelings of people who genuinely don't want to be that way"). The theory of aversive racism was primarily developed in Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM 61 (1986). Entman and Rojecki do not place aversive racists on their spectrum, but observe that they would fit in "at some point between the extremes on the scale from racism to comity." ENTMAN & ROJECKI, *supra* note 192, at 17.

200. RUPERT BROWN, PREJUDICE: ITS SOCIAL PSYCHOLOGY 227 (1995).

201. *Id.*

A: I think for the most part they're accurate, but I think they bring it on themselves.<sup>202</sup>

According to Entman and Rojecki, "[a]n accretion of consistent, race-dominated imagery from newscasts has created in these respondents' minds an enduring stereotype that defeats their otherwise sympathetic impulses."<sup>203</sup>

In a focus group meeting of whites at Drew University, one participant, Christina, observed,

Whenever the news shows the latest crime, it's always a black person who's committed it . . . . I try not to think of them as a culture that's violent, but you can't help but think that as a culture they're completely violent, when you look at TV and the videos on MTV – guns, violence. They're talking about guns and shooting their women and shooting white women . . . . Sometimes I think it is true, that black people do commit crimes more than white people. Or maybe you just hear about it more. I don't know which one it is, but it is truly frightening.<sup>204</sup>

I am stunned at a particularly stark recollection of Christina's: "I remember when we were younger, before we'd go out, it would always be like a big joke: Do you have your nigger-be-good stick? Which is like just a stick, but it was used to beat up black people, so it was called a 'nigger-be-good stick.'"<sup>205</sup> This was "a big joke"? It was "just a stick"? Worse, the violent stereotype extends beyond white fear; it really reinforces the caricatures of blacks as subhuman – grotesquely unwanted traffic.<sup>206</sup>

### VI. Conclusion: Keep Hope Alive!

Many people have asked me over the years why my legal writing constantly implores one "to keep the faith" and "to keep hope alive" when I tell such depressing stories about racism. Critics might ask the same question because, in their view, I am such a thin-skinned racial whiner. But, as I have learned from Charles Lawrence and other progressives, "Transformative

202. ENTMAN & ROJECKI, *supra* note 192, at 35.

203. *Id.*

204. DAVID K. SHIPLER, *A COUNTRY OF STRANGERS: BLACKS AND WHITES IN AMERICA* 361 (1997).

205. *Id.* at 360. Shipler reports that unsolicited comments by whites about race usually come to him in three forms: (1) complaints about incompetent blacks getting preference in hiring; (2) laments about violence and disorder in inner-city schools and neighborhoods; and (3) various stories of whites being victimized as the object of black racism. *Id.* at 459.

206. *Id.* at 360. See generally LEONARD CASSUTO, *THE INHUMAN RACE: THE RACIAL GROTESQUE IN AMERICAN LITERATURE AND CULTURE*, at xiii-xiv (1997) (providing commentary on racial objectification).



politics requires looking beyond winning or losing the particular legal dispute or political battle and asking how one's actions serve to reinforce people's awareness of our interdependence and mutual responsibility as members of the human family.<sup>207</sup> To reach racial comity, all of us, nonwhite and white, must reject the culture of oppression – actually have the gumption to go out and fight it everyday.

We must recommit to the humanizing aspects of the civil rights movement as it was organically connected to a larger movement for freedom, justice, and human dignity. However, the translation of the movement into a set of legalisms curtailed the promises of freedom, justice, and human dignity even as it offered equality before the law. The true tragedy of the civil rights movement is that it was too quickly disconnected from the humanizing aspects of the struggle that marked its origins and animated it.<sup>208</sup> Out of a diverse, expansive civil rights community, time and energy devoted to law reform prevailed over other aspects of the community's activities. Once severed from the larger community, law was easily cabined, justice easily delayed, and racist resistance easily enabled.

When I think of the civil rights community, I have in mind Vincent Harding's sense of community – "a way of being which encourages cohesion, mutual responsibility, compassion, integrity, and justice."<sup>209</sup> In Harding's view, "[I]t is possible for us to look at the heart of this powerful humanizing social movement and discover a profound quest in which all legal rights become essentially openings toward a more humane community."<sup>210</sup> I think we are all so tired and beat down from the travail of racism – the experience of racism and the claims that it generates – that most of us really yearn for comity, for the more humane community, in a national sense. We must put indifference and fear aside. We may have to forget all that we think we know about each other and start over again. I think we can reimagine, reinvent, and reestablish America as a place of racial comity.<sup>211</sup> Although much more is

207. Lawrence, *supra* note 142, at 965.

208. See generally CLAYBORNE CARSON, *IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960s* (1981) (tracing development and impact of Student Nonviolent Coordinating Committee); DAVID GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* (1986) (detailing contributions of Martin Luther King, Jr., and Southern Christian Leadership Conference); ALDON MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* (1984) (chronicling first decade of southern civil rights movement); BELINDA ROBNETT, *HOW LONG? HOW LONG?: AFRICAN-AMERICAN WOMEN IN THE STRUGGLE FOR CIVIL RIGHTS* (1997) (analyzing African American women's activities within and contributions to civil rights movement).

209. Harding, *supra* note 1, at 17.

210. *Id.*

211. As a start, respond personally to the following questions:

necessary, in these difficult racial times, I am not at this point asking for anything more.

Beyond formalized equality of opportunity, the larger promise of the civil rights movement was directed to a profound culture-shift. And though not perfectly manifested, that culture-shift is a significant legacy of the Warren Court's race jurisprudence. It is, to be sure, a contested legacy, but one worth fighting for rather than against. But this is difficult business, no matter how you choose to enter the fray. In February 2002, I participated in a continuing legal education program – a "Festival of Legal Learning" it is called – that my law school sponsored. I presented a one-hour class that raised some of the issues addressed in this Article, discussing the vignettes and handing out a copy of Entman and Rojecki's spectrum of racial resentment. The audience reception was mixed. However, I see that as a positive because I left thinking that the evaluations of my presentation would be decidedly negative.<sup>212</sup> True enough, some wrote on the evaluation forms: "I thought it would be a discussion of Warren Court cases, but it wasn't"; "Not law – Just anecdotal 'evidence' about how 'Whitey' is evil"; "Most biased instructor I have ever seen at the Festival"; and "Drivel."<sup>213</sup> But there were other views as well: "Outstanding lecture!"; "Exceeded my expectations"; "Excellent!! Thank you for such a thought-provoking and engaging discussion."<sup>214</sup> There were two positive evaluations that were more elaborate. According to one, "Brilliantly summarized his theory and fear . . . stomach turning examples, extremely open

- 
- What messages did your parents communicate to you about race?
  - How does this differ from the way you communicate with your children about race?
  - In what ways do you organize your identity and resources around race? How consciously does race affect your choice of where to live, shop, or send your children to school?
  - For the first time, a majority of blacks and whites support the idea of integration, but ideas of what constitutes integration differ. What would be the ideal percentage breakdown for you between people of your race and of others in a neighborhood in which you lived? What is the actual percentage breakdown in your neighborhood? What would be the tipping point, the point at which the racial balance [becomes] uncomfortable enough to make you want to leave the neighborhood?
  - Is affirmative action an appropriate way of redressing racial inequities in this country?
  - What is your race?

Betsy Hubbard et al., *Hungry Mind Review Questionnaire*, in *CIVIL RIGHTS AND RACE RELATIONS IN THE POST REAGAN-BUSH ERA* 189, 190 (Samuel L. Myers, Jr., ed., 1997).

212. Evaluations are on file with author.

213. *Id.*

214. *Id.*

to & tolerant of questions that displayed lack of understanding, kept communication open effectively in a large group, extremely patient with racist questions. Classy presentation!!<sup>215</sup> The other stated, "Excellent, brilliant organization & presentation. Comments to Calmore: you were not overstating these as incidents of racism. You handled uninformed, racist comments from the audience *with grace*. Implicit in several of the comments was the assumption that the blacks through prior conduct had brought this racism upon themselves."<sup>216</sup> I imagine that the reception of this Article will be similarly mixed. Still, in both the Article and the festival of learning, the lessons are that, across the racial divide, we must keep communication open, be tolerant of one another's ignorance and awkward questions, remain extremely patient with each other, not overstate or understate incidents of racism, and, perhaps most of all, handle the difficult moments with grace.

George Fredrickson reminds us that "race relations are not so much a fixed pattern as a changing set of relationships that can only be understood within a broader historical context that is itself constantly evolving and thus altering the terms under which whites and nonwhites interact."<sup>217</sup> In this Article, I have presented people of color as they live the experience of dominant constructions of them as unwanted traffic – (1) blacks being rerouted around the white neighborhood of Hein Park in Memphis; (2) young black professionals being denied equal public accommodations at a luxury hotel in Daytona Beach; (3) blacks being rendered unwelcome in Dubuque, Iowa; (4) Latino day laborers being associated by a town official with potential plague and terrorism in Brewster, New York; and (5) Asian students at Stanford University being subjected to housing discrimination in Menlo Park, California, because their people were "ruining" the country. In these disparate examples, from across the nation, the common theme is the regulation of people of color as "unwanted traffic." Taking a note from Fredrickson, I have intended these varied cases to illustrate the continuing historical and contemporary contexts within which nonwhites are racialized and how "unwanted traffic" is a significant "term[] under which white and nonwhite interact."<sup>218</sup>

In this sense, the regulation of people of color as unwanted traffic is associated with an aspect of white racism that Feagin, Vera, and Batur describe as "the socially organized set of practices, attitudes, and ideas that deny African Americans and other people of color the privileges, dignity, opportu-

215. *Id.*

216. *Id.*

217. GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY*, at xvii (1981) (comparing race relations throughout United States and South African history).

218. *Id.*

nities, freedoms, and rewards that this nation offers to white Americans."<sup>219</sup> Moreover, the social construction wreaks havoc with a viable concept of equality of opportunity. The racially unimpeded access to the basic opportunity structure that rewards whites is often a matter that whites can take for granted, provided that they simply work hard and play by the rules. There is a place not only for them, but also for all who follow suit – unless, of course, you are deemed to be unwanted traffic that must be regulated.

Old-school racism and legally forbidden discrimination have been divorced from an unacknowledged white bonding on issues of race that serves to benefit and privilege whites materially and psychologically.<sup>220</sup> That bonding reinforces a silent commitment to prevent many African Americans, who are socially and culturally constructed as unwanted traffic, from traveling through "their white utopia," to use Justice Marshall's words.<sup>221</sup> The construction of blacks as unwanted traffic does not build primarily on either fear or hate, even though they are factors. Rather, at bottom, the characterization of blacks as unwanted traffic stems from a belief in the inferiority of black people – of African Americans, more precisely. The inferiority may be deemed biological, cultural, or moral. While this is really a packaged conception of inferiority, I think that moral inferiority primarily fuels the conception of unwanted traffic.<sup>222</sup> Viewing black people as inferior, morally or otherwise, reflects the racial reality in which whites who disassociate themselves from racism nonetheless "acquiesce in the larger cultural order which continues the work of racism."<sup>223</sup> Continuing the work of racism through the social-cultural construction of blacks and other nonwhites as unwanted traffic articulates the new century's "metaracism" – an adverse personality disorder

219. FEAGIN ET AL., *supra* note 145, at 17.

220. See generally WHITE REIGN: DEPLOYING WHITENESS IN AMERICA (Joe L. Kincheloe et al. eds., 1998) (discussing social-psychological construction of whiteness and how it directs identity-based actions).

221. See text accompanying *supra* note 125.

222. According to David Shipler:

Taken together, beliefs about the morals of black people make up a bundle of stereotypes that can be seen in several parts: Blacks are dishonest and are prone to steal. They do not care enough about their children and have allowed their families to disintegrate. They are sexually aggressive and promiscuous. And they are violent. These are not new portraits; they date from the time of slavery. They find reinforcement today in social ills that seem to strike black Americans with special intensity, and they allow white people to slide easily into instant judgments about individuals who happen to have the physical characteristics that make them "black."

SHIPLER, *supra* note 204, at 318.

223. JOEL KOVEL, WHITE RACISM 212 (1970).

that is manifested in social distance, lack of human feelings, and detachment.<sup>224</sup>

In looking at the representation of African Americans and other people of color as unwanted traffic, I hope to have opened lines of inquiry that will lead to a more complete description of the nature of racial discrimination (as an aspect of racial subordination and injustice). I also hope to enable a recognition of the need to renegotiate the terms of formal redress in light of extralegal representations that reduce viable antidiscrimination claims to successful defense motions to dismiss, figuratively and literally. Of all the racial metaphors, stereotypes, and symbolic representations, the characterization of people of color, especially blacks, as "unwanted traffic" is today's most exclusionary racial signification. If you are deemed to be unwanted traffic, it does not matter if you are driving a used Ford or a new Mercedes. It does not matter if you are window shopping or about to charge your Platinum American Express card. It does not matter if you have dropped out of high school or graduated from Harvard or Oxford. It does not matter if you speak accented or unaccented English. If you are unwanted traffic, you cannot transform yourself into something else that is acceptable. You can be rerouted, detoured, and stopped while driving black (brown or beige). The police can beat you with their "nigger-be-good" stick or shoot you when you reach for your wallet. While awaiting a taxi, you are even unwanted traffic to empty cabs that pass you by. Unwanted traffic cannot be integrated or incorporated into the community of those who complain about it. There can be no unwanted traffic in crowded places, no unwanted traffic at the University of Texas or Cal Berkeley's Law School. No unwanted traffic will overcome the inviolability of the glass ceiling. The contexts for treating people of color as unwanted traffic are unlimited, and there is no way, really, for them to become something else in the eyes of many.

Thus, at the end of the day, I recall Derrick Bell's admonition that civil rights advocates must seek "to deflect and frustrate" the many manifestations of the real role that racism plays in our society.<sup>225</sup> We must break free of the contradictory adherence to an "equality ideology [that rejects] discriminatory experience."<sup>226</sup> We must reconstruct and re-present unwanted traffic as the human beings that they really are, as members of society who deserve a fair shot at living their lives as part of the larger humanity within this nation. Dismissing them as unwanted traffic – people who heretofore have been

---

224. See *id.* at 211-30 (considering phenomenon of metaracism in context of psychohistory of American racism).

225. BELL, *supra* note 117, at 80.

226. *Id.*

unjustly regulated through control and exclusion and who have been dehumanized into something else – says more about our society and culture than it does about them. Reversing this old problem suggests the directions for the new century – an America of racial comity and common humanity.

Because Thurgood Marshall's dissent in *City of Memphis v. Greene* inspired this Article I close with a reference to him. For many African Americans, Justice Marshall continues to inspire, even though many of our legitimate hopes of justice through law are now either on hold or in retreat. Now, more than ever, we must continue to do as he did and dream as he did, adopting his "defiantly hopeful" stance and his "heroic imagination."<sup>227</sup> In early 1992, he received the American Bar Association's highest award, and, from his wheelchair, he still stood taller than most of us. He concluded his acceptance remarks by quoting a poem by Langston Hughes, his college classmate.<sup>228</sup> I respectfully conclude this Article the same way:

*O, let America be America again –  
 The land that never has been yet –  
 And yet must be – the land where every man is free.  
 The land that's mine – the poor man's, Indian's, Negro's, ME –  
 Who made America,  
 Whose sweat and blood, whose faith and pain,  
 Whose hand at the foundry, whose flow in the rain,  
 Must bring back our mighty dream again . . . .  
 O, yes,  
 I say it plain,  
 America never was America to me,  
 And yet, I swear this oath –  
 America will be!<sup>229</sup>*

---

227. BALL, *supra* note 113, at 387.

228. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 395 (1998).

229. *Id.* (quoting Langston Hughes poem "Let America Be America Again").

