University of Miami Law Review

7-1-1998

Race/ism Lost and Found: The Fair Housing Act at Thirty

John O. Calmore

Recommended Citation

John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. Miami L. Rev. 1067 (1998)
Available at: http://repository.law.miami.edu/umlr/vol52/iss4/8

Race/ism Lost and Found:
The Fair Housing Act at Thirty

JOHN O. CALMORE*

The prevailing view concerning contemporary racism is that it is something that belongs to the past. Where it is taken to occur at all, it is considered as socially anomalous, as *un*usual, an individual aberration or institutional hangover placed in check as soon as its occurrence is noticed. Anyone extending to racist expression a greater place in contemporary culture . . . is bound to be considered paranoid . . . .[1]

---

1. DAVID THEO GOLDBERG, RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING at viii (1993).

I. INTRODUCTION

Efforts to resolve issues of race and racism reflect what David Shipler describes as "a curious coexistence of intensive effort and cold neglect."[2] This article examines the operation of fair housing law and policy[3] within the tension of this "curious coexistence." In this view, we generally confront issues of race in this country simultaneously on three levels: public policy, institutional, and individual. Transcending these levels, we find that race is highly embedded within our societal organization and cultural understandings.[4] These, too, are contexts for racism. At all levels and within each context, equal opportunity in housing is either advanced or blocked.

My title refers to "race/ism," labeling it in this way in order to conscientiously draw out the need to join race and racism, rather than to follow the prevalent trend in discourse, which is to speak of race as a vague force or matter that is separated from human agency and accountability.[5] This dominant discourse speaks mistakenly about sharp lines of social division that are divorced from the processes and consequences of racism.[6] Hence, the transformative potential of fair housing policy to contribute to an open society stops short of the necessary anti-racism orientation.

Thirty years ago, Congress expediently passed Title VIII of the Civil Rights Act of 1968, popularly known as the Fair Housing Act.

---

2. DAVID K. SHIPLER, A COUNTRY OF STRANGERS: BLACKS AND WHITES IN AMERICA 564 (1997).

3. This policy is primarily directed by Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619, 3631, popularly known as "The Fair Housing Act." *See generally,* JAMES A. KUSHNER, DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION (2d ed. 1995 & Supp. 1997). The Act was substantially amended in 1988. *See* James Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing,* 42 VAND. L. REV. 1049, 1087-96 (1989).

4. "The theory of embeddedness refers to the extent to which a theory emphasizes that racism is an isolated, peripheral, or abnormal element of society (low embeddedness) or is an integral part of the existing social system (high embeddedness)." John F. Dovidio & Samuel L. Gaertner, *Prejudice, Discrimination, and Racism: Historical Trends and Contemporary Approaches, in* PREJUDICE, DISCRIMINATION, AND RACISM 1, 18 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

5. *See* Joe R. Feagin, *White Racism: The Foundation of Racial Tensions and Conflict,* 1 UMOJA L.J. 1, 1-2 (1996) (acknowledging the role of racism "in perpetuating the black-white division").

6. *See* David Theo Goldberg, *The Social Formation of Racist Discourse, in* ANATOMY OF RACISM 295, 295 (David Theo Goldberg ed., 1990) ("The history of racism is given definition by changes in the conception of 'race.'"). In the words of Patricia Williams, "Racism inscribes culture with generalized preferences and routinized notions of propriety. It is aspiration as much as condemnation; it is an aesthetic. . . . If we are to reach the deep roots of this legacy, antidiscrimination must be a commitment not merely to undo the words of forced division, but also to undo the consequences of oppressive acts." PATRICIA J. WILLIAMS, THE ROOSTER'S EGG 107 (1995).

President Johnson signed the legislation into law on April 11, 1968, one week after the assassination of Martin Luther King, Jr. in Memphis, and approximately one month after the *Kerner Report,*[7] which followed five successive summers of urban disorders. It was a time of dark ghettos, racial unrest and division, and prospects for a truly open society seemed profoundly dim. It was within this context of the social turmoil and backlash in the 1960s that Congress declared that the policy of the United States is to provide, within constitutional limitations, for fair housing throughout the nation.[8]

The Kerner Commission added to the volatile mix the charged term "racism" to explain why this predicament was extant.[9] According to the Commission, "White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II. At the base of this mixture are three of the most bitter fruits of white racial attitudes: [P]ervasive discrimination and segregation . . . , [b]lack migration and white exodus . . . , [and] [b]lack ghettos."[10] Yet, both conservatives and liberals retreated from acknowledging racism. The term, let alone the subject, of racism was seen to be so accusatory, so controversial, that it was deemed unproductive even to speak of racism. It was considered best to address problems of racism more indirectly, more safely, less offensively. Over the years, deja-vu reactions have persisted.[11]

In introducing the Commission's report, Tom Wicker wrote, "Reading it is an ugly experience but one that brings, finally, something like the relief of beginning."[12] As a thirty-year retrospection, I am looking back not only at the Fair Housing Act, but also at Dr. King's life and value orientation, and at the "the relief of beginning" again to look at racism. I write, however, with some trepidation, because many will not only dislike the message, but will dislike even more the messenger. There is, however, no euphemistic, polite way to say what must be said about racism. Less offensive terms sacrifice fundamental accuracy.

---

7. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (Bantam Books 1968) [hereafter KERNER REPORT].

8. *See* 42 U.S.C. § 3601 (1994).

9. *See* KERNER REPORT, *supra* note 7, at 2 ("What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.").

10. *Id.* at 203-04.

11. *See* John Charles Boger, *Race and the American City: The Kerner Commission Report in Retrospect, in* RACE, POVERTY AND AMERICAN CITIES 3 (John Charles Boger & Judith Welch Wegner eds., 1996).

12. Tom Wicker, Introduction to KERNER REPORT, *supra* note 7, at xi. Almost thirty years later, Wicker characterized integration as "a tragic failure." TOM WICKER, TRAGIC FAILURE: RACIAL INTEGRATION IN AMERICA (1996).

Indirectly approaching the subject of white racism detours us.[13] The racism that was found thirty years ago has been discarded—imagined away or explained away or ruled away.[14] This article finds racism again and assesses its significance in frustrating the ability of fair housing to render a more inclusive and open society.

The checkered progress of fair housing over the past thirty years cannot be fully understood outside the context of racism's varied iterances. The Fair Housing Act is not simply an equal-opportunity law, but is also an open-society law.[15] Thus, James Chandler argues that a goal of national fair housing policy

> should be to undo the results of officially approved housing discrimi-
> nation between the years of 1930 and 1962. This goal would include
> the achievement of residential integration of the metropolitan areas of
> the nation, thereby cojoining the 1949 goal of "a decent home and a
> suitable living environment for every American family" with the
> apparent 1968 goal of removing racial barriers to home acquisition.[16]

In *Mayers v. Ridley*,[17] applying Title VIII to racially restrictive covenants, Judge Wilkey wrote in his concurrence that "Congress was aware that the measure would have a very broad reach, and indeed the legislation was seen as an attempt to alter the whole character of the housing market."[18] This suggests that fair housing is not only a remedy for individual claimants, but also that it seeks to eliminate discrimination from the housing market and the exclusionary features of that market. The open-society goal is further reflected in Senator Mondale's statement that the Act was intended to replace the ghettos with "truly integrated

---

13. JOSEPH BARNDT, DISMANTLING RACISM: THE CONTINUING CHALLENGE TO WHITE AMERICA 40 (1991).

14. *See* john a. powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 900 (1995) ("The [Supreme] Court has trivialized and delegitimated any discussion of race and racism, except when discussing the receded history of slavery.").

15. Although I would question President Nixon's full commitment to an open society, he did recognize the importance of fair housing laws in moving the nation to such a society. Hence, in 1971, he stated:

> Underlying our housing policies—and embodied in our laws and our Constitution—
> are certain basic principles: Denial of equal housing opportunity to a person
> because of race is wrong [and] such denial will not be tolerated whether practiced
> directly and overtly, or under cover of subterfuges, or indirectly through such
> practices as price and credit discrimination.

Statement by President Richard M. Nixon on Federal Policies Relative to Equal Housing Opportunity, News Release, June 11, 1971, *quoted in* James P. Chandler, *Fair Housing Laws: A Critique*, 24 HASTINGS L.J. 159, 159 (1973) (alteration in original).

16. *Id.* at 164 n.36.

17. 465 F.2d 630 (D.C. Cir. 1972) (en banc).

18. *Id.* at 652 (Wilkey, J., concurring).

and balanced living patterns."[19] Congressman Celler addressed the need "to eliminate the blight of segregated housing."[20]

In spite of these aspirations for fair housing, for twenty years there was little enforcement strength in the Act.[21] Federal housing programs for the poor were decimated.[22] The segregation of blacks from whites not only persists, but has now become "hypersegregation" for a significant segment of the population.[23] Discrimination in the real estate and lending markets persists as well.[24] In many ways, racism has simply overwhelmed fair housing. This is my basic thesis, which for some will appear to be old news or no news, obviously correct or obviously incorrect.

Among the modern civil rights laws, fair housing law persists as the least effective. Housing is the civil rights area that has most been plagued by slow, small advances, where the possibility for real change is viewed as most remote.[25] In John Yinger's authoritative study, he reveals that, in combination, "prejudice and discrimination have a powerful impact on American society. They greatly restrict the housing choices of many black and Hispanic households, and they are among the key causes of racial and ethnic residential segregation. . . ."[26] We are now facing Derrick Bell's virtually irrefutable presumption: "Discrimination in housing, with its vices of segregated housing patterns and inad-

---

19. *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1968) (quoting 114 CONG. REC. 3422 (1968)).

20. *See* 114 CONG. REC. H9559 (daily ed. Apr. 10, 1968) (statement of Rep. Celler).

21. Writing in 1989, James Kushner noted, "[t]he 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 life styles." Kushner, *supra* note 3, at 1050.

22. *See* John O. Calmore, *To Make Wrong Right: The Necessary and Proper Aspirations of Fair Housing, in* THE STATE OF BLACK AMERICA 1989, at 77, 83-84 (Janet Dewart ed., 1989).

23. *See* Nancy A. Denton, *Are African-Americans Still Hypersegregated?, in* RESIDENTIAL APARTHEID: THE AMERICAN LEGACY 74 (Robert D. Bullard et al. eds., 1994) (demonstrating an *increase* in the level of black hypersegregation since an earlier study). Earlier, the segregation situation had been described in these words:

> Thus one-third of all African Americans in the United States live under conditions of intense racial segregation. They are unambiguously among the nation's most spatially isolated and geographically secluded people, suffering extreme segregation across multiple dimensions simultaneously. Black Americans in these metropolitan areas live within large, contiguous settlements of densely inhabited neighborhoods that are packed tightly around the urban core. In plain terms, they live in ghettos.

DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 77 (1993).

24. *See generally* JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMIANTION (1995).

25. Thus, Kushner observed, "Of all the civil rights battles fought during the last three decades, only housing discrimination appears to remain totally unabated, entrenched, and impervious to public policy and civil rights enforcement." Kushner, *supra* note 3, at 1050.

26. YINGER, *supra* note 24, at 14.

equate and overpriced housing for minorities, continues to be one of those areas where the law is unable or unwilling to keep up with conditions in the real world."[27] While divisive issues of race are an important part of the story, the neglected issues of racism are an important part of the untold story. This article seeks to find the racism that is lost and to incorporate it more directly in telling the story of fair housing within the theme of this symposium: "Promises Kept, Promises Broken".

Against this backdrop, Part II focuses on the continuing significance of racism and why this charged subject is so difficult, but necessary, to discuss. It argues that discussion by blacks and whites represents such polarized views that the two groups talk past each other. In a story dominated by blacks and whites, the basic narrative of racism is one of a conflict that colors respective views of our racial progress, quantitatively and qualitatively, to the point that prospects for consensus on what an open society is and how America will constitute (reflect) all of its peoples is virtually stalemated.

Part III examines how modern prejudices, stereotypes, and new expressions of racism, such as aversive racism, now join with a legacy of institutional and cultural racism to serve as major obstructions to fair housing. The dispute over the meaning of racism implicates new analyses of prejudice and stereotypes within an intergroup process and relationship. In rebutting claims of racism, some now argue that discrimination against blacks is rationally based on accurate stereotypes. Part III looks at the implications of these different viewpoints for fair housing.

In Part IV, I look at the nation's ambiguous commitment to fair housing in light of an examination of how contests over norms and values are implicated in fair housing policy. I also consider how racism, as a lived experience, affects the integration imperatives of middle-class and affluent blacks in ways that have prompted an ambivalence to residential integration, because of the negative experiences these privileged blacks have experienced in other assimilationist contexts of integration. Part IV also considers some of the multicultural prospects for an open society by focusing on the experiences of particular Asian and Latino ethnic groups in dealing with residential segregation and equal housing opportunity. It also confronts the issue of whether the observations of the Kerner Commission are still instructive in light of the national changes in racial and ethnic demography over the last thirty years.

Part V re-examines the viability of the "contact hypothesis" of integration. It is through contact with larger white society that many blacks

---

27. DERRICK BELL, RACE, RACISM AND AMERICAN LAW 687 (3d ed. 1992).

experience most acutely the new racism. Similarly, through contact with blacks, whites come to accept or decline stereotypes and racial resentment toward blacks. I argue that both groups must give contact a better chance to set the stage for a broader, deeper conceptualization and practice of integration. Finally, Part V re-asserts the Critical Legal Studies critique of rights to explain how fair housing rights have been individuated away other than for affluent people of color.

As Part V implies, unfortunately, the predicament of the ghetto poor lies beyond the scope of this article. The ghetto poor are really removed from open society. It may be that in light of the unfeasibility of integration, they must look to their communities within as sites and opportunities, resisting their spatial oppression and overcoming, in place, the disabling, opportunity-denying circumstances that are marked by the tripartite intersection of race, class, and space.

II. RACISM IN THE 1990s: ITS CHANGING BUT CENTRAL SIGNIFICANCE

A. *Polarized Conceptions of Racism: Expansive-Impersonal vs. Restrictive-Personal*

Racism is *embedded,* while the genius of today's advanced racism is to convince us that it is not embedded.[28] Racism in today's America is now state-of-the-art. Severing historical origins and legacies, it introduces itself anew and covertly to the breadth of contemporary institutions, culture, and society. This advanced, insidious racism operates so effectively that we seldom distinguish serious racist harms from a variety of other harms that categorically run from "bad luck" to "natural catastrophes." The oppressive features of racism become a misfortune rather than an injustice.[29] As we view racial misfortune that disproportionately impacts colored people, we must "ask the other question": Where is the racism in this?[30] Sometimes there will be none; it is not always there. However, race neutrality will often mask racism within

---

28. *See supra* note 4 and accompanying text.

29. Katherine T. Bartlett, *Minow's Social-Relations Approach to Difference: Unanswering the Unasked,* 17 LAW & SOC. INQUIRY 437, 445 (1992) ("The disadvantages of blacks and other minorities are so taken for granted that they may appear to be natural misfortunes rather than social injustices."). Similarly, Massey and Denton note that "[t]he residential segregation of blacks and whites has been with us so long that it seems a natural part of the social order, a normal and unremarkable feature of America's urban landscape." MASSEY & DENTON, *supra* note 23, at 17.

30. This approach is adopted from Mari Matsuda: "The way I try to understand the interconnection of all forms of subordination is through a method I call 'ask the other question.'" Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory out of Coalition,* 43 STAN. L. REV. 1183, 1189 (1991). While Matsuda directs the inquiry at looking for interconnections between all forms of subordination, in contrast, my approach looks for the connection between

UNIVERSITY OF MIAMI LAW REVIEW

the most innocent-seeming contexts.[31]

Ironically, while the nation is increasingly preoccupied with matters and formations of race,[32] there is a general perception that racism is receding from the national ethos, and this perception only serves to empower racist forms and expressions.[33] Martha Minow observes that "[P]ower . . . is exercised not simply in individually chosen acts, nor even in winning particular contests for political control or public attention. Power is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussion or even imagination."[34] It is in this very sense that the power of current racism is at its peak—silently, almost from underground, shaping preferences, arranging policy and societal agendas, and excluding anti-racist practice, discourse, and even imagination. That is, racism is not receding, but ebbing and flowing, mutating and multiplying across time and space. As David Goldberg says, "there is no single unified phenomenon of racism, only a range of racisms."[35] I am concerned that these racisms are being elided from dominant discussions about social justice and even from various discussions of race itself.

Although it may appear I am issuing an all-points-bulletin for racism, I actually think that Stephen Carter is correct in observing that "[r]acism has an existential reality that has defied most attempts to discover its sources and explain its power."[36] He also suggests that while we must remain alert to challenge racism, "we must be cautious about what we decide to call racism, what we decide to call racial discrimina-

---

race and racism, that is, "race/ism". Nonetheless, like Matsuda, I am looking "for both the obvious and non-obvious relationships. . . ." *Id.*

31. *See* DANA Y. TAKAGI, THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS 182 (1992) ("The use of racial imagery and racial code words conceals rather than discloses the racial underpinnings of contemporary social problems. Race and racism are pervasive though often implicit in discussions of American politics."). Many others have made this observation, but I cite the work of Takagi because many would not find race/ism in the context where she does—the admissions policies of elite colleges as applied to Asians.

32. *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1990s 55-56 (2d ed. 1994).

33. *See generally* STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996). Ironically, at the November 1997 Critical Race Theory Conference at the Yale Law School, Dean Anthony T. Kronman's welcome at the opening reception included the observation that "racism is receding." Over the next two days, implicit and explicit disagreement with this proposition was expressed.

34. Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered,* 101 HARV. L. REV. 10, 68 (1987).

35. GOLDBERG, *supra* note 1, at 213. So, too, racism in Europe, "in its links with modernity, cannot be reduced to a single logic, and even seems to correspond to processes which are sometimes so distinct that numerous demands are made for the discussion of racisms in the plural." Michael Wieviorka, *Racism in Europe: Unity and Diversity, in* RACISM, MODERNITY & IDENTITY ON THE WESTERN FRONT 173, 174 (Ali Rattansi & Sallie Westwood eds., 1994).

36. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 216 (1991).

tion, and what we must take as signs of life's unfairness with which we
must deal in other ways."[37] Carter's caution that not all racial disadvan-
tage is a result of racism is proper. But racism reinforces synergisms of
disadvantage over both space and time in ways that present an interlock-
ing system of unfair and discriminatory disadvantage that makes it diffi-
cult to separate racial discrimination and "life's unfairness" from racism
itself.[38] Thus, even where there appears to be non-racist racial discrimi-
nation (as odd as that sounds) and non-racist aspects of "life's unfair-
ness," my suggested analysis would at least prompt "the other question,"
to explore whether there is at least some current racist taint or histori-
cally racist sediment underlying them.

As Sivanandan has argued, "Racism does not stay still; it changes
shape, size, contours, purpose, function—with changes in the economy,
the social structure, the system and, above all, the challenges, the resis-
tances to that system."[39] We must look at racism within contexts and we
must analyze it as dynamic, not frozen in time and space. What Joel
Kovel characterized as "dominative racism"[40] has lessened in signifi-
cance, not because it has completely left the scene, but, rather, because it
must now share the stage with other racisms. As Michael Omi and
Howard Winant demonstrate, racism is not interchangeable with race
and the meanings of both are transformed over time. "[T]here can be no
timeless and absolute standard for what constitutes racism, for social
structures change and discourses are subject to rearticulation."[41] Domi-

37. *Id.* "To be sure, there are times when we should force the world to change for our benefit;
but there are also times when we must recognize that the world will not change, and must, to
avoid differential impact that is so troubling, change ourselves." *Id.* at 218. It is very difficult to
tell which times are which, however. But I do not think that we should overcharge racism to
relieve our own responsibility for working to overcome our distinctive disadvantages. Self-help
and responsibility must always be parts of the equation. Beyond that is where the conflict is likely
to occur—who and what else are responsible and what should therefore be done?

38. As Michael Dyson observes, "the character of American race relations permits the
appearance of a level of success that can be easily exaggerated and exploited." MICHAEL ERIC
DYSON, REFLECTING BLACK: AFRICAN-AMERICAN CULTURAL CRITICISM 150 (1993). Dyson also
points out that the liberal left and progressives are losing the battle of language in resisting racism,
"conceding the prerogative to narrate the most crucial features of American race relations to the
political and cultural right." *Id.* at 151. Right-wing accounts of racism are reductionist. In spite
of Carter's caution, this article, to a large degree, seeks to counter those accounts.

39. PETER JACKSON, MAPS OF MEANING: AN INTRODUCTION TO CULTURAL GEORGRAPY 132
(1989, reprinted 1995).

40. *See* JOEL KOVEL, WHITE RACISM 32 (Columbia Univ. Press 1984) (1970). Kovel sees a
historical progression from dominative racism to aversive racism, with the former sited more in
the South and the latter in the North. *See id.* at 191-211. Today, both expressions of racism
transcend geographic region.

41. OMI & WINANT, *supra* note 32, at 71. The authors point out,
    Since the ambiguous triumph of the civil rights movement in the mid-1960s, clarity
    about what racism means has been eroding. The concept entered the lexicon of
    "common sense" only in the 1960s. Before that, although the term had surfaced

native racism, thus, has set the stage for the operation of a variety of sequels—new racisms that are often "successor[s] in disguise."[42]

According to Kovel, a society's racism is constituted neither by the degree of racial segregation, nor the extent of prejudice among the population.[43] Rather, these are mere manifestations of racism and the actual racism "is the tendency of society to degrade and do violence to people on the basis of race, and by whatever mediations may exist for this purpose."[44] Racists so despise others that the object of racism is dehumanized. No one should complictly participate in this degradation, violence, and dehumanization. We cannot continue to live apart as if that separateness has nothing to do with racism. Thus, in order to direct this article to well-intentioned whites, it focuses on modern forms of racism that run from resentment to aversion to "rational discrimination."[45]

Racism may not be subject to precisely defined identification, but there are features to modern racism that help us to understand its process and operation. Due to the normative clarity around issues of discrimination and equality of opportunity that developed during the early civil rights movement, open expressions of racism and prejudice are now socially condemned. There remains, however, a residual anti-black sentiment that is primarily rationalized in terms of its commitment to "traditional values."[46] Hence, modern racism often forms as "resistance to change in the racial status quo based on moral feelings that blacks violate self-reliance, the work ethic, obedience, and discipline."[47] This racism reacts more to the violation of entrenched Western values than to threatened personal interests. This is the modern racism of the right, based on an anti-black socialization that is joined to a conservative political socialization and value judgment.[48] In contrast, racism of the political left is an aversive racism that is reflected in an ambivalence.

---

occasionally, the problem of racial injustice and inequality was generally understood in a more limited fashion, as a matter of prejudiced attitudes or bigotry on the one hand, and discriminatory practices on the other.

Id. at 69.

42. BARNDT, *supra* note 13, at 83.

43. *See* KOVEL, *supra* note 40, at x.

44. *Id.*

45. The best contextualized discussion of rational discrimination I have read is found in JODY D. ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA (1997).

46. *See, e.g.,* DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS 124 (1996) ("[A]nimosity toward blacks is expressed today less in the language of inherent, permanent, biological difference, and more in the language of American individualism, which depicts blacks as unwilling to try and too willing to take what they have not earned.").

47. PAUL M. SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE 8 (1993).

48. Dovidio & Gaertner, *supra* note 4, at 22.

Aversive racists sincerely embrace egalitarian norms, but still act in sub-
tle prejudiced and racist ways. They often do not even recognize their
negative racial attitudes.[49] Thus, modern racism is a contested phenom-
enon between the right and left. Often whites seem to vacillate between
these two poles, sometimes expressing one form of racism in context A
and the other in context B.

Thomas Pettigrew has identified additional features of modern
racism that can be expressed within this ambiguous and dialectical
framework.[50] Since the civil rights movement, racism now presents
itself in ways that are "far more subtle, indirect, and ostensibly nonracial
. . . . Consequently, detection and remedy have become more diffi-
cult."[51] This, of course, is the principal problem in asserting and prov-
ing claims of discrimination in housing.[52] According to Pettigrew,
features of modern racism include: (1) a rejection of naked racism, such
as gross stereotypes and blatant discrimination; (2) a failure to internal-
ize new anti-discrimination norms as personal standards of behavior; (3)
an experience of racial ambivalence as new norms clash with earlier
racist socialization; (4) a use of indirect expressions of prejudice that
operate as rationalizations based on race-neutrality; (5) a reaction to sub-
jective threats, that is, dangers perceived from racial alteration rather
than objective relations or involvement with blacks; and, (6) a concep-
tion of opportunity that is limited to individualistic rather than group
orientation.[53] Although Pettigrew's description was presented in 1985,
he describes the racism of the 1990s as well as that which will welcome
the twenty-first century. It is this racism that is denied, even while
blocking progress to a less racist society. It is, moreover, the racism that
afflicts Asians and Latinos, even as they seek to stand outside of the
black-white paradigm of race/ism.

The conservative, or right-wing, school of modern racists attempts
to transcend the embeddedness of racism. Rather than being ambivalent,

---

49. *Id.*
50. *See* Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and
1964,* 37 RUTGERS L. REV. 673, 686-700 (1985).
51. *Id.* at 686.
52. Certain new and more subtle forms of discrimination in housing have been
    devised: some apartments are not rented to persons whose wages are based on an
    hourly scale; credit and other criteria are arbitrarily applied; false waiting lists are
    maintained; sales and rental agents are not aggressive in following up on
    applications from black prospects; and blacks and whites are still directed by real
    estate agents toward separate neighborhoods. These new types of discrimination,
    while defying detection by unsophisticated buyers or renters, continue to perpetuate
    a segregated living pattern and dual housing markets.
Chandler, *supra* note 15, at 169 (footnote omitted). *See generally* Michael Selmi, *Proving Inten-
tional Discrimination: The Reality of Supreme Court Rhetoric,* 86 GEO. L.J. 279 (1997).
53. *See* Pettigrew, *supra* note 50, at 687.

they are undercover racists. Avoiding expressions or opinions that are blatantly anti-black, they replace them with those that are relatively ambiguous and subject to being explained and justified by reference to non-racial grounds or victim-centered inadequacies. Moreover, these modern racists employ moral abstractions and substitute code words, such as "the welfare poor," "the illegal immigrant," and "the criminal element," for explicit racist references. Rooted in abstract principles of justice and fairness, such as "equality of opportunity" and "colorblindness," this new racism reflects diffuse negative feelings toward blacks and other nonwhites. These feelings derive from early political and racial socialization and *not* from personal experience or competition with blacks.[54]

An embedded view of racism adopts the modern characteristics of racism and situates racism not simply as inhering in individuals, but also in culture, institutions, and societal organization. This view of racism would claim that in the United States today, the principal flaw in analyzing racism is the failure to recognize or accept this dynamic, structured, systemic, and contextualized nature of racism. The restrictive view primarily reduces racism to individual expressions of prejudice, which is seen as autonomously divorced from societal structures. It is largely irrational and pathological. When racism inheres in prejudiced individuals, they are viewed as ignorant and self-deceiving.[55] Discrimination, in turn, is explained by intentional acts that are driven by prejudice, biases, and stereotypes.

The cultural and political right virtually limit racism to this framework of individualistic perpetration.[56] While generated by the right, however, this is also the common view held by most whites.[57] Typically, those who see racism receding draw that conclusion based on the

---

54. John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale, in* PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 4, at 91, 94.

55. GOLDBERG, *supra* note 1, at 92.

56. This limited view writes many people off in an uncaring way. As black conservative Glenn Loury states, "[I]n the last few years, conservative intellectuals have developed an inflexible, hard-edged dogma when it comes to race." Glenn C. Loury, *Call for Compassion: Conservatives' Social Policies Doomed Without Dose of Caring*, THE ARIZ. REPUBLIC, Jan. 4, 1998, at H5. Loury adds: "The fact, as chilling as it is unavoidable, is that many among the conservative elite seem tone-deaf on the issue of race. They can't see that our country's moral aspirations . . . seem impossible when one sees the despair of so many of those Americans who descend from slaves." *Id.*

57. According to Bob Blauner, "[B]y the late 1970s the main usage of racism in the mind of the white public had undoubtedly become that of 'reverse racism.' The primacy of 'reverse racism' as 'the really important racism' suggests that the conservatives and the liberal center have, in effect, won the battle over the meaning of racism." Bob Blauner, *Talking Past Each Other: Black and White Languages of Race, in* RACE AND ETHNIC CONFLICT: CONTENDING VIEWS ON PREJUDICE, DISCRIMINATION, AND ETHNOVIOLENCE 18, 23 (Fred L. Pincus & Howard J. Ehrlich eds., 1994).

inference that invidious intentional discrimination and prejudice have waned. Stephan and Abigail Thernstroms's argument is illustrative. They claim that "racists stand 'outside the norms' of American society."[58] Racism is seen as extreme and, against that measure, the nation has made progress in moving away from racism. The Thernstroms thus conclude that "in the years before the civil rights revolution, hard-core white racism was ubiquitous; in the 1990s, it is largely a thing of the past."[59]

While this "hard-core white racism" may well be less salient than in the past, a new range of racisms has adapted to changing times and crowded its areas of operation. In recognition of that, Kimberlé Crenshaw identifies among the themes of critical race theory "the view that racism is endemic to, rather than a deviation from, American norms."[60] This article endorses the Crenshaw view.[61] Generally, even outside of the context of critical race theory, blacks tend to adopt the expansive view of racism. Indeed, blacks and whites tend to interpret much of the social change over the last thirty years in different ways, largely because the vocabularies of race and racism are different. The respective racial languages adopt divergent views of American society, and it has become almost impossible to form an interracial consensus on the issue of how central race and racism are to our nation's character, past and present.[62]

In sum, while whites tend to see racism as aberrational, dated, and personal, blacks tend to see racism as central, commonly experienced, current, and group-related. Blacks tend to enlarge racism beyond the realm of personal prejudice or stereotypes that form the basis for individual behavior that is discriminatory.[63] Under such circumstances for-

---

58. STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 503 (1997).

59. *Id.* at 499.

60. Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 195, 213 n.7 (David Kairys ed., rev. ed. 1990).

61. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,* 101 HARV. L. REV. 1331, 1369-81 (1988) (discussing racist ideology and hegemony).

62. *See* Lynne Duke, *Blacks and Whites Define "Racism" Differently,* WASH. POST, June 8, 1992, at A1.

63. In discussing the enlarged conception of racism, Bob Blauner explains why whites and blacks talk past each other:

> The newer, expanded definitions of racism just do not make much sense to most whites. I have experienced their frustration directly when I try to explain the concept of institutional racism to white students and popular audiences. The idea of racism as an "impersonal force" loses all but the most theoretically inclined. Whites are more likely than blacks to view racism as a personal issue. Both sensitive to their own possible culpability (if only unconsciously) and angry at the use of the concept of racism by angry minorities, they do not differentiate well between the racism of social structures and the accusation that they as participants in that

mulating an "integrated" consensus, if you will, is blocked, because whites view blacks as "overemphasizing" racism while blacks view whites as "underemphasizing" it. Worse, black and white views are increasingly moving to their respective poles, which only exacerbates the problem of divisiveness.[64]

The majority black view simply raises the ante too high in seeking social justice. It goes too far in seeing injustice as racial oppression that is group-affecting, structural, and systemic. It suggests that common views of optimism and complacency over racial progress can only be held by failing to connect racism to institutional, cultural, and social practices that are deeply rooted in society's fundamental structures of material inequality, unequal power, and group exclusion and subordination.[65] The syndrome of optimism and complacency persists, because it fails, moreover, to appreciate Anthony Cook's observation that racism "results from a complex process of acculturation in which individuals come to see and interpret the world through lenses carefully crafted by a history of racism."[66]

B. *The Reactionary Approach to Racism: "Reductio Ad Absurdum"*

The quest for an open society, through fair housing and otherwise, is either sidetracked or derailed by racism that we fail to address by failing to acknowledge its operational features. Hence, the subjugated status and condition of blacks and other nonwhites in the United States is often legitimated—that is, both explained and justified—or challenged as unjust, depending on how we assess and analyze the role of racism. If racism is less determinative, other explanations seem compelling, including the explanation that black subordination and inequality are primarily the fault of blacks themselves. For example, according to

---

structure are personally racist. . . . The new meanings make sense to blacks, who live such experiences in their bones.
Blauner, *supra* note 57, at 22.

64. I agree here with the Thernstroms's observation: "There is no racism; there is nothing but racism. The issue of race sends people scurrying in extremist directions. And thus there is almost no overlap between opposing views, and little sympathy and understanding across the lines of political battle." THERNSTROM & THERNSTROM, *supra* note 58, at 13.

65. While there have been real gains, the overall system has become more legitimated. As a consequence, it is difficult to transform the system in the way that is required. It is difficult to see the distinction between real gains and illusory opportunity for further gains. As Fran Ansley states: "Some victories that seemed, for a time, like a ladder out of oppression have begun to feel more like a demonic ferris wheel, grinding ever onward in its oppressive and repetitive round, and driven more by the force of white advantage than by any imperative for black justice." Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1001 (1989).

66. Anthony Cook, *Cultural Racism and the Limits of Rationality in the Saga of Rodney King*, 70 DENV. U. L. REV. 297 (1993).

the Thernstroms, "the serious inequality that remains is less a function of white racism than of the racial gap in levels of educational attainment, the structure of the black family, and the rise in black crime."[67] Similarly, Dinesh D'Souza claims that the prevalent form of racial discrimination today is a *rational* response to black group traits[68] and this explains and, perhaps, justifies social aversion and media stereotyping, as well as discrimination in hiring, housing, and mortgage lending. Thus, D'Souza concludes, "One of the profoundest ironies of the past few decades is that as laws and policies outlawing racism and discrimination have been instituted and expanded, charges of racism have multiplied."[69] In part, this profound irony is explained by the entry of blacks and other people of color into new domains of heretofore undisturbed white privilege and prerogative. This entry has generated a white reaction that is manifested in various, mutating forms of new racisms.[70]

There are various techniques used to discredit the claims of expansive racism, techniques that rely on normative, empirical, and rhetorical arguments. Often the restrictive view is founded on a claim, such as D'Souza's that "most of our basic assumptions about racism and civil rights are either wrong or obsolete."[71] Hence, the claim is corrective and the tone is unapologetically self-righteous. In the introduction of his book, he states:

> Because I am committed to the *liberal* goals *of a just and inclusive society*, my objective is not to strengthen old bigotries, but *to discover a stronger basis for the principles of liberty* and *equal rights in this multiracial society. My ultimate purpose is to restore a basis for liberal hope* in an atmosphere of deepening despair, and *to enable the crusade against racism to recover the high moral ground it has lost.*[72]

The full read of his book, however, reveals that his so-called liberal goals operate to further quite reactionary views of racism; his idea of a just and inclusive society is structured primarily at the expense of any critical multicultural rejection of assimilationism and for the gain of Eurocentric hegemony; his concept of equality is limited to equal rights only. His restoration of liberal hope is depressing to black people and

---

67. THERNSTROM & THERNSTROM, *supra* note 58, at 534.

68. *See* DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY 24 (1995).

69. *Id.* at 246.

70. For discussions of the varied contexts and reactions, see JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE (1994); ELLIS COSE, THE RAGE OF THE PRIVILEGED CLASS (1993); and RICHARD L. ZWEIGENHAFT & G. WILLIAM DOMHOFF, BLACKS IN THE WHITE ESTABLISHMENT?: A STUDY OF RACE AND CLASS IN AMERICA (1991).

71. D'SOUZA, *supra* note 68, at ix.

72. *Id.* (emphasis added).

his crusade against racism claims only an ersatz moral ground, simply being the ground of power and domination that is directed against blacks and their racism towards whites and other people of color.

White racism toward blacks is rational—that is, rationalized away. D'Souza sees the features of the nation's racial crisis to consist of unjustifiable black rage, understandable and often justifiable white backlash, and deserved liberal despair. He concludes, *inter alia*, that "[i]n an increasingly meritocratic society, *black* racism becomes a rationalization for black failure."[73] His assessment attributes very little to white racism and finds that racism is not the main problem facing blacks today. Instead, group patterns, rooted in the response to yesterday's oppression, are "now dysfunctional and must be modified."[74] D'Souza contends the primary obstacle confronting blacks is "destructive and pathological cultural patterns of behavior."[75] These patterns include "excessive reliance on government, conspirational paranoia about racism, a resistance to academic achievement as 'acting white,' a celebration of the criminal and outlaw as authentically black, and the normalization of illegitimacy and dependency."[76]

D'Souza's book outraged many readers,[77] with Angela Harris calling it a "racist tract."[78] I was struck that blacks were held in such disrespect.[79] William Rasberry characterized it as a book "only racists could cheer."[80] An essay in *Time Magazine* labeled it "the bigot's handbook" and urged a public boycott of the book.[81] Glenn Loury and Robert

---

73. *Id.* at 23.

74. *Id.* at 24.

75. *Id.*

76. *Id.*

77. Jennifer Hochschild observes that although the book has not sold well and has been criticized severely because of its distorted logic and factual inaccuracies, "the fact that is was written at all, and published under the auspices of a mainstream publisher (The Free Press), is poisonous to discussions of race in America." Jennifer L. Hochschild, *When Books on Race Don't Help us Know the Truth,* J. OF BLACKS IN HIGHER EDUC., June 30, 1996, at 69.

78. Angela Harris, *Foreword: The Unbearable Lightness of Identity,* 2 AFR.-AM. L. & POL'Y REP. 207, 221 n.28 (1996) ("D'Souza's argument that antidiscrimination laws should be repealed so that blacks will learn to cultivate white values of hard work and thrift assumes that white color prejudice is rational, that all people physically identifiable as 'black' share a defective culture.").

79. As Glenn Loury states:

It is hard to avoid the conclusion that in some influential quarters, when the object of discussion is the African-American community, basic principles of decency, and of scholarly and journalistic integrity, no longer apply. Blacks seem to be held in such contempt that we can be slandered, defamed, and insulted without remorse, or consequence.

Glenn C. Loury, *Perspective on Racism; A Well-Funded Entry in the Black Inferiority Sweepstakes,* L.A. TIMES, Sept. 24, 1995, *available in* 1995 WL 9828778.

80. William Rasberry, *Only Racists Could Cheer "The End of Racism,"* MINNEAPOLIS-ST.PAUL STAR TRIBUNE, Sept. 22, 1995, at 19A.

81. Jack E. White, *The Bigot's Handbook,* TIME, Oct. 2, 1995, at 87.

Woodson found the book so denigrating that they resigned from the American Enterprise Institute.[82] They objected "to the tone of the book and what they see as sweeping, insupportable generalizations."[83] In Charles Johnson's view, "While D'Souza claims to battle against the 'enemies of equal rights,' he is in fact providing them with ammunition."[84] More bluntly, Chet Whye found him to be simply "another apologist for racism."[85]

Another influential right-wing view is that of the Thernstroms. Associating the Thernstoms with Charles Murray and D'Souza, I characterize their book as another entry into "the apologists-for-racism sweepstakes."[86] These writers absolve whites from any responsibility for the cause and remedy of the current oppressive state of blacks.[87] In the truest tradition of "friendly fire," the Thernstroms present themselves as liberals.[88] Empirically driven, they present quite an optimistic account of racism's diminution since the end of World War II. Their sense of progress rests primarily on comparisons of the relative well-being of blacks today with that of blacks prior to 1954 and in the aftermath of civil rights laws in the 1960s.[89] This supports the argument that civil

---

82. Dorothy J. Gaiter, *Two Black Conservatives Are Now Searching for a New Home—Book Makes the Men Question Who Their Friends Are, Some Say "I told you so,"* WALL ST. J., Oct. 19, 1995, at A1.

83. *Id.*

84. Charles Johnson, *Widening the Racial Divide: Glib Proposals for Ending Racism Seem More Likely to Perpetuate It,* L.A. TIMES, Nov. 26, 1995, Book Review, at 4.

85. Chet Whye Jr., *Author Dinesh D'Souza Is Another Apologist for Racism,* DENVER POST, Nov. 9, 1995, at B9.

86. *See id.*

87. According to Derrick Bell, these writers project a "surface plausibility" that proves to be "irresistible to whites who feel bogged down in the bottomless swamp of racial issues and are looking for a rescue rope of rationalities to pull them to a safe, secure position." Derrick Bell, *Racial as American Ritual,* THE VILLAGE VOICE, Nov. 21, 1995, at 51. This line of writing's attraction is summarized by Julian Bond:

> No one is responsible for black poverty except the black poor—so no one (certainly not the taxpayers) is responsible for setting it right. Discrimination doesn't exist, so we don't need the pesky anti-discrimination laws or affirmative action anymore. Black people occupy lower income, occupational and educational rungs on society's ladder because of self-inflicted pathologies, not historical or present-day discrimination. Whites don't want to work or live or go to school with them, not because of color prejudice but because of class differences.

Id.

88. *See* THERNSTROM & THERNSTROM, *supra* note 58, at 22 (identifying with the liberal optimism of Gunnar Myrdal and belief "in the potential for racial decency in most Americans").

89. Typical of their analysis, the Thernstroms point out:

> Today almost three-quarters of black families are above the poverty line. In 1940, 87 percent of black families were in poverty; the figure was down to 47 percent in 1960 and 26 percent in 1995. The black college population has grown from 45,000 in 1940 to over 1.4 million today, a thirty-fold increase. Sixty percent of employed black women were domestic servants in 1940; today very few are. A majority, in

UNIVERSITY OF MIAMI LAW REVIEW [Vol. 52:1067]

rights laws have been effective in providing equality of opportunity and that racism is rare today. Indeed, they claim that there has been a "revolution in white racial attitudes" that signals this progress.[90]

In turn, however, the Thernstroms minimize gaps in equality between blacks and whites today. When gaps are observed, they attribute them to poor educational achievement, poverty, criminal behavior, welfare dependency, the failure to effectively assimilate, female-headed households, and such factors. They never ask the other question, whether racism has anything to do with these "deficits." When responding to the lived experience of racism as portrayed by blacks, such stories and reports are dismissed as "psycho-facts."[91] Acknowledging racism is begrudging. Thus, the Thernstroms declare: "Racism exists, but pain distorts perceptions."[92] The distorted perceptions not only exaggerate the degree of racism, but also they obscure real progress.

Unless victimized by hard-core racists (who hardly exist), black claims of racism are not taken seriously, and are actually subjected to ridicule. Thus, black claims that systemic racism taints the war on drugs or the general administration of criminal justice are translated into paranoid "conspiracy theories."[93] While constantly citing demographics of increasing numbers of Latinos and Asians, except when using them to make blacks appear less sympathetic or less able, they seldom talk about these other groups and whether racism affects them.

For accurate assessments of racism, one must turn to whites. Whites are seen to view racism in precise, rational, and concrete terms. The Thernstroms cite a study by arch-conservative, John Bunzel of the Hoover Institute, in which black and white Stanford students characterized racism. The whites "talked of prejudice, stereotyping, and overtly racist acts, and believed evidence of such personal hostility was exceedingly hard to find." In other words, real racism was rare. In contrast, blacks viewed racism as almost surreal, seeing it "as something akin to a pervasive vapor—invisible but lethal," subtle, covert, and hard to explain, even though it was institutional and structural.[94] When blacks react to devastating setbacks in higher education, such as the Texas Law School's affirmative action admissions program being held unconstitu-

---

fact, hold white-color jobs. The number of black men in professional occupations has also risen impressively. Power and influence, in fact, were exclusively white prerogatives in 1940; there was no Vernon Jordon and no Michael Jordan.
Id. at 20-21.
   90. *See id.* at 138-42.
   91. *See id.* at 508.
   92. *See id.* at 506.
   93. *See id.* at 268-79.
   94. *See id.* at 387.

tional for discriminating against whites, black reactions are character-ized as "borderline hysteria."[95]

As illustrated by the works of D'Souza and the Thernstroms, the case for a restrictive view of racism is now dominant. It represents for whites a common sense or conventional wisdom that is received uncriti-cally. It provides a comforting rationalization to the dominant society to "hear no evil, see no evil, and speak no evil" when various claims of racism are presented only to be rejected and dismissed as "psycho-facts," "conspiracy theories," "surreal," and "borderline hysteria."

This conventional wisdom is brought from society to the jury box. It is brought to the halls of Congress. A majority of the Supreme Court and a significant number of lower federal court judges embrace this view. As Michael Selmi observes, one way the Supreme Court has cho-sen to help put our racist past behind us is "by using restrictive legal standards to send the message that discrimination is now the exception rather than the rule . . . [T]he Court [has] largely mirrored American society in its desire to wish away racial injustice."[96] The prevalence of this view will continue to adversely possess the inherent right of people of color to pursue life, liberty, and happiness.

Strangely, while D'Souza's book was roundly condemned, the Thernstroms's book has been more critically accepted.[97] For example, although black conservative Glenn Loury was outraged by D'Souza's book, he read the Thernstroms's book as "an important, learned, and searching statement on our age-old dilemma."[98] Yet, except in tone and pretext, the books are not all that different.[99] Both trivialize the oppres-sive features of racism. Both fix responsibility for black failure primar-ily on black cultural inferiority and the failure to assimilate. Both

95. *See id.* at 420, referring to University of Miami law professor Donald Jones for having said such decisions could lead to "lily-white universities across the United States."

96. Selmi, *supra* note 52, at 350.

97. *See, e.g.*, Editorial, *New Sober Voices on Race,* Boston Herald, May 1, 1998, at 24 (praising the work as "the best book of the decade about race"); Cynthia Cotts, *Harvard Historian: Blacks with Low LSAT Don't Belong,* NAT'L L.J., Dec. 15, 1997, at A26 (noting that "the book has been well-received, and even black scholar Henry Louis Gates Jr. had dubbed it 'essential reading'"); David Katz, *Book Shows Fallacy of Racial Preferences,* DET. NEWS, Nov. 26, 1977, at A11 (characterizing the book "as a milestone in the effort to invalidate the race-based political agenda" and observing that "anyone who cares about the progress of black America" will find it to be "an essential read"); and Alan Wolfe, *Book Review,* NEW REPUBLIC, Sept. 29, 1997, at 27 ("their tough-minded book serves the cause of racial justice").

98. Glenn C. Loury, *The Conservative Line on Race,* THE ATLANTIC MONTHLY, Nov. 1977, at 144, 145.

99. During the 1997 Asian-American Journalists Association Convention in Boston, Stephen Thernstrom and D'Souza appeared on a panel with Ronald Walters and Cornell West. As reported, "Thernstrom, according to several persons in the audience, appeared to espouse views similar to D'Souza's." Robert A. Jordon, *Asian-American Stereotypes Crumble as Panel Tackles Affirmative Action,* BOSTON GLOBE, Aug. 17, 1997, at D4.

UNIVERSITY OF MIAMI LAW REVIEW   [Vol. 52:1067

disconnect history and its legacy from having any significant bearing on present-day problems. Both almost entirely relieve white society and most white individuals of the responsibility for racist expression that continues to afflict blacks.[100] Both deny racism has any bearing on the lives of Asians and Latinos.

Indeed, the Thernstroms's book is more dangerous than D'Souza's book. As if learning from the critical reaction to D'Souza's book, the former appears much more sympathetic and friendly, but it is not. As stated in a recent issue of *The Nation,* "In the matter of race, the opportunities for bad faith are beyond mere counting. Even so, our committee has just voted *unanimously* that the worst of books currently in print is *America in Black and White: One Nation, Indivisible, Race in America* .... The two nervous subtitles betray unease, just as rapid eye-blinking, behaviorists tell us, signifies a liar in full flood."[101] While their style is different from D'Souza's, the Thernstoms are on his team, running the same race, as they run anchor on his right-wing relay team. They have simply taken his outrageously polemical and racist baton and camouflaged it as they race to the same finish line. They are that connected.[102] Therefore, as with D'Souza's work, the Thernstroms's book is a "curiously insistent racist tract,"[103] where the reader "begins to sense that there is some sort of demonic spirit on the scene, unacknowledged but ever-present."[104] Kinder, gentler racism is still racism.[105]

The Thernstroms's book not only reinforces the modern racism of the political and cultural right-wing, but also provides encouragement to aversive racists and their reincorporation of racist prejudice, stereotyping, and rationalization, which are discussed in Part III. In this manner, the Thernstroms's book furthers the notion that we have made great progress on the issues of race and that further progress is inevitable. Even the best intentioned whites may adopt this view and succumb to race fatigue and disengagement. In effect, if not motive, the white aversive racists would become largely indistinguishable from the ill-motivated right-wing modern racists.[106] Hence, as Martin Duberman has observed:

---

100. Tamala M. Edwards, *Throwing the Book at Race: A Benchmark New Work Turns the Accepted History of Racial Progress in America Upside Down,* TIME, Sept. 8, 1997, at 60.

101. "G.V.," *Bad History,* THE NATION, April 20, 1968, at 11, 12.

102. *See* Michael A. Fletcher, *The Color of Controversy; They Say They're Liberals. So Why Do Conservatives Tout Their Views on Race?,* WASH. POST, Oct. 11, 1997, at H1.

103. "G.V.," *supra* note 101, at 14.

104. *Id.*

105. *See generally* STEPHEN A. SHULL, A KINDER, GENTLER RACISM?: THE REAGAN-BUSH CIVIL RIGHTS LEGACY (1993).

106. Martin Duberman, *Promised Land,* L.A. Times, Oct. 12, 1997, Book Review, at 11. According to Duberman:

   For many whites, this is another way of saying, "We're sick of the whole issue"

"The Thernstroms's book will become something of a bible for those suffering from burnout on the race question . . . it provides an encyclopedic rationale for being all at once optimistic and inactive about racial divisions. A legion of fatigued white hearts will sigh in grateful unison."[107]

III. RACISM'S REINCORPORATION OF PREJUDICE, STEREOTYPE, AND RATIONAL DISCRIMINATION

A. *The Increasing Significance of "Aversive Racism"*

White attitudes and beliefs about matters of race are both ambivalent and conflicting. Though preoccupied with issues and divisions along lines of race, some would have us believe that if racial classification were eliminated, racism would be eliminated and a color-blind state would be achieved. But this is the perspective of the ostrich, avoiding danger by refusing to see it.[108] Worse, we refuse to see ourselves implicated in racism. Much of this reflects what Joël Kovel characterizes as "metaracism," an adverse personality disorder that is manifested in

---

("race fatigue" is the term some social scientists use to describe this spreading feeling). Mostly in private, more and more whites are saying they are fed up with hearing about black grievances, that everything within reason has been done to improve the lot of African Americans, that it has improved (even if damned few blacks seem willing to admit it, as one of the fatigued might say), that if anything more is to be done, it is up to blacks themselves to do it: to get the needed education and job skills, to rid their communities of drugs, crime, teenage pregnancy and welfare loafers.

Id.

107. *Id.*

108. It is no wonder that john powell says that "[d]espite our obsession with race—which sometimes takes the form of race aversion—our national discourse is disturbingly confused, charged, and often unproductive. Our language often seems wooden and rehearsed, and the way that we discuss race is frequently in conflict with our stated ideals." john a. powell, *The Colorblind Multiracial Dilemma: Racial Categories Reconsidered,* 31 U.S.F. L. REV. 789 (1997). Alex Johnson advocates destabilizing race in order to acknowledge the importance of ethnicity as a way to promote integration. *See* Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods,* 143 U. PA. L. REV. 1595 (1995). Johnson argues that "[i]f race functioned as ethnicity currently functions in our society, racism and the societal ills it creates would not exist." *Id.* at 1655. The problem with this argument, though, is that it fails to regard how non-white ethnic groups are *racialized* to their detriment. George Martinez points out how the official government reference to "Hispanics" as white has not afforded any access to white privilege. *See* George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness,* 2 HARV. LAT. L. REV. 321, 336 (1997) ("Far from having a privileged status, Mexican-Americans [have] faced discrimination very similar to that experienced by African-Americans."). For Europeans, ethnicity is merely symbolic, but for people of color ethnicity and race are combined more saliently. *See* John O. Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free,"* 15 LAW & INEQ. J. 25, 81 (1997) (arguing "against the colorblind effort that attempts to reduce the significance of race, not to that of eye or hair color, but, rather, to no greater significance than symbolic ethnicity as experienced by European Americans").

social distance, lack of human feelings, and detachment.[109] In understated lay terms, metaracism also represents sort of a collective fatigue that defeats compassion and openness, empathy and tolerance toward others, and reinforces an aversive weariness with trying to get along in racially-mixed settings. Mutual trust, respect, and equality of esteem fall by the wayside.[110] The lofty ideals of social justice and multiracial democracy, the foundation for an open society, are too costly or too inconvenient. As Kovel explains, metaracists may not be racially prejudiced, but "they acquiesce in the larger cultural order which continues the work of racism."[111] This observation is critical for our understanding of the permeation of racism and how we are implicated in it. This also supports my view that much anti-racist work must renegotiate culture.[112]

Kovel's concepts of metaracism and aversive racism, circa 1970, stimulated Samuel Gaertner and John Dovidio to reinvestigate these articulations of racism.[113] Aversive racism is described as subtle, "subconscious, discriminatory acts and feelings of people who genuinely do not want to be that way. This is the racism of people who would vote for a black president but might unconsciously steer away from sitting next to a black person on the Metro."[114]

Aversive racists possess strong egalitarian values. More importantly, they express a particular ambivalence where feelings and beliefs which are sincerely linked to those values are in conflict with unacknowledged feelings and beliefs about blacks.[115] Thus, aversive racists

---

109. KOVEL, *supra* note 40, at 211-30.

110. J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY (1978). According to Pole, a concept of equality of esteem is not wholly compatible with that of equality of opportunity, because the American incentive system places them in tension. *Id.* at 351. Worse, "The Supreme Court . . . has reflected this tension because it is charged with the obligation of ensuring equal treatment between economically and socially unequal persons, while being obligated to defend many of the conditions which have made people unequal." *Id.*

111. KOVEL, *supra* note 40, at 211-12.

112. *See* 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, 2185-91 (1992). My reference here to modern forms of racism, such as aversive racism, is different from the notion of unconscious racism. While Charles Lawrence, for example, is looking at unconscious and subconscious racism, I am looking at ambivalence toward people of color that resembles a subtle, perhaps subconscious, awareness that produces a cognitive dissonance. For a general discussion of unconscious racism, *see* Charles Lawrence, *The Id. the Ego, and Equal Protection: Reckoning with Unconccious Racism, in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT INFORMED THE MOVEMENT 235 (Kimberlé Crenshaw et al. eds., 1995).

113. Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism, in* PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 4, at 61.

114. Malcolm Gladwell, *The Subtler Shades of Racism: Private Emotions Lag Behind Public Discourse*, WASH. POST, July 15, 1991, at A3.

115. Gaertner & Dovidio, *supra* note 113, at 62.

2H. See also Jeff Hawkes

are at the opposite pole from "hard-core racists" or "dominative racists" who act out of bigoted beliefs and who, in Kovel's terms, represent "the open flame of racial hatred."[116] Moreover, as discussed earlier, aversive racists are also different from right-wing modern racists who represent the more subtle flame of racial resentment, although here the lines of demarcation might blur depending on the context and cause aversive racists to cross the line from racial aversion to racial resentment and rational discrimination. Unfortunately, the line is likely to be crossed as whites move from apathy and separation to engagement and interaction with blacks and their issues.

Within the context of aversive racism, the problem with well-meaning whites is that their "inability to acknowledge their negative racial feelings and their apparent rejection of negative racial stereotypes, together with their sympathetic feelings toward victims of injustice, convince them that their racial attitudes are largely positive, and certainly not prejudiced."[117] This aversive racism fuels apathy and social distance. As Tom Teepen reported, "The racial resegregation of America is moving ahead smartly, not that anyone much notices or, if they do, seems to care very much . . . . Indifferent enforcement of fair-housing laws is letting residential segregation slide."[118]

Rupert Brown recently summarized the revived notion of aversive racism as follows:

> Overt and blatant prejudice is on the wane. Many White people . . . genuinely endorse principles of tolerance and ethnic equality and, indeed, may even support progressive public policies. On the other hand, coexisting with these liberal attitudes is some residual anxiety in their dealings with minority group members, an unease stemming from culturally socialized negative images associated with them. It is this anxiety which is thought to colour White people's interactions with Blacks (and other outgroups), betraying itself in certain behavioural indicators of avoidance and coolness.[119]

Thus, I focus on aversive racism for a number of reasons. When combined with the perpetuation of historical discrimination and institutional racism, aversive racism is a significant, but unacknowledged, factor in accounting for the almost rigidly persistent features of both housing discrimination and residential segregation. It is culturally manifested as the racism of denial among well-intentioned whites, those in

---

116. KOVEL, *supra* note 40, at 54.

117. Gaertner & Dovidio, *supra* note 113, at 62.

118. Tom Teepen, *Rebuilding the Racial Divides,* Cleveland Plain Dealer, April 13, 1997, at 2H. *See also* Jeff Hawkes, *Why So Little Soul Searching on Segregation?,* LANCASTER NEW ERA, Feb. 6, 1998, at B1.

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

the best position to accept and actually live with increased integration. It is, moreover, the racism most likely to operate within the broader contexts of growing confusion and disputes over anti-racist norms. Finally, resolving issues of aversive racism calls upon those whites of good will to interrogate their own inherited white privilege, to investigate their complicity in racism, and to deal with the fact that, while they may not have authored racism, they certainly have inherited it.[120]

In this article, then, I am not concerned with the individual racist who may utter the word "nigger" every now and then.[121] I am not concerned here with addressing the more serious racist acts of violence, such as shooting a black man at a bus stop in Denver, because "he didn't belong where he was at."[122] I am not concerned with the surprising proliferation of white supremacist hate groups and their invasion of the internet.[123] These racists are well beyond reach and personify the antithesis of the open society for which I am advocating. When I say that I am not concerned with such racist manifestations, I do not mean to suggest that such racism is insignificant. Indeed, rather than receding, I believe it is making quite a comeback. Thus, I certainly disagree with my friend Harlon Dalton, who thinks that it is time to "delete the term 'racist' from our vocabulary" in order to reach the well-meaning people who do not act with such malice.[124]

While I am identifying some whites as racists—modern racists, so to speak—I am separating them from hard-core racists and overt bigots.

---

120. *See* RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS 70 (1993) ("[R]acism emerges not only as an ideology or political orientation chosen or rejected at will but also as a system of material relationships with a set of ideas linked to and embedded in those material relations.").

121. Alan Abrahamson, *Fuhrman Enters Plea of No Contest to Perjury*, L.A. TIMES, Oct. 3, 1996, at A1. During the murder trial of O.J. Simpson, Los Angeles Police Detective Mark Fuhrman's denial of ever uttering the word "nigger" was rebutted when "an aspiring screenwriter brought to court tape recordings of Fuhrman using the 'N-word' at least 41 times." *Id.* According to Police Chief Willie Williams, "The wounds that were opened up by his comments will take years for this department to overcome." *Id.*

122. Nathan Thill, 19, one of the suspects in the shooting of West African immigrant Oumar Dia, has confessed, saying that he "saw the black guy and thought he didn't belong where he was at." Assoc. Press, *Skinhead Confesses to Slaying*, THE CINCINNATI POST, Nov. 21, 1997, at 27A. In response to the question whether he liked blacks, Thill responded, "I don't like some blacks. I guess it's sort of a thing that I love my own people and I'd like to see a place where just we could be." Kieran Nicholson & Marilyn Robinson, *Three Suspects in Two Slayings Go to Court— Rallies Set to Protest Hate Crimes*, DENVER POST, Nov. 22, 1997, at A1. *See also* David Van Biena & Richard Woodbury, *Rocky Mountain Hate: Denver is Shaken by a Rash of Skinhead Crimes*, TIME, Dec. 1, 1997, at 53.

123. *See* Kevin Sack, *Hate Groups in U.S. are Growing, Report Says*, N.Y. TIMES, Mar. 3, 1998, at A10 (noting that 474 hate groups and their chapters engaged in racist behavior during 1997, with 163 Web sites now advocating racial hatred).

124. HARLON L. DALTON, RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES 170 (1995).

The tricky move is to include many who would reject my characterizing them as racists and invite their joining in anti-racist practice. I hope, however, that the careful reader will see that I am addressing the structured and systemic features of oppression, something that transcends individuals even though individuals may complicity be a part of racism in active and evasive ways.[125] Because we tend to focus so much on the racist aspects of domination and exclusion, or on individual prejudices and stereotyping, we tend not to appreciate the significance of aversive racism, an important racism of the 1990s and the type of racism that plays such a large role in housing discrimination and exclusionary racial segregation.

Since the earlier studies by Gaertner and Dovidio, various experiments and field studies have been conducted, leading many psychologists to consider aversive racism to be the most common form of racism in the United States.[126] The theory of aversive racism may be the best explanation for why discrimination persists even when "more than 85 percent of whites routinely profess in opinion polls to hold exemplary attitudes on race relations."[127] Even discounting this number to account for those who may lie, I do think that aversive racists are very common. Aversive racism is clearly different from more virulent articulations of racism. It is less rarely manifested as overt hatred or hostility. Instead, it surfaces in more mundane feelings of discomfort, uneasiness, disgust, or fear.[128] Aversive racism is also an inconsistent response, slipping out inadvertently in situations when the rules of social or racial etiquette are ambiguous.[129]

According to Dovidio, there are two ways of evaluating the significance of aversive racism, one optimistic, the other pessimistic:

> You can see this as a new form of racism which is a necessary step toward its elimination—people who haven't yet been able to overcome their natural biases. . . . The other possibility is that this could be the mutant of the virus that is resistant to change. We used to [challenge] racism by saying it was bad, illegal or immoral. But with modern racism, that message doesn't produce any real change in behavior because people don't think it applies to them.[130]

This need for whites to identify themselves with racism is important.

---

125. FRANKENBERG, *supra* note 120, at 140-57, 239-43 (discussing the discursive repertoire of power and color evasiveness as it contributes to the maintenance of material racial inequality).

126. *See* Gladwell, *supra* note 114.

127. *Id.*

128. *See, e.g.*, William Booth, *Phobia About Blacks Brings Workers' Compensation Award,* WASH. POST, Aug. 13, 1992, at A3.

129. Gladwell, *supra* note 114.

130. *Id.* (alteration in original).

We must reduce the number of whites who are beyond the message of modern racism "because people don't think it applies to them." Whites must reassess their innocence and detachment. Although aversive racism represents a departure from racial hatred and bigotry, it is nonetheless particularly insidious, because it is unlikely to be alleviated by direct appeals "to do the right thing." Aversive racists already believe they are nonprejudicial and nondiscriminating. As Dovidio and Gaertner point out, "Techniques directed at revealing the negative components of aversive racists' attitudes would probably only produce . . . a token reaction that would permit aversive racists to deny their anti-black feelings."[131] In light of this, I now turn to a discussion of how the concepts of prejudice and stereotype have evolved to the point that they attract even well-meaning whites and create even greater ambivalence among them.

B. *The New Deployment of Prejudice and Stereotypes*

In February 1969, Alonzo Stevens, a black man, sought to rent an apartment within the Beckanna Apartments in North Carolina.[132] He applied in person, and submitted his application to the employee who received and passed on applications, and who made the character, credit, and reference checks. At the time of Stevens's application, there were no black tenants in the apartment complex and there never had been any. All of the checks and references were favorable. The defendant's manager, however, determined that Stevens was "an unacceptable tenant."[133]

Defendants simply claimed that Stevens had "an offensive odor."[134] On the basis of this defense, the district court judge dismissed plaintiff's complaint. Upon appeal, however, the Fourth Circuit panel concluded that the claim of "offensive odor" was "freighted . . . with all the trademarks of racial prejudice" and was simply an excuse for an action that could find no real basis except in racial discrimination.[135] The court explained that "such [stereotypical] beliefs are frequently used to justify discrimination and segregation."[136]

In May 1975, Benjamin and Francene Bishop, a white husband and a black wife, sought to rent an apartment in Ohio.[137] At the time the husband was a graduate student at Case Western Reserve and the wife was a college student at Cleveland State. Once again, however, preju-

131. Gaertner & Dovidio, *supra* note 113, at 85.
132. Stevens v. Dobbs, Inc., 483 F.2d 82 (4th Cir. 1973).
133. *Id.* at 83.
134. *Id.*
135. *Id.* at 84.
136. *Id.* at 83 n.2.
137. Bishop v. Pecsok, 431 F. Supp. 34 (N.D. Ohio 1976).

dice and stereotype operated to deny them their desired housing. When the Bishops sued the landlord, William Pecsock, the court found that his discriminatory conduct was unjustifiably pretextual. Specifically, the court noted that Mr. Pecsock told Mrs. Bishop "that blacks were responsible for most crime in America, that they should be shipped back to Africa, and that he [the landlord] does not allow blacks in his building because their friends would hang around and terrorize the other tenants in the building."[138] In recalling this case, I am still struck by the openly racist expression communicated to the wife. Few cases would have such "smoking gun" direct evidence today, but a good deal of latent racist resentment and hostility may continue to exist, ready to come out if prodded. In this case, for example, the wife simply asked Pecsok if her race had anything to do with his refusal and, before his diatribe on the nature and tendencies of blacks, he replied, "not necessarily."[139]

Some would suggest that these blatant examples from the 1960s and 1970s are dated, that such deployment of prejudice and stereotypes is a thing of the past, and that it has no relevance for today's fair-housing world. That suggestion, however, is wrong. There remains a strong link between prejudice and housing discrimination.[140] Indeed, Massey and Denton claim that "[t]he belief that blacks have deleterious effects on neighborhoods is consistent with a broader set of pejorative racial stereotypes."[141] Although increasing numbers of whites would appear to be comfortable with black neighbors, anti-black sentiment persists. According to a 1994 study conducted by Reynolds Farley, "the overall aversion toward living among blacks remains strong, and a substantial minority of whites mention stereotypes when asked direct questions about living with blacks on their block."[142] Although virtually all whites appeared willing to move into a minimally integrated area, fewer than half were willing to move into areas that had more than "a token representation" of blacks.[143]

I admit that the prejudice and stereotypes that afflicted Mr. Stevens and Mrs. Bishop are not necessarily today's. Although instances of that old prejudice and stereotypes remain, prejudice and stereotype are not fixed concepts that are universally applied. Both prejudice and stereotype are held and deployed in various ways, "altered by turns in intellectual currents, changes in economic arrangements, and eruptions of

---

138. *Id.* at 36.

139. *Id.*

140. *See* YINGER, *supra* note 24, at 162-68.

141. MASSEY & DENTON, *supra* note 23, at 94.

142. Reynolds Farley et al., *Stereotypes and Segregation: Neighborhoods in the Detroit Area,* 100 AM. J. Soc. 750, 776 (1994).

143. *Id.*

political crisis."[144]

To appreciate the mutability of prejudice and stereotype, we should remember their past articulations. Within the United States, Gordon Allport is associated with advancing our post-World War II understanding of the term "prejudice."[145] According to Allport, prejudice was personality-based and functioned with a putative falsity, a set of unwarranted assumptions that could be corrected with better information. Thus, for example, he distinguished prejudgment from prejudice by claiming that "[p]rejudgments become prejudices only if they are not reversible when exposed to new knowledge."[146] This led him to define ethnic prejudice as an attitude or belief that reflected "an antipathy based upon a faulty and inflexible generalization. It may be felt or expressed. It may be directed toward a group as a whole, or toward an individual because he is a member of that group."[147] Prejudices are held independently of value judgments, although society tends to be concerned with those prejudices that are sustained by "a spurious overgeneralization"[148] that directly manifests itself as antipathetic action that may run along a continuum from mild antilocution to avoidance to discrimination to physical attack to extermination.[149] This range of activities is not necessarily a step-by-step progression; some may be skipped or never engaged.

Shortly after Allport's standard treatment was published, Herbert Blummer focused on a sociological view that emphasized prejudice as a sense of group position rather than the psychology of individual personality, behavior, and falsely-held views.[150] Among the attitudes underlying this prejudice, three of them resonate today: (1) for whatever reason, blacks are inferior; (2) whites have a priority claim to certain rights and privileges; and (3) blacks harbor designs on the prerogatives of whites.[151] Blummer saw the third attitude as crucial in supporting a racist mindset, a view that has been carried forward by Cheryl Harris in discussing "a property interest in whiteness."[152]

The most compelling reconceptualizations of prejudice are those

---

144. KINDER & SANDERS, *supra* note 46, at 94.
145. *See* GORDON W. ALLPORT, THE NATURE OF PREJUDICE (Anchor Books 1958) (originally published in 1954, the year of *Brown v. Board of Education*).
146. *Id.* at 9.
147. *Id.* at 10. Allport notes that many programs that try to reduce prejudice may succeed in changing beliefs, but not attitudes. *See id.* at 13. I think that, in this dichotomous way, the resistance to attitudinal change is a feature of modern racism.
148. *Id.* at 12.
149. *See id.* at 14-15.
150. *See* Herbert Blummer, *Race Prejudice as a Sense of Group Position*, 1 PAC. SOC. REV. 3 (1958).
151. *See id.* at 3-7.
152. Cheryl I. Harris, *Whiteness As Property, in* CRITICAL RACE THEORY, *supra* note 112, at 276.

that consider prejudice to be "primarily a phenomenon originating in group processes."[153] Here, the primary focus is on individuals acting as members of a social group rather than on individuals acting simply as individuals. British social psychologist Rupert Brown posits various reasons for this approach, recognizing that: (1) an orientation of preju-dice primarily directs itself to whole categories of persons rather than the group's individual members;[154] (2) prejudice is most frequently linked to a socially shared orientation;[155] and (3) prejudice is generally a group relational orientation.[156] As I view racism that is driven by preju-dice, I see a continuing white effort to maintain a sense of group position relative to people of color. That position almost invariably reflects hier-archy, exclusion, and imbalance in powers.

This intergroup relation approach to prejudice does not necessarily require interaction. Indeed, because contact between whites and blacks is more likely to be sheer and episodic rather than deeply involved and sustained, a great deal of white prejudice operates through "knowing" blacks through the mass media and popular culture's portrayal.[157] In this way, under the "dominant gaze,"[158] stereotype and bias merge with prejudice, and this is true even under the narrower Allport view of indi-vidualized prejudice.[159] Indeed, Brown finds stereotyping to be a "phe-nomenon at the heart of the study of prejudice."[160]

Stereotyping associates social categorization and prejudice. We stereotype people when we attribute to an individual characteristics that are seen as shared by most, if not all, members of the individual's group.

---

153. BROWN, *supra* note 119, at 9.

154. *Id.*

155. *Id.*

156. *Id.*

157. 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.

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

158. The "dominant gaze" refers to "the tendency of mainstream culture to replicate, through narrative and imagery, racial inequalities and biases which exist throughout society." Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film, in* CRITICAL RACE THEORY: THE CUTTING EDGE 56, 57 (Richard Delgado ed., 1995).

159. 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, 1267-70 (1992) (discussing negative stereotypes in popular culture of Asians, Mexicans, and Native Americans).

160. BROWN, *supra* note 119.

In the United States, political journalist Walter Lipmann popularized the term over seventy years ago when he applied it to describe how people use cognitive molds to reproduce mental images of people. Hence, he called stereotypes "the pictures in our heads," generally resistant to easy alteration.[161] While stereotypes can be positive, they are generally pejoratively viewed as "rigid, oversimplified, often exaggerated beliefs that [are] applied both to an entire category of people and to each individual within it."[162]

The work of French scholar Mireille Rosello directs us to a richer understanding of stereotypes.[163] Her analysis of stereotypes is interwoven within literary and social texts, focusing more on "who does what to whom, how and when," than on "what is it, and how does it work."[164] She argues that stereotypes recruit us not so much into a community, but into shared world views and conventional wisdom. Thus, a key to the effectiveness of stereotypes is their power to "invoke a consensus."[165] By invoking consensus, stereotypes serve to theorize identity. Hence, the most important function of stereotypes is "to maintain sharp boundary definitions, to define clearly where the pale ends and thus who is clearly within and who is clearly beyond it."[166]

For those who are outside the pale, so to speak, stereotypes appear as the art of representation. As Jan Nederveen Pieterse puts it, stereotypes "tend to function as self-fulfilling prophesies. The targets of stereotyping are maneuvered into certain roles, so that a vicious circle develops, in which reality seems to endorse the stereotype."[167] This endorsement is tied to the current practice of "rational discrimination," discussed in Part III C below. The deployment of stereotype as self-fulfilling prophesy and rational discrimination is a function of what Rosello describes as the stereotype's defining feature, which is its "high degree of iterativity."[168] As she elaborates:

> An ethnic stereotype is like a form of contamination; it is a strong element of iterativity that insinuates itself like some sort of bacteria to a general statement about a group or a community. The stereotypical infection then turns this nondemonstrable statement into an

161. *Id.*
162. ALLAN G. JOHNSON, THE BLACKWELL DICTIONARY OF SOCIOLOGY: A USER'S GUIDE TO SOCIOLOGICAL LANGUAGE 282 (1995).
163. *See* MIREILLE ROSELLO, DECLINING THE STEREOTYPE: ETHNICITY AND REPRESENTATION IN FRENCH CULTURES 23 (1998) ("Having infiltrated everyday culture, stereotypes now refer to something that refuses to die even if it has outlived its own relevance or significance.").
164. *Id.* at 14.
165. *Id.* at 15.
166. *Id.*
167. *Id.* at 17.
168. *Id.* at 37.

instantly memorable formula that parades as common sense, truth, and wisdom. In the next stage, the ideological content, the supposedly descriptive element of the stereotype—that is, what the stereotype says about a certain racial or ethnic group—then appears to be the stereotype itself . . . .[T]he identity and immense resilience of the stereotype resides in its apparently indestructible degree of iterativity.[169]

The significant finding for my analysis of well-intentioned whites and their possible complicit involvement is that prejudice operates "as systematic biases in intergroup judgment [and] can flow directly from these stereotypes, largely independent of motivational processes."[170] This suggests that all of us, regardless of race or ethnicity, must be "on guard" against racist stereotypical schemata that operate synergistically with stereotypical contamination and iteractivity.

C. "Rational Discrimination" in Lieu of Racism

A significant problem with stereotypes is that they are formed and maintained by "illusory correlation," which is "the subjective perception of a strong correlation that objectively does not exist. From a cognitive perspective, stereotypes can be understood as one variant of this very common judgmental error."[171] According to Loren Chapman, who coined the term in 1967, an "illusory correlation" is defined as "the report by observers of a correlation between two classes of events which, in reality, (a) are not correlated, or (b) are correlated to a lesser extent than reported, or (c) are correlated in the opposite direction from that which is reported."[172]

Somewhat problematically distinguishing away the illusory correlation of stereotypes, the restrictive view of racism justifies much discrimination as rationally based on accurate negative generalizations. In this view, stereotypes more likely explain motivation and purpose than fit within a social cognition process where they "operate beyond the reach of decisionmaker self-awareness."[173] They also serve as a rational basis for intentional discrimination. According to D'Souza, for example, while old forms of discrimination and prejudice have declined, a newly-forming discrimination is being stimulated by black cultural pathology—rational discrimination: "High crime rates of young black males,

169. *Id.*
170. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity,* 47 STAN. L. REV. 1161, 1190-91 (1995).
171. *Id.* at 1195.
172. *Id.* (quoting Loren J. Chapman, *Illusory Correlation in Observational Report,* 6 J. VERBAL LEARNING & VERBAL BEHAV. 151, 151 (1967)).
173. *Id.*

for example, make taxi drivers more reluctant to pick them up, store-keepers more likely to follow them in stores, and employers less willing to hire them. Rational discrimination is based on *accurate group generalizations* that *may* nevertheless be unfair to particular members of a group."[174]

So-called rational discrimination can amount to a marketplace racism that afflicts people of color in various contexts from Denny's Restaurants[175] to Eddie Bauer's[176] to Benneton's[177] to Avis.[178] Some would mistakenly argue that marketplace racism is just a problem for the poor.[179] It is unlikely that marketplace racism, under the cover of rational discrimination, in retail services and public accommodations,[180] stops short of extending into neighborhoods—that is, into the housing market. As Raymond Franklin has said, "The Great White Fear is that the marginal entry of middle-class blacks like themselves will be fol-

---

174. D'SOUZA, *supra* note 68, at 24. Public support for this view was openly expressed in the mid 1980s. *See* Richard Cohen, *Closing the Door on Crime,* WASH. POST, Sept. 7, 1986, Magazine, at 13 (arguing that it is rational for jewelers and taxi drivers to exclude certain customers on the basis of race). *See also* Walter E. Williams, *The Intelligent Bayesian,* NEW REPUBLIC, Nov. 10, 1986, at 18 (arguing that the intelligent use of statistics could lead one to rationally exclude "young black males"). *But see* Loren Page Ambinder, Note, *Dispelling the Myth of Rationality: Racial Discrimination in Taxicab Service and the Efficacy of Litigation Under 42 U.S.C. Section 1981,* 64 GEO. WASH. L. REV. 342 (1996).

175. Stephen Labatron, *Denny's Restaurants to Pay $54 Million in Race Bias Suits,* N.Y. TIMES, May 25, 1994, at A1 (black Secret Service agents were kept waiting while white agents were served second helpings).

176. Courtland Milloy, *Teen Stripped of More than Just a Shirt,* WASH. POST, Nov. 15, 1995, at D1; Cathy Young, *Indignity of "Rational" Discrimination,* DET. NEWS, Dec. 9, 1995, at A9 (black youth was made to leave his shirt, which he had bought on a previous day, when he could not produce a receipt).

177. Patricia J. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism,* 42 U. MIAMI L. REV. 127 (1987) (black law professor was not buzzed in to the store even though other shoppers were inside).

178. *Avis to Pay $3.3M in Discrimination Case,* FT. LAUDERDALE SUN SENTINEL, Dec. 23, 1997, at 2D.

179. Harvard professor Cornel West recalls being dressed in a three-piece suit in Manhattan while ten taxis passed him by:

> Ugly racial memories of the past flashed through my mind. Years ago, while driving from New York to teach at Williams College, I was stopped on fake charges of trafficking cocaine. When I told the police officer I was a professor of religion, he replied "Yeah, and I'm the Flying Nun. Let's go, nigger!" I was stopped three times in my first ten days in Princeton for driving too slowly on a residential street with a speed limit of twenty-five miles per hour.

CORNEL WEST, RACE MATTERS, at x (1993). *See also* 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.").

180. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property,* 90 NW. U. L. REV. 1283, 1286-91 (1996).

lowed by lower-class black 'hordes' unlike themselves."[181]

According to D'Souza, cultural relativism, which, in his opinion, posits all groups are inherently equal, has blinded liberals from seeing that not every negative generalization about blacks is false. Ironically, due to integration and desegregation, whites are now in a better position to ascertain which of their preconceived views about blacks are correct.[182] As he states, "Education and integration can help to dispel erroneous judgments about groups but they are only likely to reinforce accurate ones."[183]

D'Souza concedes that blacks are correct to claim that today's discrimination is more subtle and elusive, but "it is also based more on reality than on illusion."[184] He cites various examples of where rational discrimination plays a role in relieving whites from the charge of racial discrimination and imposing a burden on blacks to change so that they might be able to establish what I have referred to as an illusory correlation. For example, in assessing the plight of young black men—an "obsolete"[185] or "endangered species"[186] in the view of some—he argues that "[r]ational discrimination against young black men can be fully eradicated only by getting rid of destructive conduct by the group that forms that basis for statistically valid group distinctions. It is difficult to compel people to admire groups many of whose members do not act admirably."[187]

In turning to rational discrimination in housing, we note that the reluctance and apprehension whites have for black-white residential mixing stem from many beliefs, such as concern that black neighbors will undermine property values, reduce neighborhood safety, and directly threaten white social status.[188] Rational discrimination can serve to rebut overtly impermissible motives that further housing discrimination and segregation. Rational discrimination distinguishes itself from aversive racism by rationalizing a cognitive belief that justifies the aversion or exclusion. The well-intentioned whites who may be aversive racists may easily slip into rational discrimination. Modern aversive racism is used to explain why whites appear more committed to open housing and residential integration as an abstract principle than in

---

181. RAYMOND S. FRANKLIN, SHADOWS OF RACE AND CLASS 141 (1991).

182. D'Souza, *supra* note 68, at 270.

183. *Id.* at 270-71.

184. *Id.* at 287.

185. *See generally* HAKI R. MADHUBUTI, BLACK MEN: OBSOLETE, SINGLE, AND DANGEROUS (1990).

186. *See generally* YOUNG, BLACK, AND MALE IN AMERICA: AN ENDANGERED SPECIES (Jewelle Taylor Gibbs ed., 1988).

187. D'SOUZA, *supra* note 68, at 287.

188. MASSEY & DENTON, *supra* note 23, at 94.

practice.[189]   Rational discrimination may also explain this anomaly.

Both Nathan Glazer and Charles Murray have articulated a right-wing view of rational discrimination in housing matters. Glazer argues that liberals have failed to tell the whole truth about the effects of black neighborhood entry on property values.[190] He also asserts that banks and realtors justifiably worried about the ownership turnover from white to black, since most of the time this means a drop in property values, "not because blacks lived there, but because crime increased, schools declined, and the public sphere was neglected."[191] Glazer thus finds that it was this *predictable pattern* of what happened when blacks moved into the traditionally all-white neighborhoods in increasing numbers which made many integrated areas "brief interludes between being all white and being all black."[192] He concludes, as D'Souza probably would, that black segregation will only end when the black "behavior that induces the [white] motives or resistance or avoidance is reduced."[193]

Murray similarly rejects liberal claims that white discrimination against blacks is based on "negative stereotypes about black neighbors [that] remain firmly entrenched in white psyches."[194] According to Murray, these stereotypes, which include the idea that blacks are more prone to violence and crime, are more likely to live off welfare, and are lazier and less moral than whites, are "founded on empirically accurate understandings about contemporary black behavior compared to contemporary white behavior."[195] Therefore, whites can "reasonably fear" an influx of blacks into their neighborhoods.[196] Like D'Souza, Glazer and Murray seem to be saying that negative stereotypes about blacks are true and that improved race relations depend on black cultural and behavioral change in order to meet white approval standards.

Rational discrimination of this kind will displace the more benign aversive racism and this rationalized racism will play an increasingly important role in separating blacks and whites, defeating both open housing opportunities and open society. Rationalized racism will likely merge with aversive racism—perhaps in dialectical tension, perhaps not—to form a hybrid form of racism that will play out across the hous-

189. *See id.* at 92.

190. *See* Nathan Glazer, *A Tale of Two Cities,* NEW REPUBLIC, Aug. 2, 1993, at 40.

191. *Id.*

192. *Id.*

193. *Id.* at 41.

194. Charles Murray, *Class and Underclass,* N.Y. TIMES, May 1993, Sec. 7 (Literary Supplement), at 9 (quoting MASSEY & DENTON, *supra* note 23).

195. *Id.*

196. *Id.*

ing market. Conscientious whites, however well-meaning, will adopt rationalized racism, in part because of the weariness that stems from aversive racism.

In addition to rationalized racism operating to exclude, it also drives some whites to pay a premium to enter and live in their own segregated neighborhoods:

> FOR SALE: Three-bedroom, two-bath ranch-style house. Near good schools and good neighbors. Low taxes, low crime. Located in a *white* neighborhood. How much would you pay for this house? If you're white, a new study of housing prices suggests that you'll pay, on average, about 13 percent more than if the same house were in a racially integrated part of town.[197]

According to Harvard economists David Cutler, Edward Glaeser, and Jacob Vigdor, this 13% premium appears to be what whites are typically willing to pay, based on their study of the Cleveland, Atlanta, and Sacramento housing markets. The researchers found that the premium that whites pay in a greatly-segregated city, like Cleveland, is higher than that paid in a relatively integrated city, like Sacramento. The respective percentages in these two cities were eighteen and twelve. Cutler and his colleagues argue that this extra cost is primarily responsible "for keeping America's neighborhoods either predominantly black or white decades after legal segregation officially ended."[198]

Similarly, in looking at stable mixed neighborhoods, we find that negative racial attitudes play a role, but that they do not represent simple racial animus. One obstacle to maintaining these neighborhoods is white apprehension or discomfort that a significant presence of blacks will weaken the neighborhood's "structural position," which refers to "the aggregate of school quality, public safety, property values, and the like."[199] This neighborhood racialization hypothesis probably explains continuing resistance to significant black entry, because of its powerful aggregation tendency. As Ingrid Ellen says, "White households may not necessarily dislike living next to blacks per se; but many white households, rightly or wrongly, associate blacks with decreasing structural strength. Whether such stereotyped associations should be distinguished on moral grounds deserves lengthy discussion, but certainly they are analytically distinct. . . ."[200] Issues of rational discrimination (rationalized racism)—whites paying a premium to live away from blacks and

---

197. Richard Morin, *Whites Pay Premium To Live in Segregated Neighborhoods,* PORTLAND OREGONIAN, Jan. 25, 1998, at L14.

198. *Id.*

199. Ingrid Gould Ellen, *Welcome Neighbors? New Evidence on the Possibility of Stable Racial Integration,* 15 BROOKINGS REV. 18 (1997).

200. *Id.*

acting apprehensively about living in a racially mixed neighborhood because blacks personify a threat to its structural strength—suggest how the issue of racism is ambiguously complex in ways that transcend the old paradigms of overt bigotry. While I cannot say that there is racism at play in these scenarios, I think we should at least ask if there is.

The paradox, here, is that many whites in these settings may not be racists, but they benefit from the racism outside of themselves.[201] It is what Peggy McIntosh describes as a luxury of white privilege. As she observes, because whites are socialized to not recognize white privilege, describing it may make one "newly accountable."[202] While whites often think of racism as putting others at a disadvantage, they seldom acknowledge the corollary—that it puts them at an advantage.[203] Moreover, the bundle of white-privilege advantages includes being able to move and being relatively confident "of renting or purchasing housing in an area which [a white individual] can afford and in which [that individual] would want to live . . . [and being] reasonably sure that my neighbors in such a location will be neutral or pleasant. . . ."[204] Finally, holders of white privilege tend to assume that the appurtenant advantages are "neutral, normal, and universally available to everybody."[205] Would that it were so.

IV.   INTEGRATION WARRIORS AND FAIR HOUSING

A.   *The Huxtable Family Syndrome*

The repose of white privilege is most firmly guarded in the white space of the immediate environment of home, neighborhood, and community. Thus, in housing discrimination and residential segregation, issues of racism are not only difficult to identify, but also they are diffi-

---

201. As Stephen Shalom says:

> Most whites may not be racist. However, they benefit from a system of racism. Did you ever get a job by word of mouth? Did you ever buy a house or rent an apartment in an area from which blacks were excluded? Are you able to live in an area where you don't have to worry about whether your child will be gunned down on the way to school? Are you treated respectfully by the police? In these and countless other ways the contest is rigged not just in the past but today.

Stephen R. Shalom, *Affirmative Action Is Needed As Long As Racism Persists,* NEWARK STAR LEDGER, Jan. 30, 1997, *available in* 1997 WL 8041915.

202. *See* Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies, in* LESLIE BENDER & DAAN BRAVEMAN, POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 22-23 (1995).

203. *Id.*

204. *Id.* at 25.

205. *Id.* at 28. For excellent discussions of the operative features of white privilege in housing discrimination and residential segregation, see Martha R. Mahoney, *Segregation, Whiteness, and Transformation,* 143 U. PA. L. REV. 1659 (1995), and Margalynne J. Armstrong, *Protecting Privilege: Race, Residence and Rodney King,* 12 LAW & INEQ. J. 351 (1994).

cult to resolve because so much is at stake. Whites simply cannot take a chance that integration will adversely affect the structural strength of the neighborhood, the sense of community, and the status one derives from one's home. This in turn puts a lot of weight on black "integration warriors" as those who must prove themselves worthy of being neighbors to whites.

I have written elsewhere about integration warriors,[206] but re-sketch the subject here in order to provide thematic coherence. If integrated residential living patterns are to be achieved, it is unlikely to be a result of the ghetto poor "moving to opportunity" in the white suburbs.[207] On the contrary, those who are the most viable agents of integration are black like me, those of us who resemble the Huxtable family characters on the televised "Cosby Show." We are affluent, have the proper social profile and credentials, and are perceived as great neighbors, not threats to the structural strength of white neighborhoods. We are not the blacks who fit the profile that gives rise to rational discrimination. We translate human capital into socioeconomic status which, in turn, translates into social mobility. We have options that money can buy and we have lifestyle choices that are not available to most Americans, regardless of color. Indeed, we approximate—but only approximate—the attainment of white privilege, confirming the old saying that "money whitens." These blacks (and similarly situated Asians and Latinos) represent what I have characterized as the Huxtable Family Syndrome.[208]

According to two respected legal scholars in the field of housing, Robert Schwemm and Robert Ellickson, this is no trivial association. In Schwemm's view, "it may be that one 'Bill Cosby Show' can accomplish as much encouragement of residential integration as scores of Title VIII lawsuits."[209] Ten years ago, reflecting on twenty years of fair housing, Ellickson observed what Schwemm now endorses, that fair housing policy should attempt to make households let go of the insular emphasis on the racial homogeneity of neighborhoods and that the "Cosby Show"

---

206. *See* John O. Calmore, *Random Notes of an Integration Warrior,* 81 MINN. L. REV. 1441 (1997).

207. I do not oppose efforts to facilitate low-income families moving to the suburbs, but I criticize them as far inadequate of the need. *See generally* Michelle Adams, *Separate and(Un)Equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program,* 71 TULANE L. REV. 413 (1996). For a recent Urban Institute study on mobility through federally assisted housing, see MARGERY AUSTIN TURNER & KALE WILLIAMS, HOUSING MOBILITY: REALIZING THE PROMISE (1998).

208. *See* Calmore, *supra* note 206, at 1443-48.

209. Robert G. Schwemm, *The Future of Fair Housing Litigation,* 26 J. MARSHALL L. REV. 745, 772 (1993).

UNIVERSITY OF MIAMI LAW REVIEW [Vol. 52:1067]

could help in that process.[210] Ellickson explains that the characters in the popular television show portray a family that is "just like every other family, except, of course, that the family members are funnier and have more interesting things happen to them."[211] He thinks, therefore, that a lot of white viewers who see the Huxtables as an ordinary family will stop feeling that they do not want blacks in their neighborhood. They might, instead, see such a family as "dynamite neighbors."[212] Accordingly, such a change of racial attitudes might militate against the likelihood that white neighborhoods would tip from white to black as the latter enter in significant numbers.

This integration strategy is troubling because the Huxtables were no "ordinary" family. As you recall, Claire was an attorney and Cliff was a physician. Their five children were bright, high achievers, attractive, and altogether the family would be seen as "dynamite neighbors." Thus, the Schwemm-Ellickson view requires an extraordinary black family, like the Huxtables, to meet white acceptance as just an ordinary family. This reflects not simply white privilege, but covert white supremacy, as the unstated norm of whiteness requires that which is extraordinary from blacks to meet that norm, even though whites associate that norm with merely being like an ordinary family, if white.

More fundamentally, the "Cosby Show" struck an unconscionable bargain with its white audience. As Sut Jhally and Justin Lewis argue:

> It asks for an attitude that welcomes the black family onto TV screens in white homes, and in return it provides a picture of a comfortable, ordered world in which white people and the nation as a whole are absolved of any responsibility for the position of black people. The Huxtables' achievement of the American Dream leads them to a world where race no longer matters. This attitude enables white viewers to combine an impeccably liberal attitude toward race with a deep-rooted suspicion of black people.[213]

This observation describes the heavy burden that blacks must carry in order to escape the imposition of so-called rational discrimination noted above in the views of D'Souza, Glazer, and Murray. As William Julius Wilson notes, "[t]here is a class quality to racism."[214] The racism and discrimination that middle-class and professional blacks experience is less virulent and devastating than that experienced by poorer blacks.

---

210. *See* Remarks of Robert Ellickson, *in* THE FAIR HOUSING ACT AFTER TWENTY YEARS 60-61 (Robert G. Schwemm ed., 1989).

211. *Id.* at 61.

212. *See id.*

213. SUT JHALLY & JUSTIN LEWIS, ENLIGHTENED RACISM: THE COSBY SHOW, AUDIENCES, AND THE MYTH OF THE AMERICAN DREAM (1992).

214. William Julius Wilson, *The Poor Image of Black Men*, 8 NEW PERSP. Q. 26, 26 (1991).

The expressions of racism and discrimination, however, intersect in a complex way. According to Wilson, "the negative and worsening image of lower-class black males . . . exacerbates racial hostility because this image lends itself to overgeneralization about the entire black community."[215]

Finally, the Huxtable Family Syndrome suggests that we who reflect it can pretty much integrate in a problem-free manner. But for many of us the home represents a refuge from the otherwise often hostile world of integrated experiences, and it is therefore difficult to place yourself in an integrated residential neighborhood.[216] As John Goering notes, Huxtable-like residential "choices reflect a complex overlay of fears of white rejection and hostility, desires for better residential services for themselves and their children, preferences for those like themselves, and the dislike of deteriorating conditions in older, segregated neighborhoods."[217]

B. *The Quest for Dignity, Respect, and Acceptance*

The frustration of the affluent and middle-class is significant. Again, I return to the *Kerner Report*. In 1967, there was an early recognition that prosperous blacks were beginning to move toward opportu-

---

215. *Id.* at 27. Lawrence Graham is a black, affluent male. He graduated from Princeton and the Harvard Law School. He lives and works primarily in a white environment. Yet, he experiences Wilson's observation of the extended negative image:

> I overtip cabdrivers merely because they've stopped for me. I smile warmly just because a waitress hasn't seated me next to the kitchen door. I thank salespeople profusely when they don't throw my change on the counter.
> My friends ask me why it takes so little to make me happy—why I am so quick to thank others for barely treating me with respect. They are misinterpreting my actions. I don't overtip because I want to. I do it because I *have* to. These acts of kindness are simply my attempt to minimize the shame that I feel as a black person living at a time when the public sees us as thieves, as shoplifters, and as a general threat to good business.
> Put simply, I am a member of the black middle class trying to fight against a stereotype that is making me look bad and that I never created. I am that middle-class black who cringes each time a black person appears in the paper or on the evening news after being accused of or arrested for some heinous act.

LAWRENCE GRAHAM, MEMBER OF THE CLUB: REFLECTIONS ON LIFE IN A RACIALLY POLARIZED WORLD 85 (1995). For an insightful general discussion of "white uses of the black underclass," see FRANKLIN, *supra* note 181, at 89-116. These negative "rational" overgeneralizations extend to other people of color as well. *See, e.g.,* Yxta Maya Murray, *The Latino-American Crisis of Citizenship,* 31 U.C. DAVIS L. REV. 503, 516-59 (1998) (discussing the stigmatization of Latinos).

216. *See* FEAGIN & SIKES, *supra* note 70, at 224.

217. *Id.* at 270. Residential segregation results from a web of forces, including actually experienced discrimination and "the hostility that blacks anticipate receiving upon moving into predominately white areas." Reynolds Farley, Elaine L. Fielding & Maria Krysan, *The Residential Preferences of Blacks and Whites: A Four-Metropolis Analysis,* 8 HOUSING POL'Y DEBATE 763, 796 (1997). This view rebuts the Thernstroms's view that preferences are a product of "neutral ethnocentrism". *Id.* at 766.

nity on a track quite different from that of the ghetto poor. The hope then, as well as now, was that a significant number of the ghetto poor could change their track, which was basically leading nowhere, and get on the same track as the more prosperous blacks. Those on the viable track would report back and cultivate a welcome so that the ghetto poor would be inspired to follow their lead. In the view of the Commission:

> As Americans, most Negro citizens carry within themselves two basic aspirations of our society: to share in both the material resources of our system and enjoy its intangible benefits—*dignity, respect and acceptance.* Outside the ghetto many have succeeded in achieving a decent standard of life, and in developing the inner resources which give life meaning and direction. Within the ghetto, however, it is rare that either aspiration is achieved.[218]

Now, thirty years later, within the ghetto it is even worse on a number of levels.[219] Moreover, reports from the field of those outside the ghetto suggest that, while many have improved their lives materially, a significant number has not been successful in securing those intangible benefits of dignity, respect, and acceptance.

Exposure to integrated settings and activities outside the ghetto has caused a number of middle-class and affluent blacks to see integration as a means only, not as an end. It is a means, moreover, that too often resembles a necessary evil and, while the benefits outweigh the costs, the tradeoffs constitute a much closer balance than most would have presumed thirty years ago. As a consequence, ironically, the serious questioning of the value of fair housing's integration imperative, and the actual retreat from it by many, is part of a countermove to mitigate the damaging experience of having integrated in contexts other than housing.[220]

---

218. KERNER REPORT, *supra* note 7, at 204.

219. As reported by the American Assembly, there is a link between racism and economic segregation:

> Discrimination has diminished hope and opportunity for many racial and ethnic groups concentrated in distressed communities, and has been especially pernicious and persistent with respect to people of color. For example, over the last twenty years, the number of persons living in areas of high poverty has doubled from four to eight million, with three-fourths of all poor African-Americans living in such neighborhoods. The ravages of racism have destroyed families and lives and our sense of national community.

THE AMERICAN ASSEMBLY, COMMUNITY CAPITALISM: REDISCOVERING THE MARKETS OF AMERICA'S URBAN NEIGHBORHOODS 16-17 (1997). It should be noted that the American Assembly is no left-wing organization. This project, for instance, was headed by Hugh L. McColl, Jr. the chairman and chief executive officer of NationsBank. *See id.* at 1.

220. John O. Calmore, *Spatial Equality and the Kerner Commision Report: A Back-to-the-Future Essay, in* RACE, POVERTY, AND AMERICAN CITIES, *supra* note 10, at 309, 316-17 (distinguishing between linear, coherent integration and fragmented, compartmentalized integration).

Consider the illustrative story of the Hill family.[221] By all accounts, David Hill is a black man who made it. He is the son of a mailman and a schoolteacher, who grew up in a working-class neighborhood in Detroit. After graduating from the University of Michigan Dental School, he opened an office in downtown Detroit. His wife is an attorney and they have two children. The family income is $140,000. This family represents a paradigm Huxtable family, an authentic integration-warrior family. As the story goes, however, "there's one thing missing from this portrait of the American success story: a house in the suburbs. Hill chose instead to buy his dream home in an older Detroit neighborhood not far from where he grew up. 'I never thought the suburbs were the answer,' says Hill, 34."[222] The Hills are *not* atypical. In a nationwide trend "that is defying predictions made in the 1980s, professional and middle-class blacks are snubbing the suburbs and leading a new gentrification movement in cities . . . ."[223] According to a computer-assisted analysis of unpublished Census Bureau data from 1990-1996, the percentage of black households which earn in excess of $75,000 a year and live in cities was exactly the same in 1996 as it was in 1990, that is, 48%.[224] While the number of black households earning between $25,000 and $75,000 increased 19.4% to almost five million during these years, "millions stayed in the city instead of fleeing to the suburbs."[225]

Regardless of class, there is the experience and the perception of white resentment toward blacks. In the suburbs, blacks perceive that they would be unwelcome, isolated, and, perhaps, at risk of physical violence.[226] This discomfort extends from experiences in various mixed settings, from college campus to work site to public space. Black reaction impairs strong motives to integrate residentially. This reaction is explained by three factors. First, there is a desire to link residence with a sense of community that is missing within the context of predominantly white places, particularly white suburban neighborhoods. Second, there is a profound integration fatigue that is compounded by the

---

221. *See* Haya El Nasser, *Black Flight a Myth: Growing Middle-Class Isn't Fleeing to Suburbs*, USA TODAY, Oct. 23, 1997, at 1A.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. According to David Bosits of the Joint Center for Political and Economic Studies, "If a black person moves in, even if in every respect they're similar to their white neighbors, there will be people who will suspect that they're less trustworthy and more likely to commit a crime." *Id.* Elijah Anderson, an ethnographer at the University of Pennsylvania, describes the sense of isolation, observing, "There's a sense that the white society is a lot more resistant to blacks . . . . It's safer to be close to black communities." *Id.*

alienation and distrust of whites that is associated with the black experience of having "integrated" dominant institutions and parts of society. Finally, the heavy burdens of having to personify "the acceptable Negro" and assimilated token in order to succeed on mainstream terms is taking its toll, a sociological burden I have likened to that of "passing" biologically as white. In short, the quest for material benefits through integration is in acute tension with being able to find within integration a sense of belonging that is enhanced by the accoutrements of dignity, respect, and acceptance.

My claims here may appear incredible to most whites. Many would agree with Senator Moynihan that these are inappropriate agony narratives that represent the story of those blacks who are "caught with the legacy of grievance which is inappropriate to their condition."[227] Worse, this story really detracts from the concern that we ought to be giving to the ghetto poor, the "truly disadvantaged," to use William Julius Wilson's apt term. This story is that of denial or delusion, a failure to acknowledge and appreciate how much better things are for blacks who are prospering than they were thirty years ago. Still, however, residential integration will be an increasingly hard sell if the privileged class continues to "retreat from a 'mainstream' they have come to feel is an irremediably hostile place."[228]

When I speak of blacks "choosing" to live in black neighborhoods I do not mean to suggest that segregation is literally voluntary. In reality, this option is often one of default or retreat. Under these circumstances, self-segregation is defensive and not an attempt to re-summon black nationalist orientations. Indeed, the African-American quest for fair housing really does involve integration *warriors*. Unless the nation, from the White House down, can really commit to fair housing, however, their fight will continue to frustrate not only them, but also the nation's efforts to achieve an open society.

C. *Asians, Latinos, and "Post-Kerner Report" Cities*

The increasing Asian and Latino populations have greatly broadened racial and ethnic diversity in the United States over the last thirty years.[229] The Thernstroms cite these dramatic demographic changes in

---

227. *See* COSE, *supra* note 70, at 33 (recalling a conversation with Senator Moynihan).

228. *Id.* at 188. According to Cose, even though prosperous, a significant number of the black middle-class is in "excruciating pain," because the nation has broken the covenant "that if you work hard, get a good education, and play by the rules, you will be allowed to advance and achieve to the limits of your ability." *Id.* at 1.

229. According to the 1990 Census, non-Hispanic whites numbered 199,666,000, or 83% of the nation's total population of 248,710,000. Blacks were 29,986,000, or 11.7%. From 1980 to 1990, the Asian-Pacific Islander population grew almost 108% to a total of 7,274,000. Among

support of an argument that the Kerner Commission was wrong to conclude that the nation was moving toward two separate and unequal societies of blacks and whites.[230] Since 1965, the heavy influx of Asians and Latinos has helped create the "multicultural metropolis." As a result, Los Angeles is viewed as a paradigm "post-Kerner Report metropolis—a major city in which African Americans are not the dominant element of the minority population."[231] In Los Angeles, for example, the population is 40% Latino, 10% Asian and 14% black.[232] In five other cities among the twenty largest, blacks are not the dominant non-white group. Those cities include San Diego, Phoenix, San Antonio, San Jose, and San Francisco. In Houston, blacks and Latinos are each 28% of the population.[233] In other large cities, such as New York, Chicago, Dallas, and Boston, although blacks are still the dominant non-white group, there are significant numbers of other nonwhites.

While there are black-city, white-suburb configurations in such cities as Cleveland, Detroit, Philadelphia, Memphis, Milwaukee, New Orleans, St. Louis, and Washington, D.C., the Thernstoms argue that in "the more dynamic corners of urban America, . . . the simple two-tone black and white portrait drawn by the Kerner Commission is as outmoded as an old-fashioned black and white movie."[234] Thus, the Thernstroms, in contrast to Massey and Denton, see the future of the United States as significantly open to residential integration and not plagued by "an American apartheid." The fact is, however, that the open society reflected in the residential patterns of Asians and Latinos does not suggest a similar openness for African Americans.[235]

---

them are 1,645,000 Chinese, 1,407,000 Filipinos, 848,000 Japanese, 815,000 Asian Indians, 799,000 Koreans, and 615,000 Vietnamese. Among those of Hispanic origin, who may be of any race, there was an increase of 53% growing to a total of 22,354,000. Among them are 13,496,000 Mexicans, 2,728,000 Puerto Ricans, 1,044,000 Cubans, and 5,086,000 of other Hispanic origin. U.S. Bureau of the Census, 1991 PRESS RELEASE CB91-216.

230. THERNSTROM & THERNSTROM, *supra* note 58, at 209-10.

231. *Id.* at 210.

232. *Id.* at 208, Table 2 (citing 1990 Census data).

233. *Id.*

234. *Id.* at 211.

235. *See generally* Louie Albert Woolbright & David J. Hartmann, *The New Segregation: Asians and Hispanics, in* DIVIDED NEIGHBORHOODS: CHANGING PATTERNS OF RACIAL SEGREGATION 138 (Gary A. Tobin ed., 1987). Nevertheless, I am trying to be careful to avoid trivializing significant racist practices that continue to impede the general anti-subordination progress of Asians and Latinos, notwithstanding their relatively better access to open housing, by heeding the words of Rachel Moran: "Without a monolithic racial label, Latinos are presumed to be less disadvantaged than Blacks. This approach at times trivializes the genuine discrimination, both historical and contemporary, that impedes Latinos' educational and economic advancement." Rachel F. Moran, *What if Latinos Really Mattered in the Public Policy Debate?*, 85 CAL. L. REV. 1315, 1338 (1998). With the exception of Puerto Ricans, Moran concedes that Latinos are advantaged over blacks in the context of open housing access. *Id.* at 1336. *See id.* at 1332 (regarding the particular disadvantages of Puerto Ricans).

Generally, neither Asians nor Latinos experience the degree or kind of segregation that blacks experience. In contrast to blacks, for those groups, socioeconomic advances translate into residential deconcentration and integration.[236] Primarily, those who are poor or who are recent immigrants who seek the connection and support of an ethnic enclave are the ones who experience Asian and Latino segregation. Sometimes, new immigrants, particularly from Central America or Mexico, will reside in poor black neighborhoods. But for both Latinos and Asians generally, as Massey and Denton point out, "segregation generally begins at a relatively modest level among the poor and falls steadily as income improves."[237] Indeed, no ethnic group of Asians or Latinos is "hypersegregated"[238] and Asians and Latinos tend to experience segregation that is temporary rather than permanent.[239] Generally, Asians and Latinos have moved to integrated, quality suburbs and have been spatially assimilated to a large degree.[240]

---

236. A Rand study of Mexicans in Los Angeles concluded:

> The degree of residential segregation between Anglos and Latinos is directly related to the proportion of immigrants in the Latino community and to the average socioeconomic levels of Latinos. The higher the proportion of native-born and the higher the status of Latinos and Anglos are. Moreover, unlike the patterns for blacks, an influx of Latinos into an area does not appear to precipitate an outflow of Anglos. Thus, with increasing exposure to U.S. society and continued upward mobility, Latinos blend into the larger society.

PETER SKERRY, MEXICAN AMERICANS: THE AMBIVALENT MINORITY 69-70 (1993) (quoting KEVIN F. MC CARTHY & R. BUCIAGA VALDEZ, CURRENT AND FUTURE EFFECTS OF MEXICAN IMMIGRATION IN CALIFORNIA 63 (1987)). *See also* Douglas S. Massey & Nancy Denton, *Trends in the Residential Segregation of Blacks, Hispanics, and Asians: 1970-1980,* 52 AM. Soc. REV. 803, 817 (1987). Skerry's overall theme is that Mexicans are not significantly racialized and their orientation is more like European ethnics than American blacks. Hence Skerry is criticized for deracializing Mexicans and implying that remedies for racial discrimination should not apply to Mexicans. Ian F. Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory,* 85 CAL. L. REV. 1143, 1205-1207 (1998). Yet, in spite of spatial assimilation, political and economic assimilation for many Latinos remain elusive. Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience,* 85 CAL. L. REV. 1259, 1281 (1998).

237. MASSEY & DENTON, *supra* note 23, at 87.

238. *Id.* at 77.

239. A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 144-45 (Gerald D. Jaynes & Robin M. Williams, Jr., eds., 1989).

240. *See generally* YEN LE ESPIRITU, ASIAN AMERICAN PANETNICITY: BRIDGING INSTITUTIONS AND IDENTITIES 29-30 (1992); J. JOHN PALEN, THE SUBURBS 148-49 (1995). I want to make two important points about this spatial assimilation. First, although Asians and Latinos are relatively less segregated than blacks, they still face significant exposure to discrimination in the housing market. It may be that because of a different history, they are more willing to be integration pioneers. It may be that whites treat them as buffer minorities who are positioned between whites and blacks. The relatively less segregation for Asians and Latinos, however, does not necessarily mean that their integration is a problem-free process or result. Second, because I am primarily focusing on people of color who are viable integration warriors, I am not addressing the serious subordination of people of color, primarily blacks, Mexicans, and Puerto Ricans, who live within the constraints of concentrated, neighborhood poverty. See WILLIAM JULIUS WILSON, THE TRULY

Latino immigrants tend to be poor and suffer the constrained choices that are associated with immigrant poverty. A significant portion of these immigrants are low-wage laborers and progress tends to be projected generationally as socioeconomic status and access to the broader opportunity structure are improved. It may be, however, that second and third generations of these immigrant families will not overcome society's racism and not follow the path of the earlier generational advances of European immigrants.

One reason it is important to disaggregate Latino ethnic groups in addressing their housing issues is that the groups tend to be concentrated in different regions and their opportunities and the resistance to those opportunities are different in the various regions. Racist legacies are different. Half of the Latino population resides in California and Texas, and when we add the states of New York, Florida, and Illinois the proportion rises to 75%.[241] Those residing in California and Texas are primarily Mexicans and Central Americans, while those residing in New York and other Northeastern states are primarily Puerto Ricans and those residing in South Florida are primarily Cubans. These regional differences implicate the patterns of segregation that the various groups have experienced. According to John Palen, historically, segregation has been the most common in border states such as California and, particularly, Texas. Beyond these border states, he finds, "economics rather than ethnicity has played the major role in determining residential patterns. Housing segregation never became institutionalized elsewhere as it did in Texas and California."[242] Additionally, analyses of school data indicate an increasing degree of segregation for poor Latinos in California and Texas.[243]

In spite of this instinualized border-racism, the residential segrega-

DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 58 (1987) (discussing the concentration effects of inner-city poverty). From 1970 to 1990, the number of neighborhoods with at least 40% poor people more than doubled and the total number of persons residing in such neighborhoods grew from 4.1 million to 8 million people. PAUL A. JARGOWSKY, POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY 30 (1996). During this period, the number of African Americans living within these ghetto circumstances increased from 2.4 million to 4.2 million and Latinos living within these barrio circumstances increased from 729,000 to 2 million, most of these being immigrants. Id. Moreover, within public housing projects, Southeast Asians, like the Vietnamese and Cambodians, are targets of racial violence and harassment within public housing projects. Edward Epstein & Jason B. Johnson, *S.F. Board Argues Over Project's Race Tensions,* S.F. CHRON., Aug. 4, 1998, at A13 (discussing "the long standing allegation that Asian-American residents of predominantly African American projects are being targeted for racially motivated crimes.") *See also* Emelyn Cruz Lat, *Asians Sue S.F. Housing Authority,* S.F. EXAM., March 11, 1998, at A1.

241. PALEN, *supra* note 240, at 146.

242. *Id.* at 148.

243. Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society,* 80 MINN. L. REV. 825, 841 (1996).

tion of Mexicans is less than one would expect in light of their generally low social and economic status and the high proportion of foreign-born.[244] Instead, Mexican-American segregation is comparable to that of many European groups early in this century.[245] While "Mexican-Americans have a high rate of acceptance into white neighborhoods, . . . at the same time large numbers are becoming trapped in inner-city barrios."[246] As "illegal immigration" increases, the problem of segregation also increases. In turn, there is increased tension in the Mexican-American population between the "haves" and "have nots".[247]

Cubans tend to be the most affluent and integrated of the Latino groups. Before the Cuban revolution caused thousands of Cubans to flee the Fidel Castro regime, there was only a small number of Cuban communities in the United States.[248] In many ways, the first large influx of Cubans who came resembled a "model minority." Those who came were in the best position to access the nation's opportunity structure.[249] Many Cuban Americans were middle-class businessmen and professionals who, although fleeing Fidel Castro's Cuba, came to the United States with marketable skills and professions.[250] According to Louie Woolbright and David Hartmann, moreover, the federal government greatly facilitated their assimilation, as they benefited from federal assistance that was not provided to other Latino groups.[251] That assistance included special programs to teach Cubans English, to facilitate vocational training and job placement, and to distribute them broadly to prevent their being segregated.[252] They were thus able to access the national job and housing markets. The federal government also aided Cubans to become licensed and certified so they could continue to work in their middle-class jobs, validating their credentials in the United

---

244. It is noted:

> Greater differences exist between different segments of the Mexican American population than any of the other Asian and Hispanic groups . . . . Despite some success in assimilation, Mexican Americans have suffered from a history of discrimination, subordination, and segregation. Many entered the United States as a conquered people and quickly lost their lands and became disenfranchised. Discrimination denied them education and employment skills, and most occupy the lowest occupational status in the Southwest. Also, since Mexican Americans are the group with the highest proportion of illegal residents, many are exploited and abused, particularly in the areas of employment and housing.

Woolbright & Hartmann, *supra* note 235, at 146.
245. *Id.* at 149.
246. *Id.* at 150.
247. *Id.*
248. *Id.* at 151.
249. *Id.*
250. PALEN, *supra* note 240, at 147.
251. Woolbright & Hartman, *supra* note 235, at 151.
252. *Id.*

States.[253] With the increasing concentration of Cubans in South Florida, however, they have become more segregated, particularly in Miami, while nonetheless succeeding in integrating older middle-class neighborhoods throughout the metropolitan region.[254]

Puerto Ricans, largely residing in New York, are the poorest, most segregated of the Latino groups. Many Puerto Ricans resemble African Americans in appearance, because of the high rate of intermarriage. Many Americans actually consider a significant number of them to be black and consequently they face similar treatment in the real estate market. Also, the Puerto Rican urban poor resemble the black poor in their proportion of female-headed families, welfare recipients, and central-city residents.[255]

Most Puerto Ricans came to the United States at the wrong time and to the wrong region. Most arrived during the 1950s, "when economic opportunities were relatively restricted in many Northern cities where they first settled."[256] This, too, placed them within a housing predicament similar to many blacks. Puerto Ricans came to Northeastern cities that were experiencing economic decay, an aging housing stock, and high levels of segregation. Over time, Puerto Rican space was racialized in ways similar to that of African-American ghettos: "Many whites began to fear that the coming of Puerto Ricans signaled neighborhood decay, crime, and social disorganization. As a result, Puerto Ricans are as residentially segregated as blacks, having low rates of suburbanization and being confined to the inner cities of the Northeast."[257]

Asian immigrants and refugees greatly vary in income status, with such groups as the Vietnamese, Laotians, Cambodians, and Hmong having very high poverty rates. These groups also tend to be the ones which have most recently arrived and have very small proportions of college graduates and managers or professionals.[258] For each of these groups, over 65% is foreign-born, so class subjugation will likely intersect with nativistic racism to impede their open-housing progress.[259] Many from

253. Id. at 151-52. See also Johnson, supra note 236, at 1284 n.90, pointing out that we should distinguish between different stages of Cuban immigration as Cubans who came to the United States prior to 1980 were mostly white and found greater economic, social, and political acceptance than those who came in the Mariel Boatlift, many of whom were black Cubans.

254. Raymond A. Mohl, Creating Miami's "Second Ghetto": Racism and the Cuban Coming, MIAMI TIMES, Feb. 9, 1995, at 4C.

255. Moran, supra note 235, at 1322 n.26.

256. Woolbright & Hartmann, supra note 235, at 150-51.

257. Id.

258. U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990s 17 (1992).

259. As Bob Chang and Keith Aoki indicate, "Nativisitic racism is not just an intersectional

these groups will·concentrate in ethnic enclaves, not really pushing, at first, a fair-housing campaign. These groups, however, make up less than 15% of the Asian-Pacific Islander population.[260]

Unlike Latinos, various Asian ethnic groups are more likely to reside together in metropolitan areas.[261] While refugees have been scattered, over 60% of the Asian population lives in just three states, California, New York, and Hawaii.[262] As of 1990, 39.1% lived in California.[263] Within these areas, the test of fair housing in the near-future will most likely implicate five Asian ethnic groups, which will most significantly test the fair-housing promise of an open society: Chinese (22.6% of total), Filipino (19.6%), Japanese (11.6%), Asian Indian (11.2%), and Korean (11%).[264] With the exception of Japanese, whose percentage of foreign-born is 32.4%, each of these groups has a foreign-born population of over 60%.[265]

Since exclusionary restrictions were removed in 1965, the Asian foreign-born residing in the United States are quite different from their predecessors. Although this group continues to include people from earlier sources such as China and the Philippines, new countries now supply the recently arriving immigrants. As with the earlier groups of Cubans, a significant number of these immigrants come to the United States already possessing the social and human capital that enables them to exercise residential mobility, bypassing the ethnic enclaves others have to work their way out of.[266] As commentators have mentioned: "[T]here is a tendency for new Asian immigrants to be heavily drawn from the middle class. Many Asian immigrants are educated, urban individuals who come to the United States as professionals, technicians,

---

term, but signifies that both nativism and racism are mutually constitutive of the other and operate in tandem to preserve a specific conception of the nation." Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination,* 85 CAL. L. REV. 1395, 1401 (1998).

260. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 258, at 17.

261. In 1990, 90% of all Asian-Pacific Americans resided in urban areas. Most were geographically concentrated in Western states. ASIAN AMERICANS/PACIFIC ISLANDERS IN PHILANTHROPY, AN INVISIBLE CRISIS: THE EDUCATIONAL NEEDS OF ASIAN PACIFIC AMERICAN YOUTH 11 (1997) [hereinafter AAPIP]. Belying the image of migrant worker, ninety-three percent of Latinos reside in metropolitan areas. PALEN, *supra* note 239, at 148. But the respective Latino ethnic groups tend not to cluster in the same metropolitan areas.

262. AAPIP, *supra* note 261, at 11.

263. *Id.*

264. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 258, at 15.

265. AAPIP, *supra* note 261, at 10.

266. According to Palen, "Unlike poor blacks or Hispanics, who often find themselves locked into older central-neighborhoods, legal Asian and other foreign immigrants tend to settle immediately into those suburban neighborhoods where employment opportunities are greatest and incomes the highest . . . [bypassing] the traditional American pattern of settling first in the central city and then later moving to the suburbs." PALEN, *supra* note 240, at 152.

managers, and small business owners."[267] The United States Immigration Act of 1965 gives a preference to people who are well-trained and to those who have capital to invest, but Congress "did not anticipate, however, that people form *Asia* would fill these slots."[268]

It is perhaps too soon to tell whether Asians who reflect the Huxtable family syndrome will confront a similar racism as do blacks. Currently, 50% of Asians now live in the suburbs, making them a little more suburban than whites.[269] Moreover, it appears that while there are Asian neighborhoods in large metropolitan areas, Asian ethnic enclaves "are more a consequence of selection than segregation. Asians [generally] have not been subject to the same exclusionary housing practices that have been part of the historical experience of African Americans."[270] Given the advantages of their class background, many Asians live in affluent suburbs in order to take advantage of good public schools, with homes commonly purchased because they are located in school districts that have the highest SAT scores.[271]

Over time we are likely to see a successful residential integration of Asians that will reflect either a distinct cultural pluralism or one that resembles earlier European assimilation. Housing developers in some areas target very affluent Asian customers by emphasizing an Asian character to some of the neighborhood amenities[272] and by building houses that reflect Asian cultural influences.[273] However, we may also see that Asian ethnicity will be racialized in ways that will be harmful.

---

267. Paul Ong et al., *The Political Economy of Capitalist Restructuring and the New Asian Immigration, in* THE NEW ASIAN IMMIGRATION IN LOS ANGELES AND GLOBAL RESTRUCTURING 3, 24 (Paul Ong et al. eds., 1994).

268. *Id. See also* Chang & Aoki, *supra* note 259, at 1423 (discussing the influx of capital as well in Monterey Park, California).

269. PALEN, *supra* note 240, at 149.

270. *Id.*

271. *Id.* at 152.

272. Marion Bond, *Where East Meets West, Rowland Heights: In an Area Where a Ranch and Wheat Farms Once Stood, a Community Flourishes with a Burgeoning Asian Influence,* L.A. TIMES, April 21, 1996, at K1.

273. For instance, consider the following:

> To the untutored eye, these are simply nice new homes perched on a ridge. Walk through the models, with their comfy decor and gleaming kitchens, and you still might not see anything unusual.
> But wait. That bin near the kitchen sink? That's to store up to 50 pounds of rice. The flame on the gas range is four times as powerful as on most stoves—the better to stir-fry in a wok. Floor plans offer up to eight bedrooms for extended families. And the low cabinet in the foyer is to stash shoes as you enter the house.
> The subtle message: Welcome, Asian home buyer. . . .
> "Builders recognize that a white, two-child, two-parent family is not the only market anymore. At Walnut Estates, we are targeting an affluent Asian executive family," says Terrance Hanna. . . .of J.M. Peters.

Denise Hamilton, *Developers Trying to Make Asian Buyers Feel at Home in Southland,* L.A.

As some have observed, "[s]econd and third generations, educated in the United States and exposed to racism without the 'excuse' of being 'foreign' and speaking English with an accent, may find racism increasingly jarring and discover common ground with other groups of color."[274]

Although Asians are predominantly successful in their efforts at spatial assimilation, a significant pan-ethnic problem is the experience of racial intimidation and violence, including residential integration of neighborhoods leading to "move-in violence."[275] Asians are often subjected to harassment and vandalism in their own homes and to various forms of intimidation directed at them to keep them from living or working in a specific neighborhood. Nativistic racism comes into play here as Asians are stereotyped as "foreign invaders." For example, the U. S. Commission on Civil Rights reports that in 1981, shortly after moving into a new house in Portland, Maine, a Cambodian man was playing in the snow with his children. A group of neighbors hit him on the head with a rock hidden in a snowball. As he approached his so-called neighbors, one of them said, "Go back where you came from, gook."[276]

Those such as the Thernstroms point to the positive experiences of Asians and Latinos in Los Angeles as evidence of racial progress toward an open society. But in the Los Angeles metropolitan area, there is a racial hierarchy of "most preferred neighbors" that stratifies whites on top, followed in order by Asians, Latinos, and blacks.[277] In a county

---

TIMES, June 17, 1995, at N1. This rebuts the old saw that money whitens. It takes a lot of money, however, as the homes in this story ran about $500,000.

274. Ong et al., *supra* note 267, at 327. Paradoxically, society views Asians as a model minority and as permanent foreigners. Consider this clash of images in the case of Asian Stanford students who recovered $300,000 for alleged housing discrimination when they attempted to rent a house in Menlo Park, California. The lessor allegedly told the women that she already had "good white American applicants" and that "you people are ruining this country." Carolyne Zinko, *Stanford Students Settle Housing Suit Over Racial Slurs,* S.F. CHRON., Feb. 11, 1998. at A17.

275. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 267, at 22.

276. *Id.* at 31. *See generally* NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, 1996 AUDIT OF VIOLENCE AGAINST ASIAN AMERICANS: THE VIOLENT IMPACT ON A GROWING COMMUNITY 1 (1996) (reporting anti-Asian violence had increased 17%, in contrast to FBI reports of a 7% general decline in 1996). The Fair Housing Act prohibits interference, coercion, or intimidation to prevent the exercise or enjoyment of fair housing rights. 42 U.S.C. §§ 3617 and 3631 (1994). *See generally* Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority,* 37 WM. & MARY L. REV. 69 (1995).

277. According to a news report in the *Los Angeles Times,* a study by Camille Zubrinsky and Lawrence Bobo found: "In surveys and interviews of 4,025 Los Angeles County residents, all ethnic groups showed some willingness to live in mixed neighborhoods. The comfort level dropped sharply for Asians and Latinos if hypothetically more than a third of their neighbors were to be black." Larry Gordon, *Prejudice Called Main Cause of Housing Segregation: Angelenos Have Become More Open to Diverse Neighborhoods, But Evidence of Racial "Hierachy" Is Found,* L.A. TIMES, Dec. 23, 1996, at B1.

survey, about 28% of blacks interviewed said they had experienced housing discrimination, whereas 9% of Latinos and 5.8% of Asians said they had experienced such discrimination.[278] Moreover, the Los Angeles County Human Rights Commission reported in 1989 that there were 167 racially motivated hate crimes; approximately 60% were anti-black, with almost 70% taking place at the victim's residence.[279] Therefore, whatever Los Angeles represents for the Thernstroms, for blacks it is just another hypersegregated city.[280]

Asians, Latinos, and African Americans are not fungible minorities, and how one group is treated may say very little about how another is treated in the housing market. Indeed, how one Latino or Asian ethnic group is treated may say very little about how another is treated. Moreover, although housing is very important, the absence of segregated living does not mean that Asians and Latinos live free of racism. The Thernstroms are too quick to point to Los Angeles as we now know it as the ideal multicultural future and to dismiss the *Kerner Report* as obsolete.

If we are truly to have an open society we must accommodate everybody. To better assess the potential to do that, we must learn more about those who are neither black nor white. So much of our analysis of race is limited to the context of blacks and whites. Yet, when we take into account other people of color we inappropriately lump them as Asians or Latinos. But as these racialized ethnic groups experience issues around space and location, there is a great need to disaggregate people of color to appreciate how class, ethnicity, immigration and race affect them. Moreover, as this brief sketch indicates, other factors must be taken into account—when foreign-born peoples arrived in the United States, what they brought, and where they located are important to appreciate their potential and desire to assimilate in ways similar to those of earlier European immigrants or, instead, to further challenge the characterization of the nation as a white-burning melting pot. What happens spatially in the lives of Asians and Latinos will reinforce the nation's orientation to a closed society or help to reorient the nation and move us to a more open one.

D. *Practicing the Open-Housing Commitment*

Ten years ago, Judge Guido Calabresi, then Dean at Yale Law School, reminded us of something that we must continue to reiterate. He said, "I would like to underscore the historical point [that] the govern-

---

278. *Id.*

279. MASSEY & DENTON, *supra* note 23, at 90.

280. *Id.* at 77, Table 3.4.

UNIVERSITY OF MIAMI LAW REVIEW [Vol. 52:1067]

ment of this country, on the national as well as the local level, for many years and until very recently, pursued a policy of encouraging segregated housing."[281] More recently, in 1995, Roberta Actenberg, then HUD Assistant Secretary for Fair Housing and Equal Opportunity, acknowledged this same sad history.[282] She observed that the Fair Housing Act represented a national commitment to turn that history around and to end discrimination in housing: "we entered into a compact with each other and future generations to guarantee that no one in this country—no one—would ever again be denied access to housing because of his or her race, religion, or national origin."[283] Inherent in the original Fair Housing Act and the extended commitments of the 1988 Amendments "was an understanding that housing is fundamental to economic and social opportunity. It was understood by Congress and the nation that, in order for people to lift themselves and their children to a better life, they must first be able to obtain affordable housing in decent, safe communities."[284]

Thus, it is difficult to overstate the importance of our proper commitments to fair housing. Lawrence Bobo correctly describes residential segregation as "the structural linchpin" of America's racial inequality.[285] To appreciate this observation, we should consider for a moment the literal meaning of "linchpin." In one sense, a linchpin is "a pin that goes through the end of an axle outside the wheel to keep the wheel from coming off."[286] The linchpin, in this sense, would empower and enable racial inequality to keep rolling. Therefore, the structure of racial inequality cannot be dismantled without removing the linchpin of residential segregation and its complementary evils of discrimination and exclusion. Racial inequality, with the linchpin intact, rolls on, carrying with it denied or diminished opportunity in education, employment, and

---

281. Guido Calabresi, *Preface* to THE FAIR HOUSING ACT AFTER TWENTY YEARS *supra* note 210. *See also* Robert A. Solomon, *Building a Segregated City: How We All Worked Together*, 16 ST. LOUIS U. PUB. L. REV. 265 (1997); Reggie Oh, Comment, *Apartheid in America: Residential Segregation and the Colorline in the Twenty-First Century*, 15 B.C. THIRD WORLD L.J. 385 (1995); and Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Integration*, 81 IOWA L. REV. 479 (1995).

282. Roberta Achtenberg, *Keynote Address* to Symposium, *Segregation, Housing & the Urban Poor*, 143 U. PA. L. REV. 1191 (1995). Still, as President Clinton has said, "We can do better. We can start by making sure that our own Federal policies and programs across all of our agencies support the fair housing and equal opportunity goals to which all Americans are committed." *Memoranda of President—Federal Leadership of Fair Housing*, 59 F.R. 8513 (Jan. 17, 1994), published at 42 U.S.C.A. § 3608 (1998).

283. Achtenberg, *supra* note 282, at 1191.

284. *Id.* at 1191-92.

285. MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 33 (1995).

286. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 491 (1969).

wealth accumulation. The wheels are much more than merely where the rubber meets the road—rather, these wheels are instead vicious cycles of subordination.

In another sense, a linchpin is "something that serves to hold together the elements of a situation."[287] It is crucial for us to more fully appreciate that in segregated space the oppressive elements of the situation often coalesce and are experienced in simultaneity.[288] Here, the elements are those of geographic racism. And while things have grown more complicated since the *Kerner Report*, geographic racism remains. It has mutated and become more multifaceted, but no less oppressive, divisive, polarizing, and stratifying.

Various social science studies and polls reveal that whites are generally committed to open housing in principle, but there is a significant loss of commitment in practice. There is a variety of suggested answers to this conundrum. In one response, Paul Sniderman and Thomas Piazza argue for the need to separate policy issues related to fair housing from those such as welfare and affirmative action, because our contemporary discussion of race fails to distinguish between what whites think about blacks from what they think about the range of policies dealing with blacks.[289] They claim further that the factor of prejudice must be placed within specific policy contexts. Prejudice is still an important impediment to race relations, but it does not dominate white reaction to the extent that whites reject across-the-board public policies that are directed to assist blacks.[290]

Whites, for instance, so oppose affirmative-action policies that they have come to dislike blacks themselves as a consequence of the perceived unfairness of affirmative action. Relatedly, there is a white "judgment that blacks are not making a genuine effort to cope with their problems [and this] has as heavy an impact on the political thinking of a person who is *not* prejudiced as it does on the thinking of one who *is*."[291] Of course, the initial judgment itself may be a function of prejudice.

Nonetheless, the larger point is well-taken that it is now inappropriate to speak in terms of the issue of race. Conflicts over racial policy are

---

287. *Id.*

288. David Harvey, *Class Relations, Social Justice and the Politics of Difference, in* PLACE AND THE POLITICS OF IDENTITY 41, 56-67 (Michael Keith and Steve Pile eds., 1993). *See generally* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis, in* CRITICAL RACE THEORY, *supra* note 112, at 449.

289. *See* SNIDERMAN & PIAZZA, *supra* note 47, at 7-8.

290. *See id.* at 13.

291. *See id.* at 8.

fueled by different norms, fears, and projected gain and loss.[292] In this respect, according to Sniderman and Piazza, a distinctive feature of fair housing "is the call to use the force of law to back the principle of equal treatment in a 'private' context—to intervene in decisions which people would ordinarily take to be their own business."[293] Consequently, they suspect that some whites may oppose open-housing laws because they oppose enlarging the area of private choices that are subject to legal regulation.[294]

In contrast to the Sniderman-Piazza view, others conclude that "[o]n the basis of current evidence, opposition to government implementation of equal treatment and integration appears to be based much more on lack of strong commitment to those goals than on the role of the government itself."[295] Indeed, Donald Kinder and Lynn Sanders criticize the Sniderman-Piazza view, because it implies that "when it comes to understanding the political views of white Americans, race prejudice simply isn't that important."[296] They claim, instead, that today's racism reflects neither prejudice alone nor traditional values alone, but, rather, a combination of both.[297] It is the resultant racial resentment of blacks that is a substantial barrier to really committing to fair housing and an open society. In Part V, I argue that we must re-contact with each other to set the stage for these commitments to become viable. There are encouraging signs that interracial contact could improve relations, with whites especially benefiting.[298] I now turn to that potential.

---

292. *See id.* at 12.

293. *See id.* at 124-25.

294. *Id.* at 127. Historically, the tension between liberty and equality interests has been resolved in favor of the former, and this has significantly impeded fair-housing progress. As Dorothy Roberts has argued, even though it would violate the most basic American freedoms to mandate that white homeowners live next to black neighbors, personal choice of whites has represented a "personal revulsion of blackness [that] attains the stature of a protected liberty interest that supersedes blacks' interest in social and economic participation." Dorothy E. Roberts, *The Priority Paradigm: Private Choices and the Limits of Equality*, 57 U. PITT. L. REV. 363, 379 (1996).

295. HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 304 (rev. ed. 1997). According to Massey and Denton:

> Although 88% of whites in 1978 agreed that blacks have a right to live wherever they want to, only 40% in 1980 were willing to vote for a community-wide law stating that "a homeowner cannot refuse to sell to someone because of their race or skin color." That is, as recently as 1980, 60% of whites would have voted against a fair housing law, even though one had been on the federal books for a dozen years.

MASSEY & DENTON, *supra* note 23, at 92. In a more recent replication of this survey, in 1995, the percentage of those favoring the open-housing law rose to 64%. Still, however, 36% opposed it, even though the Fair Housing Act had been on the books for over twenty-five years. SHUMAN ET AL., *supra* at 302-03.

296. KINDER & SANDERS, *supra* note 46, at 269.

297. *Id.* at 292.

298. *See* Nancy A. Denton, *The Persistence of Segregation: Links Between Residential*

V. RECONSIDERING THE "CONTACT HYPOTHESIS" AND DEEPENING INTEGRATION

A. Revisiting the "Contact Hypothesis"

Fair housing presents special problems for improving relations through interracial contact between blacks and whites. For instance, white support for equal treatment norms is greatest when intergroup contact is random and impersonal rather than persistent and intimate.[299] For integration to be a more viable part of the fair housing campaign, white people must carry more weight. First, whites must interrogate and delegitimate aspects of the advantage they derive from racism and assume risks that would allow them to overcome the tendencies of aversive racism. Second, whites must be alert to the attractive nuisance features of rational discrimination and be careful not to become entrapped by them. Third, whites must decline, disarm, and cheat their stereotypes that prejudice their imagination, knowledge, and contact with respect to people of color. Fourth, whites must come to prefer a more open, inclusive society that denotes a broader, deeper view of integration. Finally, for all of this to come together, we all, particularly blacks and whites, must give the contact hypothesis another chance.[300]

What conditions are optimal to ensure that intergroup contact will have positive effects in reducing racism? Allport's contact hypothesis focused on reducing intergroup prejudice and its central premise was that the best way to reduce intergroup tension and hostility was for the group members to come into contact with each other under certain conditions,[301] including: (1) social and institutional support for the contact; (2) acquaintance potential where the contact develops meaningful relations because it is sufficiently frequent, close, and lasting; (3) equal sta-

---

Segregation and School Segregation, 80 MINN. L. REV. 795, 823 (1996) (citing Christopher G. Ellison & Daniel A. Powers, *The Contact Hypothesis and Racial Attitudes Among Black Americans,* 75 Soc. Sci. Q. 385, 396 (1994); Lee Sigelman & Susan Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes,* 71 Soc. FORCES 781, 781, 792 (1993)).

299. A COMMON DESTINY, *supra* note 239, at 137.

300. According to John Palen, for example, while the pre-1980s model of suburbanization of black entry leading to white flight and resegregation has little empirical validity in the 1990s, "the all-black suburbs of today tend to be not poor but middle-class or even affluent communities. Their racial makeup is a matter of deliberate choice by those moving in." PALEN, *supra* note 240, at 133. Although this conclusion is much debated, it is significantly true, for the reasons discussed above regarding the ambivalence blacks feel toward integration. As one commentator stated, "Among blacks who have worked, learned and lived in predominantly white settings, one theme occurs over and over again: such interaction has not made many whites accept blacks as equals, and perhaps never will." Charisse Jones, *Years on Integration Road: New Views of an Old Goal,* N.Y. TIMES, Apr. 10, 1994, at A1.

301. *See* ALLPORT, *supra* note 145, at 250-67.

tus participants; and (4) cooperative or mutually supportive activity.[302]

It is clear from this list of conditions that contact *per se* is not enough. Getting to "know" people of color through the media and popular culture is not enough. Sharing work space or public space is not enough. Now we must go out of our way to make quality contact along the conditional lines described above. Actually, it may be that we must establish this contact outside of residential living patterns in order to be more receptive to seeking residential integration. At any rate, I want to examine the optimum conditions that I believe will facilitate our movement to an open society.

1.   SOCIAL AND INSTITUTIONAL SUPPORT

This support rests with those in power and authority to be clear and firm in endorsing and promoting the goals of integration—for examples, law school deans and college presidents, corporate managers, city government administrators, high school principals, service supervisors, police chiefs, etc. Rupert Brown identifies three reasons why this is important.[303] First, those in such positions can wield sanctions and rewards for activities that hinder or advance integration goals. Second, by encouraging or forcing people to comply with inclusionary norms they may come to internalize related behaviors and attitudes. Third, and most importantly, institutional support for integrated contact may help to create a new social climate that will induce norms of inclusion and tolerance to emerge.[304]

2.   ACQUAINTANCE POTENTIAL

Sheer, infrequent contact is unlikely to reduce prejudice or dislodge stereotypes. Indeed, this form of contact may actually exacerbate rela-

---

302. Allport concludes that:

> Prejudice (unless deeply rooted in the character structure of the individual) may be reduced by equal status contact between majority and minority groups in the pursuit of common goals. The effect is greatly enhanced if this contact is sanctioned by institutional supports (i.e., by law, custom or local atmosphere), and if it is of a sort that leads to the perception of common interests and common humanity between members of the two groups.

Id. at 267. For a current consideration, see Marten Patchen, *Contact Between Ethnic Groups: When and How Does It Lead to More Positive Relations,* 25 INT'L J. GROUP TENSIONS 271 (1995). In Houston, Texas, contact has been enhanced to overcome cross-cultural conflict by marginalizing disruptive influences, giving proactive attention to problems before they become unmanageable, exercising self-disiplined leadership by civic leaders and media, and by expressing positive public rhetoric by the city's leadership. Thus, the city has decreased the presence of "the politics of resentment in its ethnic and racial relations." Glenda Joe, *Houstonians Find a Little Talking Pays Big Dividends,* HOUST. CHRON., Aug. 27, 1998, at 35.

303. *See* BROWN, *supra* note 119, at 238.

304. *See id.*

tions.[305] On the contrary, contact that solidifies an acquaintance may cultivate positive emotional experiences—we simply really enjoy interacting—that may spill over to other members of the group. From interracial acquaintance we may gather more accurate information or deeper insights about the experience of others. This, in turn, may cause us to begin to emphasize what we have in common over what divides us.[306]

Ironically, longitudinal studies on residential integration suggest caution in giving significant weight to the acquaintance factor. In an interview of two-hundred white residents concerning their reactions to new neighbors—some black, others white—the whites interacted initially with both sets of neighbors, and the interaction reduced modern racism scores. But the acquaintance and prejudice-reduction model only proved true during the first three months. At the end of one year, white residents had less information about the black neighbors than the white neighbors. The study suggests "that what caused the reductions in racism may have been the disconfirmation of stereotypical expectation provided by the black neighbors rather than changes mediated by getting to know them."[307] Thus, it is more often the disconfirmation of stereotypical expectation, rather than acquaintance, that leads to acceptance. Without the acquaintance reinforcement, however, some interaction will reconfirm rather than disconfirm such expectation. Moreover, the expectation itself may serve to block even the opportunity for acquaintance.

3. EQUAL STATUS

Historically, contact between blacks and whites has been in the context of black subordination, which only reinforced white attitudes that blacks are inferior. For example, blacks and whites in the South interacted, but blacks were almost always in subservient roles as nannies, maids, cooks, doormen, handymen, sharecroppers, etc. The value of equal status contact, again to rebut prejudice and stereotype, is that it is more difficult for the white to sustain the negative image in the face of task competence shown when blacks and whites stand on equal footing. From the military to the public school, various studies confirm the value of equal status contact.

However, two significant problems arise. First, whites seldom deem blacks to be on equal footing with them. Affirmative action is the salient block in today's society. Second, equal status seems to be role-restricted, with little transferable application to other contexts. Athletes

---

305. *See id.* at 239.
306. *See id.* at 241.
307. *Id.*

and workers, for example, tend to go their separate ways after the sport or job is over. Studies of coal miners and department store workers revealed that "[t]he positive attitudes engendered at work did not seem to generalize beyond the factory gate."[308]

4. COOPERATION

Although Brown says that "[r]esearch has unambiguously supported this co-operation condition,"[309] often interracial contact is more likely to occur in a context of competition or conflict than in one of cooperation. This is reflected on college campuses, at the workplace, and within neighborhoods experiencing significant entry by nonwhites. The experience in the armed services is viewed as an optimum one, because it tends to facilitate the occurrence of all four conditions.

It is unlikely that at present there are many contexts providing the optimum conditions, but we need to commit at least to going as far as we can, as often as we can, to foster contact on the conditions discussed. In order for prejudice and stereotypes to have less damaging influence on the aspiration toward an open society, we must work to enhance interracial contact with a broad range of supplementary influences that "promotes the process of generalization from favourable contact with individuals to positive attitudes toward the group from which the individual comes."[310]

B. *Raising the Integration Ante*

Just over thirty years ago, prior to the Fair Housing Act, a national survey revealed the following categories of neighborhood "integration": "(1) Open: those with two or more Negro families but less than 1 percent Negro residents; (2) Moderately integrated: those with from 1 to 10 percent Negro families; (3) Substantially integrated: those with more than 10 percent Negro families."[311] These categories represent tokenistic expectations of integration. Neighborhoods with two families cannot be characterized as "open," nor is a neighborhood with just over ten percent Negro families "substantially" integrated. Integration must denote quality of life more than numerical mixing. Thus, pushing for the integration goals of fair housing, I look beyond an empirical view of the numbers and look more to integration norms and aspirations. I up the ante. After the civil disorders in the 1960s, the Kerner Commission

---

308. *Id.* at 243.
309. *Id.* at 245.
310. *Id.* at 259.
311. W. DENNIS KEATING, THE SUBURBAN RACIAL DILEMMA: HOUSING AND NEIGHBORHOODS 17 (1994).

saw that integration should "provide Negroes with the same freedom and range of choices as whites with equal incomes."[312]

Today, "enabled freedom" and "range of choice" are crucial objectives associated with fair housing.[313] Next, integration should reinforce our humanity. In a mixed neighborhood, people would increasingly recognize their neighbors as human beings.[314] In the context of school integration, Pettigrew remarks, "Integration . . . means not just having children together in the same building, but rather something about the quality of the contact that goes on between them. I am talking about humanity. I am talking about cross-racial acceptance and friendship and equity and equality."[315] Thus, a mixed neighborhood may not be integrated in my terms. Beyond population mix and sharing space, my view would require that integrated neighborhoods evidence mutual acceptance. Finally, the term integration must broaden its reference to include the nature of intergroup relations to embrace an integration that addresses issues of equity, where each group is significantly represented, broadly distributed, and sharing power and equality.[316]

Presently, the dominant conception of integration associated with the fair-housing campaign is different from my vision. The limited, legalistic view of integration is that of formal equal opportunity. In this context, individualism and assimilation plague the conceptualization and operative features of integration. As john powell notes, "Integration can be a tough concept to embrace when one considers that it cannot claim many examples. One obstacle, especially for those who would otherwise support the idea of integration, is the association of integration with assimilation."[317]

---

312. KERNER REPORT, *supra* note 7, at 405.

313. Range of choice should not be limited to integration, however. Those living in poor communities should have the choice to live under improved circumstances in place. Fair housing, linked with community development and job creation, should help them to overcome the opportunity-denying circumstances of place.

314. *See* Rose Helper, *Success and Resistance Factors in the Maintenance of Racially Mixed Neighborhoods, in* HOUSING DESEGREGATION AND FEDERAL POLICY 170, 171 (John M. Goering ed. 1986).

315. *Id.* (alteration in original).

316. According to Robert Weaver, the first Secretary of HUD, the realization of integrated housing would be "a situation in which white and nonwhite families not only live in a spatially mixed community but also accept one another, associate without self-consciousness, and do not look forward to release from each other as neighbors." Robert Weaver, *Integration in Public and Private Housing,* 304 ANNALS 86 (1956). (Note that this observation was made forty-two years ago.).

317. john a. powell, *Living and Learning: Linking Housing and Education,* 80 MINN. L. REV. 749, 753 (1996). powell presents a compelling conceptualization of integration in both the housing and education contexts. *See id.* at 788-93. The picture is not completely bleak: "The existence of stable racially and ethnically diverse urban communities is one of the best-kept secrets of our nation." Phillip Nyden & Michael Maly, *The Emergence of Stable Racially and*

Sometimes the terms "integration" and "assimilation" are confused, as they are merged into one idea. Fair-housing redress here is not up to the task, because individualistic assimilation as a means to integration is inadequate to address the harms of blacks who have been discriminated against and segregated as members of a social group. Indeed, this orientation of integration will only become more problematic as the nation becomes more diverse as Asian and Latino populations grow. This limited concept of integration is at war with a viable multicultural future. Hence, Elaine Kim characterizes an aspect of Asian identity as a struggle against erasure where "many Asian Americans sought an alternative identity to what was being offered in the dominant culture—the nonchoice between being either different and inferior or the same and invisible, between eternal alien and assimilated mascot."[318]

The merger of integration and assimilation into one idea reinforces the notion that integration is an individual matter and that white acceptance for so-called open neighborhoods can consist of a token few people of color—that one or two of us can symbolize an "open neighborhood." Under these circumstances, white dominance, in the name of "localism" and "home rule" can remain solidified within integrated settings. People of color can personify proper agents of integration only when they do not disturb the neighborhood's primarily homogenous racial and class composition. In other words, integration is reduced to the feigned flexibility of tokenism.

C. *Individuating Fair Housing Rights Away*

A little over ten years ago, adherents of critical race theory challenged the critique of rights that had been lodged by critical legal studies scholars.[319] With a decade of profound retrenchment in redressing legal rights, I wonder if those general critiques of the critical legal studies position remain compelling within the area of fair housing. The critical legal studies scholars argue that rights-based strategies tend to be unhelpful and can be harmful. In the context of fair housing, this critique is accurate. In that regard, Massey and Denton have argued, "The fundamental weakness of the 1968 Fair Housing Act was its reliance on individual efforts to combat a social problem that was systematic and institutional in nature."[320]

Ethnically Diverse Urban Communities: A Case Study of Nine U.S. Cities, 8 HOUSING POL'Y DEBATE 491, 491 (1997).

318. Elaine H. Kim, *Foreword* to READING THE LITERATURE OF ASIAN AMERICA xi (Shirley Geok-lin Lim & Amy Ling eds. 1992).

319. *See Part 2—Critical Race Theory and Critical Legal Studies: Contestation and Coalition, in* CRITICAL RACE THEORY, *supra* note 112, at 63-122.

320. MASSEY & DENTON, *supra* note 23, at 198.

As summarized by Mark Tushnet:

> In its weakest version the critique of rights argues that there is no
> necessary connection between winning legal victories and advancing
> political goals; in a somewhat stronger version it argues that, more
> frequently than most lawyers think, winning legal victories either
> does not advance political goals or actually impedes them. In the
> strongest and most implausible version the critique of rights argues
> that winning legal victories almost never advances political goals.[321]

This critique distinguishes between legal and political victories, which
incorporates another distinction between ideological or rhetorical effects
and material effects.[322] The rights-based strategy of fair housing, as
enforced by HUD and in the courts, is an ideological victory that none-
theless has had insignificant effects in desegregating the metropolis and
thereby improving the material life of the ghetto poor.

In fair-housing race cases, the tension between legal and political
victories produces a mixed bag, but far too often the result will either be
winning a legal victory but a political loss,[323] or losing in court and
losing politically.[324] Winning legally and politically seldom occurs
outside the context of suits brought on behalf of integration warriors
who are middle-class or affluent. For the ghetto poor, losing in court but
winning politically may be the most progressively effective strategy of
rights. It might be the one that helps to build grass roots bases and to
mobilize the subordinated group to act to relieve heartfelt injustice.[325]

Advancing a fair-housing rights campaign is limited, because those
rights are essentially individualistic.[326] But as Tushnet claims, "progres-
sive change requires undermining the individualism that vindicating

---

321. Mark Tushnet, *The Critique of Rights,* 47 SMU L. REV. 23, 23 (1993).

322. *See id.* at 23-24.

323. *See* Michael H. Sussman, *Discrimination: A Unitary Concept,* 80 MINN. L. REV. 875
(1996) (discussing Yonkers Board of Education, 624 F. Supp. 1276 (S.D.N.Y. 1985) *aff'd.,* 837
F.2d 1181 (2d Cir. 1987), *cert. denied,* 486 U.S. 1055 (1988).

324. *See e.g.,* Memphis v. Greene, 451 U.S 100 (1981). Here, the Supreme Court upheld the
city's erection of a street barrier separating a segregated white neighborhood from a neighboring
black area. David Kairys characterized the decision as the clearest illustration of the following
proposition: "Even measures that have a clearly harmful, particularized effect on minorities are
now assumed to be completely free from the influence of racial considerations, no matter how
extensive or unecessary the harm may be, or how closely the circumstances and context may fit
historical patterns of racism." David Kairys, *Unexplainable on Grounds Other Than Race,* 45
AM. U. L. REV. 729, 730-31 (1996).

325. *See, e.g.,* STEPHEN NATHAN HAYMES, RACE, CULTURE AND THE CITY: A PEDAGOGY FOR
BLACK URBAN STRUGGLE 138-39 (1995) (discussing the meaning of "place" and the connection
with solidarity and self-actualization). *See generally* EDWARD W. SOJA, THIRDSPACE (1996);
PLACE AND THE POLITICS OF IDENTITY (Michael Keith & Steve Pile eds., 1993).

326. *See* Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable
Remedies to Achieve the Purposes of the Fair Housing Act,* 64 TEMP. L. REV. 909 (1991).

legal rights reinforces."[327] This is a common recognition among fair-housing advocates and scholars. Ten years ago, there was a conference at the Yale Law School on "The Fair Housing Act After Twenty Years."[328] The 1988 Amendments had just been added. There was renewed hope in the air. In considering the limits of litigation under the Act, however, one pressing question nagged the conference: "Can a law that relies so heavily on private enforcement ever succeed in systematically attacking the widespread patterns of discrimination and segregation in America's housing?"[329] The consensus then and now is that it cannot. Extensive discrimination continues and entrenched patterns of segregation persist, "now victimizing a whole new generation of homeseekers who were mere children when Title VIII was passed."[330]

It is unclear how far a rights strategy can take us. It may be that progressive fair-housing advocacy and rights are not congruent. Progressive advocacy would extend well beyond the formal equal opportunity that rights seek to attain and, instead, move to attack oppression. As Iris Young points out, as with legal rights themselves, "[d]iscrimination is a methodologically individualist concept."[331] Racism, today, is more an expression of oppression than discrimination alone. Oppression is commonly a group-based harm that is structural or systemic. Extending beyond disparate treatment, it "[i]s the inhibition of a group through a vast network of everyday practices, attitudes, assumptions, behaviors, and institutional rules."[332] Again, as Young says, "[t]he difference between the concept of discrimination and the concept of oppression emerges most clearly with the insight that oppression often exists in the absence of overt discrimination."[333]

When we look beyond the acts of individuals, the challenge of institutional racism presents itself. As Joseph Barndt observes:

> Institutional racism as practiced today with subtlety and sophistication often seems both innocent and innocuous unless it is recognized as the successor in disguise to the deliberate and direct institutional racism of the past. Rather than being eliminated, racism has been driven underground . . . . The results, however, are no less harmful. Today's racism cannot be understood or confronted without comprehending its deliberate and intentional origins.[334]

---

327. Tushnet, *supra* note 321, at 26.

328. THE YALE CONFERENCE, *supra* note 210.

329. *Id.* at 43.

330. *Id.*

331. Iris Marion Young, *Five Faces of Oppression, in* POWER, PRIVILEGE AND LAW 66, 67 (Leslie Bender & Daan Braverman, eds., 1995).

332. *Id.* at 68.

333. *Id.* at 67.

334. BARNDT, *supra* note 13, at 83.

The important insight here is the recognition of institutional racism as the successor in disguise to the deliberate and direct institutional racism of the past. Perpetuating the past effects of discrimination through institutional racism explains a lot—from how the real estate industry and the federal government have contributed to the segregation of blacks, to how lending agencies discriminate in mortgage finance; from exclusionary zoning in the suburbs, to the link between segregated education and segregated housing.

The rights critique also points to the backlash use of counter-rights by the anti-progressive forces. This is currently seen in reverse discrimination cases that challenge affirmative action and voting redistricting. Generally, as Tushnet notes, "if the rhetoric of rights in our culture is individualistic (and if that sort of individualism is anti-progressive in today's circumstances), conservatives are *more* likely than progressives to find the rhetoric of rights helpful."[335] From this perspective, progressive victories are difficult to sustain, because the individualism of rights will eventually stabilize existing social relations at the expense of transformation.[336] This analysis helps to explain why fair housing has had more force in serving to curb discrimination than it has had in militating against segregation and why the fair-housing remedy has been most effective when serving the rights holder who is economically better off, who is asserting a right to be free from simple discrimination, and who sues simply as an individual rather than the representative of a larger social group.

VI. CONCLUSION

Shortly after Christmas in 1962, Martin Luther King, Jr. said that "True integration will be achieved by true neighbors who are willingly obedient to unenforceable obligations."[337] Perhaps, in spite of the lawyer in me, this is really what I have written about here. The challenge is in motivating reluctant people of color and whites to reach out to embrace each other and thereby uphold this unenforceable obligation. Until this occurs, color-blind rhetoric will continue to obscure racism and impede progress to true integration. If we want true integration we must realize that it will impose personal costs and risks on whites and people of color. A commitment to fair housing entails an assumption of

335. Tushnet, *supra* note 321, at 33.

336. *See id.* In housing, this is illustrated by the racial zoning cases. *See* Charles E. Daye, *The Race, Class and Housing Conundrum: A Rationale and Proposal for a Legislative Policy of Suburban Inclusion,* 9 N.C. CENT. L. REV. 37 (1978).

337. Martin Luther King, Jr., *The Ethical Demands for Integration, in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 117, 124 (James Melvin Washington ed., 1986).

these various risks. An open society is not easier to negotiate than a closed society; it is just a better reflection of our humanity. We must not allow racism to continue to overwhelm fair housing and reinforce a closed society. In supporting fair housing, we must oppose racism.

Fair housing ought to provide a point of departure for furthering equality and justice broadly throughout our society and culture. It ought to provide a platform from which all people can stand tall, assert their humanity, and live their dreams. It ought to undergird the values of acceptance, openness, and common but unassimilated ground. It ought to enable us to embrace a viable multicultural future. Thus, I close by quoting Dr. King once more. I find myself quoting him more and more to contrast his views to those who have misappropriated his color-blind dream.[338] Here, then, I recall his words upon accepting the Nobel Peace Prize:

> I have the audacity to believe that peoples everywhere can have three meals a day for their bodies, education and culture for their minds, and dignity, equality, and freedom for their spirits.[339] I accept the Nobel Prize for Peace on behalf of a civil rights movement which is moving with determination and a majestic scorn for risk and danger to establish a reign of freedom and a rule of justice.[340]

Dr. King expressed beautiful dreams, but I do not think he expected us to dream forever.

---

338. *See* Ronald Turner, *The Dangers of Misappropriation: Misusing Martin Luther King, Jr.'s Legacy to Prove the Colorblind Thesis*, 2 MICH. J. RACE & L. 101 (1996).

339. Martin Luther King, Jr., *Nobel Prize Acceptance Speech (1964), in a* TESTAMENT OF HOPE, *supra* note 337, at 224, 226.

340. *Id.* at 224.