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Business as Usual? Brown and the Continuing Conundrum of Race in America

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BUSINESS AS USUAL? *BROWN* AND THE CONTINUING CONUNDRUM OF RACE IN AMERICA

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In this article, Professors Robert Chang and Jerome Culp examine the state of race in America in the aftermath of the landmark Supreme Court decision of Brown v. Board of Education. *Their findings reveal that while* Brown *established fundamental precedent in the area of race relations, racial inequality remains entrenched in a number of modern social institutions. Chang and Culp analyze this dilemma by focusing on three distinct trends. First, a cycle of inequality is driven by racial disparities in wealth and perpetuated by the interlocking systems of education, housing, family, health care, employment, and criminal justice. Second, civil rights activists often fall short of their goals following* Brown *due to an overall system of oppression described as civil rights myopia. Finally, racial remediation schemes also face major obstacles as white identity has intensified since* Brown. *As a result, little has changed in the ten-year window preceding* Brown*'s fiftieth anniversary and racial inequality remains a persistent problem in America.*

I. INTRODUCTION

Every ten years or so, there are various conferences and symposia that revisit *Brown v. Board of Education*.[1] While these discussions are

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1. We refer collectively to two decisions as *Brown*. *See* Brown v. Bd. of Educ. 347 U.S. 483 (1954) (declaring unconstitutional de jure segregation in state public schooling) (*Brown I*); Brown v. Bd. of Educ., 349 U.S. 294 (1955) (providing for federal court oversight of local authorities charged

important, we wonder if the conversations taking place during this fiftieth anniversary are much different from those that took place during the fortieth.[2] In this article, we try to understand why these discussions might be the same. From our findings, we believe that race will continue to have an unfortunate salience for racial minorities with regard to opportunity and outcome and that the promises of *Brown* will remain unfulfilled on *Brown*'s hundredth anniversary, leaving yet another group of judges, lawyers, academicians, politicians, and students to ponder the continuing conundrum that is race in America.

Part I begins by looking at what has changed with regard to racial groups in an approximate ten-year window preceding *Brown*'s fiftieth anniversary. We focus on racial wealth disparities and examine briefly the way that interlocking systems or social institutions of education, housing, family, health care, employment, and criminal justice operate to maintain these disparities. In Part II, we examine the problem of civil rights myopias, drawing lessons from an early Asian American challenge to segregated education, the early League of United Latin American Citizens (LULAC) litigation strategy challenging racial discrimination, and the more recent resistance of the African American community to gay/lesbian/bisexual civil rights claims.[3] In Part III, the focus shifts away from racial minorities to look at the white majority. Following the *Brown* litigation, white racial identity intensified.

II. STUCK IN A MOMENT

During a moment of optimism thirteen years ago, one of us declared an "African American Moment," a time "when different and blacker voices will speak new words and remake old legal doctrines."[4]

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with implementing desegregation) (*Brown II*). As for representative symposia and conferences, see *infra* note 2.

2. *Compare* Symposium, Brown@*50*, 47 HOW. L.J. 1 (2003), *and* Symposium, *The Quest for Equal Educational Opportunity:* Brown *Nears 50,* San Antonio *Turns 30*, 52 AM. U. L. REV. 1339 (2003), *with* Symposium, Brown v. Board of Education *After Forty Years: Confronting the Promise*, 36 WM. & MARY L. REV. 337 (1995), *and* Symposium, Brown v. Board of Education, 20 S. ILL. U. L.J. 3 (1995), *and* Conference, Brown *at Forty*, Amherst College (December 1994), *in* RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION (Austin Sarat ed., 1997).

3. We use this locution because we have used it before. *See* Robert S. Chang & Jerome M. Culp, Jr., *Nothing and Everything: Race,* Romer, *and (Gay/Lesbian/Bisexual) Rights*, 6 WM. & MARY BILL RTS. J. 229, 230 n.3 (1997) (noting that the three categories follow the language of Colorado's Amendment 2). We recognize the importance of labels and how they may intentionally and unintentionally exclude. For example, we mean to include transgendered persons. At times, we use "queer" to denote these communities and particular political stances, following Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation,"* 48 HASTINGS L.J. 1293, 1295 n.6 (1997). We argue, though, about the mainstreaming effect that the popularity of shows like *Will and Grace* or *Queer Eye for the Straight Guy* is having on queerness. One of us argues that the shows have an aspect of exoticization akin to mascoting whereas the other sees more the transformative possibilities. We leave it to the readers to guess which of us holds each view.

4. Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 40.

Two years later, the other of us followed suit and declared a similar "Asian American Moment."[5] These declarations came during the emergence of critical race theory in the legal academy.[6] While different voices did, indeed, speak new words and challenge old doctrines,[7] the hope reflected in these declarations seems naïve in light of the entrenched racial inequality that we protested.[8] Instead of a period of racial advancement, we have found ourselves stuck in a different kind of moment, characterized by what we call the inequality cycle.[9]

The inequality cycle is our description for racial inequality that is entrenched through systems or social institutions that operate to maintain or further inequality. In measuring racial inequality, we use wealth, rather than income, as its primary indicator.[10] The number of such interlocking systems or social institutions that play a role in the inequality cycle is quite large, but we will touch on six: education, housing, family, health care, employment, and criminal justice.

A. Wealth as a Measure of Racial Inequality

First, we examine a snapshot of racial wealth inequality using 1993 and 2000 data comparing non-Hispanic white (white), black, and Hispanic households.[11] We do not include Asian Americans, Pacific Island-

5. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1245 (1993), 1 ASIAN L.J. 1, 5 (1993).

6. For two accounts of its beginnings, see CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw et al. eds., 1995); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: THE CUTTING EDGE (2000) [hereinafter CRITICAL RACE THEORY: THE CUTTING EDGE]. A different account that centers student movements can be found in Sumi Cho & Robert Westley, *Historicizing Critical Race Theory's Cutting Edge: Key Movements That Performed the Theory*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 32 (Francisco Valdes et al. eds., 2002) [hereinafter CROSSROADS].

7. *See generally* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 6; CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 6.

8. This is not to say that we were unaware of the entrenched nature of racial inequality as our other work around that time reflects. *See, e.g.*, Jerome M. Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965, 967 (1993) (discussing the limitations of the Act and the continuing failure of legislation to "raise and answer the *race question*"); Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That Is America*, 23 HASTINGS CONST. L.Q. 1115 (1996) (discussing the difficulties of preserving affirmative action in the face of explicit and implicit white resistance).

9. We are not, of course, the first to think of inequality as consisting of an ongoing cycle that perpetuates itself. For two recent scholars who use this idea, see Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727 (2000); Berta E. Hernández-Truyol, *Breaking Cycles of Inequality: Critical Theory, Human Rights and Family In/justice*, *in* CROSSROADS, *supra* note 6, at 345.

10. In doing so, we follow Oliver and Shapiro, who argue persuasively that wealth is a better indicator of racial inequality than income, noting that "even when Blacks and Whites display similar characteristics—for example, are on a par educationally and occupationally—a potent difference of $43,143 in home equity and financial assets still remains." MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL EQUALITY 2, 8 (1995).

11. We will generally use "white" to refer to those in the Census category "non-Hispanic white." We understand that the Census has denoted "Hispanic" to be an ethnic category which may include all races and that there are ethnic Hispanics who identify as racially white.

ers, and Native Americans in the table that follows because the data is unavailable due to the continuing failure of the U.S. Census to include these groups in its reports on wealth and asset ownership. Information for these groups can be found in different reports that typically assess income and poverty, but not wealth and assets. One commentator surmises that "[a]lthough data regarding the wealth of Asian Americans is not available, it is likely that it is lower, as Asian Americans have a lower rate of home ownership and business ownership"[12] and a higher poverty rate, even though Asian American household median income is higher than that of whites.[13] A similar conclusion can likely be drawn about Native Americans based on median income, poverty rates, and home and business ownership.[14]

Comparisons between groups over time are further complicated by the way that the Census continues to tinker with its categories.[15] In 1990, there were five racial categories: "White; Black; American Indian, Eskimo, and Aleut; Asian and Pacific Islander; and Other race."[16] In 2000, there were at least five or six, not counting the new "two or more races" quasi-category,[17] with Asian and Pacific Islander at times disaggregated.[18]

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12. Spencer Overton, *Voices from the Past: Race, Privilege, and Campaign Finance*, 79 N.C. L. REV. 1541, 1550 n.37 (2001) (citation omitted).

13. *Id.* With regard to median household income, three factors—number of workers in the household, education, and area of residence—may account for much of the difference. *See* Chang, *supra* note 5, at 1262–63 (noting that Asian American households have more workers than white households, Asian Americans need more years of education to reach income parity with whites, and Asian Americans are concentrated in coastal metropolitan areas that have correspondingly higher incomes and higher costs of living).

14. *See* U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000 (2002), *at* http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf (last visited Feb. 29, 2004).

15. How groups are constituted by the Census is complicated and changes over time. For example, "a person who was included in the Asian Indian category in 1980 and 1990 census tabulations might have been included in different categories previously: Hindu in 1920–40, Other race in 1950–60, and White in 1970." U.S. CENSUS BUREAU, HISTORICAL CENSUS STATISTICS ON POPULATION TOTALS BY RACE, 1790 TO 1990, AND BY HISPANIC ORIGIN, 1970 to 1990, FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES 5 n.7 (2002), *at* http://www.census.gov/population/www/documentation//twps0056.html (last visited Feb. 28, 2004). The ethnic Hispanic census category emerged in 1980 after being "Persons of Spanish Mother Tongue" in 1950 and 1960 and "Persons of Both Spanish Surname and Spanish Mother Tongue in 1970." *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 82 (2d ed. 1994).

16. *See* U.S. CENSUS BUREAU, RACIAL AND ETHNIC CLASSIFICATIONS USED IN CENSUS 2000 AND BEYOND (2000), *at* http://www.census.gov/population/www/socdemo/race/racefactcb.html (last visited Aug. 24, 2004).

17. *See* Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1760 (2003). For the debate over the multiracial category, see Tanya Katerí Hernández, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998); Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997); Luis Angel Toro, *"A People Distinct from Others": Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH. L. REV. 1219 (1995).

18. *Compare* U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2000 (2001), *at* http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf (last visited Feb. 29, 2004) ("Asian" racial category is defined separately from the "Native Hawaiian and Other Pacific Islander" category), *with* U.S. CENSUS BUREAU, The ASIAN AND PACIFIC ISLANDER POPULATION IN THE UNITED STATES: MARCH

We digress in discussing these "other groups" only to highlight what is missing—as the "other groups" question is an important part of our methodology.[19]

TABLE 1
MEDIAN WEALTH BY RACE AND HISPANIC ORIGIN[20]

	1993	2000
non-Hispanic White	$45,740	$79,400
Black	$4,418	$7,500
Hispanic	$4,656	$9,750

As evidenced by the Census data, from 1993 to 2000, median household wealth increased for all three groups.[21] Black wealth, however, remained fairly steady near ten percent of white wealth, while Hispanic wealth appeared to increase slightly from approximately ten percent in 1993 to twelve percent of white wealth in 2000, although this marginal increase is not statistically significant.[22] This seems to indicate that when comparing 1993 to 2000, black and Hispanic households, in the aggregate, are not catching up to white households. This decreasing income gap between blacks and whites has been the focus of much attention,[23] but the relative wealth differences hold true regardless of income levels.[24] This can be seen by comparing median household wealth by income quintile.[25]

2002: POPULATION CHARACTERISTICS (2003), *at* http://www.census.gov/prod/2003pubs/p20-540.pdf (last visited Feb. 29, 2004) (aggregating the two). Another change, "American Indian, Eskimo, and Aleut" to "American Indian and Alaska Native" seems nonsubstantive.

19. *See infra* note 105.

20. These figures are drawn from T. J. ELLER & WALLACE FRAUER, U.S. CENSUS BUREAU, ASSET OWNERSHIP OF HOUSEHOLDS 9 (1993), *at* http://www.census.gov/prd/1/pop/p70-47.pdf (last visited Feb. 28, 2004); SHAWNA ORZECHOWSKI & PETER SEPIELLI, U.S. CENSUS BUREAU, NET WORTH AND ASSET OWNERSHIP OF HOUSEHOLDS: 1998 AND 2000 14, *at* http://www.census.gov/prod/2003pubs/p70-88.pdf (last visited Feb. 28, 2004) [hereinafter NET WORTH AND ASSET OWNERSHIP OF HOUSEHOLDS]. The Hispanic origin category of the Census is understood to be an ethnic, not a racial, category.

21. These figures are drawn from T. J. ELLER & WALLACE FRAUER, *supra* note 20, at 9, *at* http://www.census.gov/prd/1/pop/p70-47.pdf (last visited Feb. 28, 2004); NET WORTH AND ASSET OWNERSHIP OF HOUSEHOLDS, *supra* note 20.

22. *Cf.* ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN 12 n.15 (2000) (noting "[t]he median net worth difference between hispanic and black households is not statistically significant").

23. *See, e.g.*, Stephen Moore, *The Haves and the Have-lesses*, NAT'L REV., Mar. 6, 2000, at 30; Editorial, "*The Greatest Century Ever*," ORANGE COUNTY REG., Dec. 26, 1999, at G02 (citing a Cato Institute study reporting that during the last century, "income for black Americans has increased 10-fold and the income gap between whites and blacks has been cut in half").

24. *See supra* note 20.

25. *See supra* note 20.

TABLE 2
MEDIAN HOUSEHOLD WEALTH BY INCOME QUINTILE[26]

Quintile		Non-Hispanic White	Black	Hispanic
Lowest				
	1993	$7,605	$250	$499
	2000	24,000	57	500
Second				
	1993	27,057	3,406	2,900
	2000	48,500	5,275	5,670
Third				
	1993	36,341	8,480	6,313
	2000	59,500	11,500	11,200
Fourth				
	1993	54,040	20,745	20,100
	2000	92,842	32,600	36,225
Highest				
	1993	128,350	45,023	55,923
	2000	208,023	65,141	73,032

However, an initial comparison between 1993 and 2000 is difficult because the figures are not corrected for inflation.[27] If we do so, using Census methodology,[28] you get the following table, with dollar amounts in 2000 dollars.

TABLE 3
MEDIAN HOUSEHOLD WEALTH BY INCOME QUINTILE, ADJUSTED TO 2000 DOLLARS

Quintile		Non-Hispanic White	Black	Hispanic
Lowest				
	1993	$8,815	$290	$578
	2000	24,000	66	580
Second				
	1993	31,362	3,948	3,361
	2000	48,500	5,275	5,670
Third				
	1993	42,123	9,829	7,317
	2000	59,500	11,500	11,200
Fourth				
	1993	62,638	24,046	23,298
	2000	92,842	32,600	36,225
Highest				
	1993	148,770	52,186	64,820
	2000	208,023	65,141	73,032

At least three disturbing trends are evident. The first, as noted above, is that very significant wealth differences between the groups per-

26. *See supra* note 20. The quintile upper limits for 1993 in ascending order were as follows: $1071, $1963, $2995, $4635. For 2000, they were: $1304, $2426, $3813, $5988.

27. When adjusted for inflation, there was an actual gain in median wealth from 1993 to 2000. NET WORTH AND ASSET OWNERSHIP OF HOUSEHOLDS, *supra* note 20.

28. A multiplier is required that converts 1993 dollars into 2000 dollars. The median household wealth was $37,587 in 1993 using 1993 dollars. This translates into $43,567 using 2000 dollars. *See* NET WORTH AND ASSET OWNERSHIP OF HOUSEHOLDS, *supra* note 20, at tbl.B. The multiplier is equal to 43,567 divided by 37,587, or approximately 1.1591. The 1993 dollars may be converted into 2000 dollars by multiplying the figures in the 1993 column by the multiplier.

sist at every income level. The second is that blacks and Hispanics are, for the most part, not catching up and often are falling behind their white counterparts.[29] If you compare the wealth of black and Hispanic households as a percentage of the correlative white household, you find that the percentage often declines from 1993 to 2000. The third, and perhaps most disturbing trend, is that the poorest black and Hispanic households have lost ground. This is most evident in the lowest quintile where white household wealth increased dramatically from $8815 to $24,000, whereas black wealth declined and Hispanic wealth remained steady.

A fourth trend, not shown in Table 2, is that the number of white households increases steadily as you move from the lowest quintile to the highest.[30] Using the year 2000 data, there were 13,992,000 white households in the lowest quintile and 17,518,000 households in the highest.[31] The reverse occurs for blacks, with 4,007,000 households in the lowest quintile, decreasing to 1,505,000 in the highest.[32] A similar trend occurs with Hispanic households, although the decline is not as dramatic as it is for blacks with 2,314,000 in the lowest and 1,080,000 in the highest.[33] While white households are overrepresented at the top income quintiles, black and Hispanic households are overrepresented at the bottom.

A final observation is that in the year 2000, white households in the bottom income quintile (annual income less than $15,648) had a median net worth of $24,000, whereas black and Hispanic households in the third quintile (annual income between $29,112 and $45,756) had median net worths of $11,500 and $11,200, respectively.[34] Phrased differently, the median wealth of black and Hispanic households that earned two or three times as much as the top earning white household in the bottom income quintile had less than half the median wealth of bottom quintile white households.

Our basic conclusion from this snapshot is that when we use wealth as the primary indicator, the economic health of black and Hispanic households has generally not improved relative to their white counterparts, and in many cases, has worsened. Although we used 1993 and 2000 data, we can safely surmise that the picture has worsened for black and Hispanic households during the recent economic downturn.[35] Thus,

29. In each income quintile, black wealth is increasing at a slower rate than white wealth. For Hispanics, their wealth is increasing at a slower rate in the bottom and top quintiles, but is increasing at a slightly higher rate in the second through fourth income quintiles. We would argue that the gain in the second and third quintiles is negligible given the starting point.

30. NET WORTH AND ASSET OWNERSHIP OF HOUSEHOLDS, *supra* note 20.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *See* Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1631–32 (2003) (discussing the impact of the recent economic downturn on black and Hispanic workers). One stark example comes from New York City where a recent study reports that "nearly one of every two black men between 16 and 64 was not working." *See* Janny Scott, *Nearly Half of Black Men Found Jobless*, N.Y. TIMES, Feb. 28, 2004, at B1 (citing a study by the Community Service Society looking at actual jobless-

the picture at *Brown*'s fiftieth anniversary does not look much different that it did at its fortieth.

B. The Inequality Cycle

We return now to the question of why things have not changed in the last fifty years. Because of the interlocking systems or social institutions of education, housing, family, health care, employment, and criminal justice, it is unlikely that they will change.

Our beginning hypothesis is that wealth begets wealth. It operates as a cycle through its intergenerational effects, which include the direct transmission of wealth[36] and the indirect transmission of wealth through opportunities that are associated with or fostered by wealth.

In the same way that we focused on household wealth in the previous section, we will focus on the household as the primary unit of consideration in this section. We do so because children grow up in a household, and the household in which the children grow up fosters or constrains their opportunities.

System 1: Education. The educational attainment of parents has a strong effect on the educational achievement of their children.[37] Educational attainment is the result of what one does with the opportunities that are available. Past (and we would argue present) generations of children have had their opportunities circumscribed because of race.[38] As one commentator notes:

> Black children reared in families without economic or educational resources are unlikely, as adults, to have gained the kind of skills, knowledge, and aspirations that many white children will have gained from the day-to-day experience of being raised by an educated or economically privileged family. This relative lack of experiential knowledge or understanding among black people in one generation will affect the beliefs and aspirations of the next.[39]

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ness rather than the unemployment figure which is much lower, 12.9% for black men in New York City in 2003).

36. A current example of this kind of direct transmission of wealth can be seen in the baby boom generation, which stands to inherit approximately seven trillion dollars between 1987 and 2011. MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 6 (1997). The baby boomers will in turn transmit a portion of that, or perhaps even more, to the next generation.

37. Goodwin Liu, Brown, Bollinger, *and Beyond*, 47 HOW. L.J. 705, 748 n.249 (2004) ("The positive correlation between parental education and student achievement is well-established.") (citations omitted).

38. DERRICK BELL, RACE, RACISM AND AMERICAN LAW 155–270 (4th ed. 2000).

39. Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 734–35 (2004).

Our continuing failure to eradicate this race effect means that a primary vehicle for breaking the inequality cycle, education,[40] will not meaningfully change the status quo.

System 2: Housing. Where one lives has a strong impact on both employment and educational opportunities.[41] Residential segregation eviscerated the hope that *Brown* would result in integration, one goal of which was to lessen the prejudice in the hearts and minds of children through their interaction with those of different races. With the fight over bussing,[42] and the Supreme Court ruling against interdistrict remedies,[43] whites who had successfully fled to new school districts in the suburbs were not subject to desegregation orders. The result—underfunded inner city schools that were largely minority, and suburban schools that were largely white—was a situation beyond the scope of legal redress as accepted by the Court.[44]

When the racial wealth effect based on discrimination in housing is considered, a clearer picture of why there is such a large disparity in the wealth of the average white household as compared with black and Latina/o households emerges. Rather than duplicate or report in detail the excellent work by scholars such as Douglas Massey and Nancy Denton,[45] we will focus on a few examples that demonstrate the participation of the state in enabling whites to participate in home ownership and disabling blacks and other minorities from the same.

First, the government, until 1950, encouraged the use of racially restrictive covenants in the home loans that it underwrote through the FHA and VA loan insurance programs.[46] Second, the loans underwritten by the FHA and VA went primarily to whites.[47] Third, the Federal Home Owners' Loan Corporation used maps that coded neighborhoods

40. *See* Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation,* 27 HARV. J.L. & PUB. POL'Y 569, 571 (2004) ("Perhaps most importantly, though, the American social system rests on two goals that require access to education: the 'melting pot' that absorbs diverse populations into a pluralistic society and the upward mobility that allows us to overcome class barriers.").

41. Henry G. Cisneros, *With Liberty and Justice for All: How American Can Provide Fair Housing for All Its People,* 1 HISP. L.J. 53, 59 (1994) ("[S]egregation in housing affects, and is in turn affected by, school performance, employment opportunities, transportation accessibility, health, welfare, crime, and a host of other issues.").

42. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 401 U.S. 1 (1971).

43. *See* Missouri v. Jenkins, 515 U.S. 70 (1995). For an excellent discussion of this case, see Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 CAL. L. REV. 377 (1996) (reviewing RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995)).

44. Hayman & Levit, *supra* note 43.

45. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 17 (1993).

46. *See* GEORGE A. LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS 26 (1998).

47. *Id.* at 6.

on the basis of race to determine their creditworthiness.[48] The result was that between 1934 and 1962, the FHA and VA programs made possible the purchase of $120 billion of residential real estate. Less than two percent went to nonwhite families.[49] The effect of these discriminatory policies was magnified because private banks used these racial maps that largely determined creditworthiness.[50]

If we take into account property appreciation and intergenerational wealth transfers, then we begin to better understand the wealth disparities discussed above. If we add to this the connection between segregated neighborhoods and educational opportunities, we can see more clearly how our failure to address the racial disparities that exist with regard to housing and its effect on wealth will result in the persistence of racial disparities. Again, the cycle. Inequality begets inequality.

System 3: Family. Thus far, we have talked about some of the ways that wealth begets wealth and is transmitted intergenerationally, directly and indirectly. We should remember, though, that the family is the primary site for this transmission. Also, the family is not a race-neutral institution: racial-sexual policing operated directly through the legal form of antimiscegenation laws, through the extralegal form of lynch law, and indirectly through the segregation of neighborhoods, schools, and workplaces. The result was that as of 1987, ninety-nine percent of married white Americans were married to other white Americans.[51] Although the rate of interracial marriages has risen, families are still very monoracial. Insofar as wealth is concentrated in white households and families, racial minorities have not been able to access this wealth through intermarriage. This has an ongoing impact on wealth disparities between the races.

We are nearing the end of a twenty-five-year period during which the baby boom generation has inherited approximately seven trillion dollars from the previous generation.[52] At the same time, "the average black family headed by a person over the age of sixty-five has no net financial assets to pass down to its children."[53] It is not just that nothing is going to be transmitted to the next generation in black families—the older generation often is not in a position to be self-sufficient. Many of them are drawing resources from their adult children. One result is that black families, instead of being able to accumulate wealth and transmit it directly and indirectly to their children, are instead having to devote

48. *See* MASSEY & DENTON, *supra* note 45, at 51–54 (detailing the practices of the Home Owners' Loan Corporation, a government-sponsored program, which rated neighborhoods as creditworthy or not, with Black neighborhoods redlined as the least creditworthy).

49. *See* LIPSITZ, *supra* note 46, at 6.

50. MASSEY & DENTON, *supra* note 45, at 52.

51. Roger Sanjek, *Intermarriage and the Future of Races in the United States*, *in* RACE 103, 114 (Steven Gregory & Roger Sanjek eds., 1994).

52. *See* OLIVER & SHAPIRO, *supra* note 36, at 6.

53. *Id.* at 7.

many of these resources to the previous generation. Perhaps this may help explain one of our earlier observations—that black households in the third income quintile have less than half the wealth of those white households in the bottom income quintile. We see then how the family, the primary site of wealth accumulation and intergenerational transmission, perpetuates racial wealth and opportunity gaps.

System 4: Health Care. Health care presents another example of the comparative value of black and white lives. The story of Otis Jenkins, an African American, is emblematic. When an infection in his foot became gangrenous, it was amputated. He was not told of an alternative, though more expensive, procedure that could have saved his limb. Unfortunately, his is not the atypical case. For similar conditions, whites are more likely to be told about and receive the alternative, limb-saving procedure than are blacks.[54] But one might wonder if this difference in treatment is due to differences in health care access and health insurance. While this accounts for some differences in the treatment of whites and blacks, a recent study reported in the *New England Journal of Medicine* shows that race alone has a strong effect on the decisions doctors make. In the study, videotapes were made of a patient interview with a white and black person with identical scripts and identical medical information. Several hundred doctors were asked to view the videotapes and prescribe follow-up treatments. There was a marked disparity in the level and quality of follow-up care based on the race of the patient, with the white patient being recommended for better and more costly procedures than the black patient.

To the extent that health care is less accessible to certain populations, this will have long-standing direct and intergenerational effects. Prenatal and postnatal care and nutrition have a direct effect on brain development and health through one's lifetime. Racial disparities in health care have a tremendous effect on one's opportunities with regard to education and employment, which then includes a strong intergenerational effect.

System 5: Employment. Discrimination in employment limits one's ability to acquire wealth, affects what neighborhoods one can reside in and limits one's access to health care and one's ability to accumulate the kinds of human and social capital that can be transmitted intergenerationally to the next generation. Thus, racial discrimination in one generation transmits itself to the next.

System 6: Criminal Justice. To the extent that there is racial discrimination in the criminal justice system, this too has intergenerational effects. Involvement in the criminal justice system has the immediate effect of taking the person out of the work force during the time of incarceration, and it affects one's prospects for future employment. Inability

54. *American in Black and White: Health Care, the Great Divide* (ABC Nightline, Feb. 24, 1999).

or difficulty in acquiring gainful employment prevents or limits one from acquiring wealth and affects where one can afford to live, which correlates strongly with the quality of education available for the next generation. Discrimination in the criminal justice system has a compounding effect.

Failure to understand how these systems or institutions operate will lead to partial or ineffective remedies. The result is that the racial disparities documented above will likely persist and continue to plague future generations.

III. CIVIL RIGHTS MYOPIAS

Sometimes, an individual or a group faced with discrimination responds reflexively in an attempt to address the immediate harm(s) without sufficient regard for the broader systems of oppression that may be in place.[55] We call this problem "civil rights myopia." We examine three examples of civil rights myopias and the lessons they teach for those formulating civil rights strategies.

A. "We're Not Black": A Lesson from Gong Lum v. Rice[56]

Sometimes, an oppressed individual or group may seek a remedy that might solve their immediate problem, but which may leave intact the broader system of oppression.[57] The case of *Gong Lum v. Rice*[58] is instructive in this regard. The case is sometimes described in Asian American history texts as an early challenge by a Chinese immigrant father on behalf of his American-born daughter against segregated public education, taken all the way to the Supreme Court.[59] It is also sometimes celebrated as an early example of how Chinese immigrants did not merely acquiesce to discrimination directed against them.[60] The fact that the case arose in Mississippi in the 1920s merely adds to the case's mystique.[61]

This description of the case may be a little misleading. The challenge to segregated schooling was not a direct challenge to the system of separate schools; rather, it was an as-applied challenge to the way that segregated schooling was used to deny enrollment in a white public

55. *See* Nathaniel Persily, *The Right to be Counted*, 53 STAN. L. REV. 1077, 1102–03 (2001) (reviewing PETER SKERRY, COUNTING ON THE CENSUS?: RACE, GROUP IDENTITY, AND THE EVASION OF POLITICS (2000)).

56. 275 U.S. 78 (1927).

57. *See* Persily, *supra* note 55, at 1102–03.

58. 275 U.S. at 78.

59. *See* SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY 58 (1991). One of us must confess to making this mistake in his first article. *See* Chang, *supra* note 5, at 1294. It is nice to be able to correct youthful exuberance.

60. Chan, *supra* note 59, at 58.

61. *Gong Lum*, 275 U.S. at 78; *see* Chan, *supra* note 59, at 58.

school to then nine-year-old Martha Lum.[62] At the time, the Mississippi Constitution provided that "separate schools shall be maintained for children of the white and colored races."[63] The challenge to the state of Mississippi was how to deal with the Chinese within the state's black or white racial paradigm.

Martha Lum's "lawyers knew better than to argue that Chinese were White."[64] Instead, they argued that as a person "of pure Chinese origin and descent," she is not "colored," and in the absence of a public school for those of Chinese ancestry, she should be permitted to attend the white public school.[65] This argument succeeded in the trial court where Lum's attorneys won a mandamus petition, ordering school authorities to permit her attendance in the white public school.[66] Accordingly, the school district appealed to the Supreme Court of Mississippi.[67]

Even though Martha Lum did not claim a white identity, in order to define "colored" as that which is not "white," the Mississippi Supreme Court devoted a good portion of its decision to determining that "white" in the State Constitution was synonymous with the Caucasian race.[68] In doing so, it followed the racial logic used by other states such as California and Louisiana.[69] The Mississippi Supreme Court then classified Martha Lum as colored and left her with the choice of attending the colored public schools of her district or attending a private school.[70] The U.S. Supreme Court later affirmed the state court's decision.[71]

As indicated above, this case was pursued on behalf of Martha Lum and did not seek to dismantle the system of segregated public education.[72] If successful, it would have resulted in expanded opportunities for children of Chinese ancestry, but it still would have left Negro children with inferior segregated schooling. In order to achieve this specific result:

> Gong Lum's lawyers explicitly distanced Chinese from Blacks. . . . [They] asked the [Mississippi Supreme] Court to take judicial notice that the Jim Crow laws did not treat members of the

62. *See Gong Lum*, 275 U.S. at 80–81.

63. Rice v. Gong Lum, 104 So. 105, 107 (Miss. 1925), *aff'd*, 275 U.S. 78, 81 (1927) (quoting MISS. CONST. of 1890, § 207).

64. Taunya Lovell Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building*, 5 ASIAN L.J. 7, 14 (1998).

65. *Rice*, 104 So. at 106–07.

66. *Id.* at 107.

67. *Id.* at 106.

68. *Id.* at 107–10.

69. *See* People v. Hall, 4 Cal. 399 (1854) (prohibiting Chinese testimony under a statute prohibiting testimony by "Blacks," "Mulattos," and "Indians" against a white person, holding that Chinese were included under the Indian category because Indians had migrated from Asia to the Americas via a land bridge, or in the alternative that "Black" was a catch-all category for that which is not "White"); State v. Treadaway, 126 La. 300, 322 (1910) (holding that while a Negro is necessarily a person of color, that there are persons of color who are not Negroes).

70. Rice v. Gong Lum, 139 Miss. 760, 788 (1925).

71. Gong Lum v. Rice, 275 U.S. 78, 83 (1927).

72. *See id.* at 84.

> "Mongolian race" as belonging to the "Negro race." Japanese and Chinese were classified together, and according to the brief, "furnish some of the most intelligent and enterprising people. They certainly stand nearer to the [W]hite race than they do to the [N]egro race. If the Caucasian is not ready to admit that the representative Mongolian is his equal he is willing to concede that the Mongolian is on the hither side of the half-way line between the Caucasian and the African."[73]

As if this litigation strategy was not problematic enough, the Chinese community in Mississippi responded to the *Gong Lum* decision by trying to assimilate as much as possible into the white community, "ceas[ing] all social contact with Blacks and ostraciz[ing] individual Chinese who continued to maintain social relations, including marriages, with Blacks."[74]

This decision by the Chinese living in Mississippi is criticized as gaining at the expense of blacks and negating any possibility for a coalition between blacks and Chinese, essentially "thwarting all hope of substantive racial equality for both groups."[75] Thus, the Chinese, while gaining some racial privilege, participated in their own subordination by promoting a racial order where they remained racially oppressed.[76] By choosing this course, the Chinese forgot what brought them to Mississippi in the first place. In fact, Chinese workers were imported to the South during Reconstruction to replace black workers[77] as part of a strategy to racially stratify the labor force in order to deepen the exploitation of all workers.[78]

This example shows that a binary racial system having two levels of stratification may not be as efficient as a racial system with more levels of stratification.[79] Of course, stratification does not take place only along racial lines, but it also includes class, gender, sexual orientation, and immigration and citizenship status.[80] Consequently, a myopic civil rights vision may improve the conditions for the immediate individual or group. It may, however, result in little overall change and may in fact consoli-

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73. Banks, *supra* note 64, at 15.

74. *Id.* at 17.

75. *Id.* at 18.

76. One of us describes this aspect of society rewarding or supporting people who "reject our race, reject our sexual orientation, and reject our gender" as the seventh aspect of self-hatred. Jerome M. Culp, Jr., *Seventh Aspect of Self-Hatred: Race, LatCrit, and Fighting the Status Quo*, 55 FLA. L. REV. 425, 427 (2003).

77. *See* JAMES W. LOEWEN, THE MISSISSIPPI CHINESE: BETWEEN BLACK AND WHITE 21–26 (1971).

78. *Cf.* Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 229–30 (2003) (discussing contemporary racial stratification of the labor force fostered by immigration laws that create a disposable labor force).

79. For two excellent analyses of the operation of racial stratification and labor exploitation, see ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA (1971); and CHRIS FRIDAY, ORGANIZING ASIAN AMERICAN LABOR: THE PACIFIC COAST CANNED-SALMON INDUSTRY, 1870–1942 (1994).

80. *See generally* Roundtable, *Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L.J. 535 (1998).

date or deepen the overall system of oppression that continues to oppress that individual or group along with others.

B. "We're White, Too": Early LULAC Litigation Strategy

Unlike the attempt to secure a gain for Martha Lum and other Chinese American children by distancing the Chinese from blacks, early LULAC litigation strategy went further by claiming an explicit white racial identity.[81] This legal strategy took advantage of an 1897 decision which held that a Mexican immigrant claimant was legally white within the purview of the naturalization laws and, therefore, eligible for U.S. citizenship.[82] The decision was premised on the operation of the Treaty of Guadalupe Hidalgo,[83] which provided citizenship for persons of Mexican ancestry, and the naturalization laws, which limited naturalization to free white persons and persons of African nativity or descent.[84]

This litigation strategy produced mixed results for Mexican Americans. First, it was not always successful in securing the same rights as "non-Mexican Whites."[85] Furthermore, the strategy proved at times to be too successful and backfired when it came to exclusion from juries.[86] As Ian Haney Lopez has demonstrated in his article on LatCrit theory, the Texas state courts eventually came around to LULAC's claim that Mexicans were legally white and used it to reject claims of racial discrimination in violation of the Fourteenth Amendment when Mexican Americans were excluded from juries.[87] As other whites served on juries, Mexican Americans, qua whites, had no legitimate complaint about racial discrimination under *Strauder v. West Virginia*[88] and the Fourteenth Amendment.

Perhaps most importantly, this litigation strategy, similar to the *Gong Lum* strategy, did not dismantle the overlying system of racial subordination and, in fact, reinforced it through the active participation and collusion of (some) Mexican Americans in the system of racial subordi-

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81. *See generally* DAVID G. GUTIÉRREZ, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY 79–87 (1995); George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 338–39 (1997); Steven H. Wilson, *Brown over "Other White": Mexican Americans' Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 LAW & HIST. REV. 145, 150–64 (2003).

82. *In re* Rodriguez, 81 F. 337 (W.D. Tex. 1897).

83. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, art. 8–9, U.S.-Mex., 9 Stat. 922, 929–30.

84. Act of Feb. 18, 1875, ch. 80, 18 Stat. 318 (1875).

85. *See* George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555, 560–66 (1994) (recounting early cases regarding public accommodations).

86. *See* Martinez, *supra* note 81, at 328.

87. *See* Rogers v. State, 236 S.W.2d 141 (Tex. Crim. App. 1951); Sanchez v. State, 243 S.W.2d 700 (Tex. Crim. App. 1951)); Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1169–70 (1997), 10 LA RAZA L.J. 57, 83–84 (1998) (discussing *Salazar v. State*, 193 S.W.2d 211 (Tex. Crim. App. 1946)).

88. 100 U.S. 303 (1879).

nation. This strategy also foreclosed the possibility of coalition between Mexican Americans and blacks to challenge the overarching system.

Thus far, we have discussed two similar civil rights myopias: *Gong Lum*, which might be characterized as "don't apply Jim Crow to us because Jim Crow applies to blacks, and we're not black,"[89] and the early LULAC strategy, which might be characterized as "don't apply Jim Crow to us because Jim Crow applies to blacks and we're white."[90] We turn now to the third civil rights myopia—the dilution claim.

C. *"There's Not Enough to Go Around": African American Resistance to Civil Rights Claims by the Gay/Lesbian/Bisexual Community*

Alveda King, the niece of Martin Luther King, Jr., has stated that "gays and lesbians as a group have never suffered the kinds of indignities that black people have, and therefore any demands they make on American society only demean the struggle that her uncle and countless others died for in order to achieve basic equality for black people."[91] The fear seems to be that "comparing racism with some other form of bias [has] eclipsed or diminished attention to the importance of racism altogether."[92]

While we are cognizant of the dangers of analogizing between different forms of oppression[93] and understand that, at some level, resources are finite, we find repugnant the notion that adding gay/lesbian/bisexual claims to the civil rights agenda will somehow dilute, or make more difficult, the efforts of traditional minorities to gain justice. We call this homophobia or heterosexism masquerading as a pragmatic claim.[94] One fallacy is the presumption that there is an African American community that is distinct and separate from the gay/lesbian/bisexual community.[95] They are, and have always been, overlapping communities.[96] Another problem is that the dilution claim does not understand that different systems of oppression—racism, sexism, heterosexism, nativism, classism,

89. *See supra* notes 56–80 and accompanying text.

90. *See supra* notes 81–88 and accompanying text.

91. Mark F. Johnson, *Civil Rights and Wrongs (Homosexuality in Black America)*, HUMANIST, Mar. 13, 1998, at 39.

92. Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and the "Civil Rights Agenda,"* 1 AFR.-AM. L. & POL'Y REP. 33, 39 (1994).

93. *See generally* Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397; *see also* Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994).

94. *Cf.* Jerome M. Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994).

95. *See* Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 7 (1999).

96. *Id.* at 48–49.

ableism—are not separate and, in fact, operate in ways that reinforce one another.[97]

Unfortunately, we do not have a unified field theory of oppression to offer.[98] We do, though, offer a methodological prescription that tries to address these civil rights myopias.

D. A Prescription of Sorts

When addressing oppression, it is always necessary to ask the "other groups" question. In suggesting this prescription, we borrow from feminist legal scholars who ask "[t]he woman question."[99] They ask "about the gender implications of a social practice or rule: have women been left out of consideration? If so, in what way; how might that omission be corrected? What difference would it make to do so?"[100] This strikes us as a remarkably sensible thing to do.

We wish that the NAACP in San Francisco had considered these questions in fashioning its consent decree in 1983 to desegregate San Francisco schools.[101] We wish that the plaintiffs who brought a class action lawsuit in 1994 to dissolve the consent decree had engaged in this type of analysis.[102] The complaint alleged that the upper limit placed on the percentage of Chinese American students at Lowell, a magnet public high school, operated to admit lesser-qualified African American, Latina/o, white, and other Asian American applicants at the expense of better-qualified Chinese American applicants.[103]

If the San Francisco NAACP had engaged in an analysis similar to that undertaken by feminist legal scholars, perhaps the consent decree would have been different. Given the controversy that was growing even then with regard to the issue of Asian American admissions to elite colleges,[104] it was foreseeable that admissions ceilings for Asian Americans,

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97. For some excellent work that tries to engage interlocking and reinforcing systems of oppression, see Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251 (2002); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257 (1997); Peter Kwan, *Complicity and Complexity: Cosynthesis and Praxis*, 49 DEPAUL L. REV. 673 (2000); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25 (1995).

98. In our contribution to a recent symposium on this topic, we made the modest suggestion that those engaging in this analysis move beyond the political dimension to suggest specific points of intervention with regard to legal doctrine. *See* Robert S. Chang & Jerome M. Culp, Jr., *After Intersectionality*, 71 UMKC L. REV. 485, 490 (2002).

99. Katharine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990).

100. *Id.* Bartlett adds that "[a] question becomes a method when it is regularly asked." *Id.*

101. *See* Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854, 856–57 (9th Cir. 1998).

102. *Id.*

103. *Id.*

104. Stanford University, for example, in investigating the differential rate of admissions for Asian American applicants as compared with white applicants, seemed to implicitly acknowledge bias against Asian Americans when it concluded that "the overrepresentation of whites among special

or for specific Asian American groups, would create feelings of resentment among Asian Americans. Perhaps this could have been addressed through greater Asian American community involvement that would have resulted in a buy-in of sorts by Asian American community groups, and this greater involvement might have resulted in a differently fashioned consent decree.

If the *Ho* plaintiffs had asked the "other groups" question, maybe they would not have pursued the challenge in the way that they did. Perhaps a lesson can be learned from what happened with regard to a consent decree whereby the Los Angeles Police Department was ordered to increase its representation of women, African Americans, and Hispanics.[105] The U.S. Commission on Civil Rights discovered that Asian Americans were afraid to sue later to be included in this consent decree because of the fear that the entire decree, which benefits other minorities and women, "could unravel."[106] The Asian Americans who were dissatisfied with the consent decree asked the "other groups" question. Because of this possible harmful effect on other minority groups and women, they sacrificed their narrow self- and group interest and decided not to pursue a court challenge. While we might laud the Asian Americans in the Los Angeles example for taking this position, it is unfortunate that they were placed in this position because of the failure of those involved in the LAPD consent decree to ask the "other groups" question.

IV. THE INTENSIFICATION OF WHITE IDENTITY FOLLOWING *BROWN*

White people are made, not born.[107] Simone de Beauvoir made the same claim about women.[108] Both statements incorporate the idea that race and gender are social categories that have been, and continue to be, constructed. Much of the work on the social construction of race has focused on racial minority groups. There is a growing body of literature that examines "whiteness" as a socially constructed racial category.[109]

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groups such as alumni legacies, faculty/staff children, and athletes did not work to account for the differential rate of admissions except in a relatively minor way." Grace W. Tsuang, Note, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L. REV. 659, 670 n.77 (1989) (citing STANFORD UNIVERSITY, 1985–86 ANNUAL REPORT OF THE COMMITTEE ON UNDERGRADUATE ADMISSIONS AND FINANCIAL AIDS 5 (1986)).

105. U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S 59 n.53 (1992).

106. *Id.*

107. *Cf.* ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE 1 (1999) (making the same claim about Asian Americans).

108. SIMONE DE BEAUVOIR, THE SECOND SEX 267 (1949).

109. *See generally* NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995); ERIC LOTT, LOVE AND THEFT: BLACKFACE MINSTRELSY AND THE AMERICAN WORKING CLASS (1993); DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991); MICHAEL ROGIN, BLACKFACE, WHITE NOISE: JEWISH IMMIGRANTS IN THE HOLLYWOOD MELTING POT (1996); CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997).

Much of the work in the legal literature has focused on certain aspects of whiteness such as privilege,[110] transparency,[111] or guilt.[112]

It seems to us that there has been less engagement with whiteness as an oppositional identity category, experienced most intensely at two opposite extremes: when engaging in conscious racism[113] or when feeling like the victim of racial remediation.[114] The former, which might include whiteness experienced around participation in Aryan Nation or the killing of James Bird in Texas, is less interesting to us because it represents an extreme form of racism that, unfortunately, has become the paradigm for racism.[115] The latter, though, requires attention because of how pervasive we believe this feeling to be.

Cheryl Harris brilliantly captures the way that whiteness is experienced as property accompanied by a big bundle of sticks.[116] She tracks the way the Court shifted from protecting whiteness as status in *Plessy*[117] to whiteness as privilege in *Brown*.[118] She then proceeds to examine the experience of whiteness around the racial remedy of affirmative action, which many whites experience viscerally as reverse racism.[119] We agree with her analysis, but we want to extend it further to encompass any form of racial remediation. Under this view, any form of desegregation will be experienced negatively by whites who value consciously/unconsciously/subconsciously the attendant privileges of whiteness. This negative feeling will range from annoyance at the imposition to outright anger over the theft of their white privilege. The resentment that racial remediation fosters will strengthen whiteness experienced as an oppositional identity. We believe that civil rights advocates have underestimated the intensity and pervasiveness of this feeling among whites.

In order for civil rights advocates to address this problem, we need to understand that this oppositional white identity has evolved in the fifty years since *Brown* and has become animated primarily by the ideology of neutrality. The result is that it does not appear the same as the white citizens' councils; it does not have the appearance of massive white resis-

110. *See, e.g.*, Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881 (1995).

111. *See, e.g.*, Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993).

112. *See, e.g.*, Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1 (1990). We take Ross's description of white innocence claims as being rooted in white guilt.

113. *See* Nancy Dowd, *Resisting Essentialism and Hierarchy: A Critique of Work/Family Strategies for Women Lawyers*, 16 HARV. BLACKLETTER L.J. 185, 197 (2000) ("Whites produce status for themselves by discriminating against people of color.").

114. This includes so-called reverse racism, but is a broader concept.

115. Too much antidiscrimination law is limited by the idea of the perpetrator perspective. *See* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053–54 (1978).

116. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

117. Plessy v. Ferguson, 163 U.S. 537 (1896).

118. Brown v. Bd. of Educ., 347 U.S. 483 (1954); Brown v. Bd. of Educ., 349 U.S. 294 (1955).

119. Harris, *supra* note 116, at 1766–91.

tance to desegregation in all its forms. Instead, it is cloaked in seemingly unassailable neutral forms that animate and promote the notion of white innocence, which sets up whiteness as an oppositional identity.

Neutrality, though, at this point in history, is not so different from the behavior of the white citizens' councils. It is marked by a failure to understand the social forces that created and maintained racial inequality. Neutrality, now the primary marker for white oppositional identity, is one that involves complicity—accepting the fruit of the poisonous tree of slavery, Jim Crow, and "neutral" market forces that continue to foster disparate wealth accumulation along racial lines, which results in disparate racial transmission of both wealth and opportunities intergenerationally.

For racial groups such as Asian Pacific Americans, the question will be to what extent we will, through our neutral pursuit of good neighborhoods, good schools, good marriage partners, good jobs, good health care, and safe communities, participate and also benefit from the fruit of that poisonous tree called the American Dilemma.

V. CONCLUSION

In Part II, we examined racial inequality as measured by wealth, along with some of the systems and social institutions that operate to entrench this inequality. Part III explored some of the shortcomings of civil rights advocates due to what we described as civil rights myopias. In Part IV, we addressed the problem that arises around any racial remediation scheme because of the concomitant intensification of white racial feeling and identity.

All this leads ultimately to the question of what kind of nation we aspire to be. We can be a nation that tries to honor the best sentiments found in the Constitution. The way to honor those sentiments is to give them meaning, to provide for meaningful relief when we violate those sentiments. But as a nation, we are much better at making lofty statements about liberty and opportunity than we are at creating the material conditions necessary to effectuate liberty and opportunity for communities, families, and individuals who have been denied liberty and opportunity. Perhaps that is one way to understand *Brown I* and *Brown II*. *Brown I* stands for the lofty principle, *Brown II,* for the failure to effectuate it. The result, as we've demonstrated, is a cycle where inequality is perpetuated. Fifty years after *Brown*, we are able to stand here and look back and pass judgment on the failure of this nation to bring about *Brown*'s promise. As we indicated at the beginning of this article, if the past is any indication, we predict that *Brown*'s promise will remain unfulfilled on its hundredth anniversary. One difference, though, is that we will be the ones who are being judged by the next generations. We would like to leave behind a different legacy.

EPILOGUE BY ROBERT CHANG

Here, I step out of the authorial "we" to construct this epilogue. I include this epilogue because my coauthor Jerome often ended his pieces with an epilogue. You look at his articles, and there would be a false ending or two followed by an epilogue. I think this is because even at the end of an article, he always had more to say. At his passing in February 2004, he still had so much to say. Even through his battle to keep his transplanted kidney, the ideas for articles and books kept coming. But one thing we did not talk about was the epilogue for this article. I am left to imagine what he would want us to say.

He might have wanted to talk about his nephews and nieces. He might have wanted me to talk about my son. He cared so much about the next generations. He might have wanted us to end on a message of hope for them. Or he might have wanted us to end on a note of anger on their behalf. One thing, though, he would have wanted us to avoid is bitterness.

Walter Dellinger, at Jerome's Memorial Service, ended his brief remarks by saying, "Oh how he fought." Let us learn from Jerome and put aside the bitterness that can wither the heart. Let us fight with hope, with anger, and with humility.