



11-1-2004

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Recommended Citation

Leonard M. Baynes, *Racial Justice in the New Millennium, From Brown to Grutter: Methods to Achieve Non-Discrimination and Comparable Racial Equality - Introduction*, 80 Notre Dame L. Rev. 243 (2004).

Available at: <http://scholarship.law.nd.edu/ndlr/vol80/iss1/5>

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SYMPOSIUM

RACIAL JUSTICE IN THE NEW MILLENNIUM; FROM *BROWN* TO *GRUTTER*: METHODS TO ACHIEVE NON-DISCRIMINATION AND COMPARABLE RACIAL EQUALITY

INTRODUCTION

*Leonard M. Baynes**

From June 13–15, 2004, the Association of American Law Schools (AALS) held a midyear workshop on “Racial Justice in the New Millennium.” This workshop commemorated the fiftieth anniversary of *Brown v. Board of Education*¹ and the first anniversary of *Grutter v. Bollinger*.² At the workshop, scholars came together to assess and evaluate racial equality under the law.³ These ground-breaking cases heralded American racial justice and diversity. During the last fifty years, people of color have made remarkable strides in society, and the era of state-sanctioned segregation formally ended. However, many individuals have been left out of this progress, and the benefits of *Brown* never trickled down to many individuals of color. As *Newsweek* columnist Ellis Cose put it:

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1 347 U.S. 483 (1954).

2 539 U.S. 306 (2003). In a companion case addressing the constitutionality of the undergraduate admissions program, the Court found that Michigan’s program was not narrowly tailored. See *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

3 We are grateful that the *Notre Dame Law Review*, the *AALS Journal of Legal Education*, the *St. John’s Journal of Legal Commentary*, and the *Florida Coastal Law Review* will publish selected papers that were presented at the Workshop.

Brown . . . is the real thing: a Supreme Court decision that fundamentally and forever changed America. It jump-started the modern civil-rights movement and excised a cancer eating a hole in the heart of the Constitution. So why is the celebration of its 50th anniversary bittersweet? Why, as we raise our glasses, are there tears in our eyes? The answer is simple: *Brown*, for all its glory, is something of a bust.⁴

Many students of color still attend racially segregated schools,⁵ and the quality of the education at these schools is often still inferior. The average white student attends a school that is 80% white while the average African American student attends a school that is 67% black.⁶ The Harvard Civil Rights Project issued a report entitled: "*Brown* at 50: King's Dream or *Plessy*'s Nightmare."⁷ The report found that in the South, the percentage of African American children in schools with a white majority rose from 0% in 1954 to 43.8% in 1988, but declined to 30.2% in 2001.⁸ Moreover, in 1968, the percentage of African American students who attended schools in the South with 90% (or greater) black enrollment was 77.8%.⁹ In 1988, this percentage fell to 24%, but then rose to 31% in 2001.¹⁰

In *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education*, Gary Orfield notes that suburban schools offer three times more high-ability classes than low-ability classes, whereas poor urban schools offer the same number of each of these kinds of classes.¹¹ The end result is that a high-performing urban student, most likely African American or Latino/a, is likely to have fewer opportunities to take the kinds of classes that will allow him/her to succeed on the SAT.¹²

4 Ellis Cose, *Brown v. Board: A Dream Deferred*, NEWSWEEK, May 17, 2004, at 53, 53.

5 *Id.* at 54.

6 Jacqueline Jordan Irvine, *Still Standing in the Schoolhouse Door*, EDUCATION WEEK, May 19, 2004, at 38, 39.

7 GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?* (2004), available at <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf>.

8 *Id.* at 19 tbl.7.

9 *Id.* at 20 tbl.8.

10 *Id.*

11 GARY ORFIELD & SUSAN B. EATON, THE HARVARD PROJECT ON SCHOOL DESEGREGATION, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 60 (1996).

12 See Ellis Cose, *Living with the Tests*, NEWSWEEK, Sept. 14, 1998, at 65, 65 (noting a study showing that among African American public high school students who earned 1200 or higher on the SAT, 59% enrolled in Calculus and 76% enrolled in honors English).

In fact, in a recent case, a New York court found that the New York City school system was providing an inferior education for its children.¹³ In New York City, 84% of the children attending public school are children of color, 80% are foreign born, and 16% speak little or no English.¹⁴ Its schools are often dilapidated and dirty with crumbling infrastructures.¹⁵ The schools often lack sufficient textbooks and computer terminals.¹⁶ A disproportionate number of inexperienced and uncertified teachers teach at the schools with the most at-risk children.¹⁷ As a consequence of this underfunding and racial segregation, of the ninth graders who do not transfer out of the New York school system, only 50% graduate within four years, while 30% fail to either graduate or achieve a general equivalency degree by the age of twenty-one.¹⁸

Many African Americans and Latinos continue to live in "hypersegregated" communities where they are unlikely to encounter whites.¹⁹ Whites and people of color often have only electronic encounters with one another through the meager and sometimes demeaning stereotypes on primetime television.²⁰ The hypersegregation of African Americans and Latinos is caused by income disparities between African Americans and Latinos,²¹ exclusionary zoning practices that limit the quantity of affordable housing in suburban neighborhoods,²² blatant housing discrimination against racial minorities,²³

13 Campaign for Fiscal Equity v. State, 801 N.E.2d 326, 349 (N.Y. 2003).

14 *Id.* at 329.

15 *See id.* at 334.

16 *Id.* at 335-36.

17 *Id.* at 333.

18 *Id.* at 336.

19 DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 92 (1993).

20 Leonard M. Baynes, *WHITE OUT: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293, 299 (2003).

21 MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH* 86 (1997) (noting that African American households on average earn 62% of the income of white households).

22 *See, e.g.*, *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 731-32 (1975) (finding that a zoning ordinance rendered it physically and economically impossible to obtain low and moderate income housing in the municipality).

23 *See, e.g.*, Vivian S. Toy, *Open Arms, Closed Doors and Racism*, N.Y. TIMES, Feb. 22, 2004, §14LI, at 1 (citing an Association of Community Organization for Reform Now study finding that eleven out of sixteen Long Island real estate brokers exhibited discriminatory behavior).

and “white flight” from integrated communities.²⁴ This hypersegregation relegates many African Americans and Latinos to neighborhoods where work has disappeared²⁵ and in which transportation options to suburban jobs are either unavailable or unaffordable.²⁶

The disparities between African Americans and Latinos and whites are still very wide on other measures. African Americans and Latinos, on average, earn only 50% of what whites earn.²⁷ When it comes to wealth formation, African Americans and Latinos have far less wealth accumulation than whites.²⁸ In fact, in New York, it is estimated that approximately one-half of African American men are underemployed or unemployed.²⁹ Moreover, discrimination still takes place. Recent studies show that employers choosing between two applicants with the same credentials are more likely to call for an interview an applicant with a “white-sounding name” like Emily than an applicant with stereotypical “black-sounding name” like Lakisha.³⁰ Another study shows that employers are more likely to hire a white applicant with a criminal record than an African American applicant without one.³¹ Moreover, the criminal justice system continues to harshly penalize African Americans for victimless drug crimes, thus placing more than one-third of African American men under the auspices of the criminal justice system.³² Given that many states prohibit convicted felons from voting, even those who have done their time,

24 See, e.g., *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1102 (2d Cir. 1988) (noting that in an effort to prevent “white flight” from an integrated apartment complex, a landlord denied to minority applicants the same rights enjoyed by white applicants).

25 WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 174–75 (1996).

26 See generally MAFRUZA KHAN & GREG LEROY, *GOOD JOBS FIRST, MISSING THE BUS: HOW STATES FAIL TO CONNECT ECONOMIC DEVELOPMENT WITH PUBLIC TRANSIT* (2003), available at <http://www.goodjobsfirst.org/pdf/bus.pdf> (noting that a fifty-state survey revealed that no state effectively coordinates economic development spending with public transportation planning).

27 See George H. Taylor, *Racism as “the Nation’s Crucial Sin”: Theology and Derrick Bell*, 9 MICH. J. RACE & L. 269, 275–76 (2004) (discussing African American household incomes); Carey Goldberg, *Hispanic Households Struggle Amid Broad Decline in Income*, N.Y. TIMES, Jan. 30, 1997, at A1 (citing Census data on Hispanic household incomes).

28 *Id.* at 12–13, 48, 85–90, 109–11.

29 Janny Scott, *Nearly Half of Black Men Found Jobless*, N.Y. TIMES, Feb. 28, 2004, at B1.

30 David Wessel, *Capital: Racial Discrimination Is Still at Work*, WALL ST. J., Sept. 4, 2003, at A2.

31 *Id.*

32 See Fox Butterfield, *Many Black Men Barred from Voting*, N.Y. TIMES, Jan. 30, 1997, at A12.

approximately 14% of African American men are unable to vote.³³ These disparities have been described as “an emerging catastrophe.”³⁴

Despite these devastating disparities, polling data suggests that while many whites believe that they are treated better as a group than African Americans and Latinos, they feel that both groups are treated fairly. In a 2004 AARP survey of racial attitudes, 52% of whites acknowledged that society treats them better than African Americans.³⁵ However, whites responded overwhelmingly that African Americans (76%) and Latinos (77%) were treated fairly.³⁶ In contrast, only 38% of African Americans and only 48% of Latinos responded that they were treated fairly.³⁷ More specifically, 61% of whites responded that African Americans have equal job opportunities to whites, whereas only 12% of African Americans agreed.³⁸ Similarly, 50% of whites responded that Latinos had job opportunities equal to non-Latinos, whereas only 40% of Latinos agreed.³⁹ Sixty-nine percent of African Americans and 52% of Latinos reported experiencing at least one incident of unfair treatment in the past thirty days or discrimination at some point during their lives.⁴⁰ In contrast, 21% of whites claimed that they had experienced at least one incident of “reverse discrimination” during their lifetimes.⁴¹

Much of this disparity in the polling data probably is a result of the belief of many whites that affirmative action programs give African Americans and Latinos a significant advantage over whites. However, former Princeton University President William Bowen and former Harvard University President Derrick Bok, in their seminal book *The Shape of the River*, compared affirmative action programs to handicapped parking spaces (i.e., that most motorists believe that they would be able to park in these spots but for the fact that these parking spaces were assigned to handicapped parking).⁴² In fact, in their ground-breaking study, the authors found that less than 2% of whites may have lost admission opportunities to students of color because of

33 *Id.*

34 Bob Herbert, *An Emerging Catastrophe*, N.Y. TIMES, July 19, 2004, at A17.

35 THE GALLUP ORGANIZATION FOR AARP, CIVIL RIGHTS AND RACE RELATIONS 7 (2004), available at http://research.aarp.org/general/civil_rights.pdf.

36 *Id.* at 17.

37 *Id.*

38 *Id.* at 47.

39 *Id.* at 48.

40 *Id.* at 7.

41 *Id.*

42 WILLIAM BOWEN & DERRICK BOK, *THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 36–37 (1998) (borrowing the parking-space analogy from Thomas Kane).

affirmative action programs.⁴³ In his keynote speech to the conference and his symposium paper, *Race, Class, Diversity, Complexity*, Berkeley law professor Goodwin Liu establishes that Stanford's students of color provide racial and socio-economic diversity.⁴⁴ Professor Liu hypothesizes that if Stanford and other elite law schools eliminate their affirmative action programs, rich whites would replace the more economically diverse students of color.⁴⁵

In 2003, the United States Supreme Court, in *Grutter v. Bollinger*, found that racial diversity is a compelling interest.⁴⁶ Therefore, university admissions committees can make "individualized" determinations of applicants in which race can be one of many considered factors.⁴⁷ Remarkably, in her majority opinion, Justice O'Connor said that the beneficiaries of Michigan Law School's affirmative action programs had been deemed "qualified."⁴⁸ She also acknowledged the unpredictability of law school admissions (i.e., high LSAT scores and GPAs do not guarantee admission).⁴⁹ She cited the fact that Michigan admitted non-minority students with *lower* GPAs or LSAT scores than those of students of color that Michigan rejected.⁵⁰

Despite the *Grutter* decision, foes of affirmative action have continued to pursue statewide referenda to bar these policies and have made concerted efforts to investigate and question whether universities are exceeding the narrow tenets of *Grutter*.⁵¹ They have had people bring investigations against second-tier academic institutions for alleged discriminatory practices in career placement.⁵²

These anti-affirmative action activities have the tendency to discourage universities from more aggressively pursuing affirmative ac-

43 *Id.* at 36.

44 Goodwin Liu, *Race, Class, Diversity, Complexity*, 80 NOTRE DAME L. REV. 289 (2004).

45 *Id.* at 299.

46 539 U.S. 306, 343 (2003).

47 *Id.* at 337-39.

48 *Id.* at 338.

49 *See id.*

50 *Id.*

51 *See, e.g., Mich. Court Allows Drive to End Affirmative Action*, WASH. POST, June 14, 2004, at A18; *Michigan Judge Rules Against Anti-Affirmative Action Petition*, WASH. POST, Mar. 27, 2004, at A20; Dana Milbank, *Affirmative Action Opponents Preparing for a Ballot Battle*, WASH. POST, July 4, 2003, at A7; Robert E. Pierre, *Affirmative Action Foes Seek Mich. Referendum: Initiative Would Amend State's Constitution*, WASH. POST, Mar. 5, 2004, at A3.

52 Roger Clegg, *No Whites Need Apply; Minority Job Fairs Demand Government Investigation; They're Illegal*, LEGAL TIMES, Feb. 16, 2004, at 50; Jim Edwards, *Law School Under Discrimination Inquiry*, LEGAL INTELLIGENCER, Jan. 15, 2004, at A4.

tion policies. Moreover, they have apparently discouraged African American and Latino/a students from pursuing some of these opportunities.⁵³

There is still so much anger and vehemence over a few opportunities given to some students of color. However, people should pay attention to Secretary of State Colin Powell, who, at the 2000 Republican Convention, stated: "Some in our party miss no opportunity to roundly and loudly condemn affirmative action that helped a few thousand black kids get an education, but you hardly hear a whimper when it's affirmative action for lobbyists who load our federal tax code with preferences for special interests."⁵⁴

This AALS workshop explored the many challenges still remaining in our society as we now move from formal equality to real equality. We now struggle with how to make the dictates of the *Brown* and *Grutter* decisions a reality. In addition, many faculty members struggle with ways to introduce concepts of racial equity in their courses.

The workshop provided a forum for the discussion (and examination) of the following issues: (1) evolving notions of racial construction, which adapt to more modern needs to oppress and subordinate; (2) the role of racial inequality and its intersection with other subordinations (i.e., class, national origin, gender, and sexuality); (3) the examination of what equality really means; (4) older methods of addressing inequality: affirmative action, discrimination litigation, boycotts, and community action; (5) newer methods for remedying inequality such as reparations.

Two concurrent sessions took place. The first drew on the different methods that faculty members use to integrate race and equality in their classes in the areas of property law, contracts, criminal law, torts, tax, corporate law, law and economics, antitrust law, environmental law, and healthcare. In addition, the second session explored new methods of remedying inequality in the areas of business, affirmative action, economic development, and labor and union law.

After a rigorous review process, four scholars—Roy Brooks (San Diego), Goodwin Liu (Berkeley), Leticia Saucedo (Nevada-Las Vegas), and Gloria Valencia-Weber (New Mexico)—were selected for

53 See, e.g., Maryanne George, *U-M's Next Class Looks Whiter; Why Is Debated*, DETROIT FREE PRESS, May 28, 2004, at 1A (noting that enrollment deposits were down 13% for African American students and up 8% for white students); Peter Schmidt, *Fewer Black Students Are Applying to Ohio State and Michigan Since Supreme Court Ruling*, Chron. Higher Educ. Online Ed., Feb. 23, 2004, at <http://chronicle.com/daily/2004/02/2004022301n.htm>.

54 Thomas B. Edsall, *Bush Plays Down Split with Powell: Affirmative Action Stances Show Divide*, WASH. POST, Aug. 2, 2000, at A20.

this Notre Dame symposium. The planning committee is delighted that they have agreed to write articles for this symposium. We believe that their articles help to stress the essence of what was discussed at the conference. In his article, *Getting Reparations for Slavery Right, A Response to Posner and Vermeule*, Professor Roy Brooks articulates coherent grounds for providing reparations to African Americans for past injustices.⁵⁵ As mentioned earlier, in his article, *Race, Class, Diversity, Complexity*, Professor Goodwin Liu discusses the complexity of diversity at a university such as Stanford where a majority of the student body is not white.⁵⁶ In her article, *The Browning of the American Workplace*, Professor Leticia Saucedo highlights how some low-level jobs are now predominantly held by Latinos, and articulates a theoretical framework to deal with this.⁵⁷ In her article, *Racial Equality: Old and New Strains and American Indians*, Professor Valencia-Weber discusses the intangibility of race and the inexactness of equality as applied to American Indian issues.⁵⁸ She notes that even rather simplistic American notions of gender may not comfortably apply to American Indians.⁵⁹

By providing for this discussion concerning how to achieve racial justice and equity for people of color, the workshop and this symposium offer an opportunity to reflect on our collective history, our progress to date, and our future.

Special thanks go to the other members of the planning committee: Professors Albert Brophy (Alabama), Beverly Moran (Vanderbilt), Donna Lee (CUNY), and Reynaldo Valencia (St. Mary's). Without their collective vision, the workshop (and symposium) would not have happened. In addition, the AALS's staff was crucial in the success of the workshop. Special acknowledgments also go to Jane LaBarbera (Associate Director), Joyce Saltalamachia (Deputy Director), Veryl Miles (former Deputy Director), Tracie Thomas (Senior Meetings Manager), and Gehan Girguis (Executive Assistant).

55 Roy Brooks, *Getting Reparations for Slavery Right, A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251 (2004).

56 Liu, *supra* note 44.

57 Saucedo, *The Browning of the American Workplace*, 80 NOTRE DAME L. REV. 303 (2004).

58 Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333 (2004).

59 *Id.* at 372-73.