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A Retrospective on Race: The View from Long Island

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In the more than thirty years that I worked as a law professor, most of those years at Touro Law Center on Long Island, I wrote about race and law on multiple occasions. Most of my articles were published in law reviews, but I did write at least four articles for the local newspaper, *Newsday*, as racial conflict surfaced here on Long Island.

On the occasion of the 50th anniversary of *Brown v. Board of Education* in 2004, I offered a critique of the rhetorical device—diversity, and inclusion -- used to deflect or defuse opposition to affirmative action.¹ In 2005, I wrote about the forcible eviction of undocumented immigrants from a housing in Farmingville and condemnation of a housing complex and eviction of its elderly and disabled residents.² In 2007, I wrote about the arrest and conviction of a black man who shot a young white man who was part of a mob in front of his house hurling racial epithets at his family and threatening his son.³ Last, but not least, in 2008, I wrote about the persistence of racial categories even as public discourse announced the emergence of a post-racial society after Barack Obama was elected President of the United States.⁴

I am proud and grateful that the editors of the *Journal of Race, Gender and Ethnicity* have agreed to reprint these Op-Eds. I think of this essay as a retrospective examination of my journey as a law professor and a meditation on racism as a local and national phenomenon. Each of these articles is preceded by an annotation which updates my comments and analysis in light of recent developments in the United States and Long Island. The organization of the articles is not chronological but topical. I thought it might be interesting to juxtapose past articles with short introductions that provides some historical context and comments on current political rhetoric, including the “Make America Great Again” slogan (which many have interpreted to mean “make America white again”),⁵ that propelled Donald Trump’s political ascendancy. For me, re-

¹ Deborah Post, *Diversity Has Distracted Us*, Opinion, *NEWSDAY*, May 16, 2004, at A54, <https://advance.lexis.com/api/permalink/e78f48c7-060e-4cd6-bdbd-c1c194177e5a/?context=1000516>.

² Deborah Post, Opinion, *Two Cases, Two Reactions, Same Lingering Problem*, *NEWSDAY* Sept. 25, 2005, at A43, <https://advance.lexis.com/api/permalink/5a2adfa7-0bfe-413f-92dd-64a8743586b2/?context=1000516>.

³ Deborah Post, *Fear and Race Ruled the Day*, *NEWSDAY*, Dec. 30, 2007, at A 52, <https://advance.lexis.com/api/permalink/a9e5d887-0d55-4b07-8823-bf6391584367/?context=1000516>.

⁴ Deborah Waire Post, Opinion, *A Fresh Look at Prejudice*, *NEWSDAY*, Nov. 9, 2008, at A55, <https://advance.lexis.com/api/permalink/c9a8b364-02db-4998-8553-ef4c1d487d7c/?context=1000516>.

⁵ “Make America Great Again” has been interpreted by many critics of Trump as a “dog whistle politics.” See e.g. Ian Haney Lopez, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014). Dog whistle politics are not new, but a recurrent political strategy that uses race and ethnicity to mobilize white voters. In 2016, a poll revealed the fact that 81% Trump supporters who participated in the poll believed that discrimination against whites was as big a problem as discrimination against blacks. There is a consensus among many in the black community, including the Congressional Black Caucus, that “make America great again” is understood by Trump supporters to mean “make American White again. This interpretation of his intent in coining this slogan was reinforced by his comment during discussion with members of Congress about immigration reform during which he referred to that African nations are “shithole” countries. *Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa*, *N.Y. TIMES* JAN. 11, 2018, <http://nuti.ms/2EzkeQe> (last visited April 1, 2018).

A recent article in the *New York Times* explained the difference between white supremacy, racism and “white nationalism.” According to a scholar on whose work the article relies, Professor Eric Kaufman from

reading these pieces have been instructive. This journey into the past when juxtaposed with contemporary political realities confirms my belief that continuity as well as change is a defining aspect of culture.⁶ Although racism has manifested in different ways throughout the history of the United States, it is a sentiment and belief system deeply embedded in the culture of this country.

Populist Politics and Anti-immigrant Sentiment Then and Now

The promise Trump made to build a wall between Mexico and the United States and to make Mexico pay for the wall became the rallying call for Trump supporters. “Build the wall” was one of the chants that galvanized the crowds at Trump rallies. While Trump has not yet been successful in building that wall, he has successfully implemented policies that deport thousands of immigrants - many of whom are living in the United States because they were granted Temporary Protected Status as refugees from wars or natural disasters. With his latest Executive Order 13780, entitled Protecting the Nation From Foreign Terrorist Entry Into the United States, the refugee “screening” has been “strengthened and executive orders that renewed TPP for groups such as the Liberians, El Salvadorians, Haitians, and Nicaraguans have not been renewed.”⁷

ICE has been instructed to arrest anyone who has violated immigration laws or any laws including traffic offenses. In other words, criminals and the “bad hombres” that Trump promised to deport are not the primary focus of ICE anymore.⁸ It is not a policy that is about making communities safer, but one that fractures families. ICE is rounding up and deporting people who have been here for decades, who own their own businesses or have been employed by the same company for years, and who have children or spouses who are American citizens.⁹ This policy is

Birkbeck University in London, white nationalism is “the belief that national identity should be built around white ethnicity, and that white people should therefore maintain both a demographic majority and dominance in the nation’s culture and public life.” Amanda Taub, *White Nationalism Explained*, N.Y. TIMES, Nov. 21, 2016, <https://nyti.ms/2ke7jT8>. In October 2017, Richard Spencer, President of the National Policy Institute and Alt Right leader of the white nationalist movement spoke at University of Florida In Gainesville where he was met by many protesting his message. In a news interview he stated that “race is the foundation of identity.” He is an advocate of White Nationalism.

⁶ My first research and writing as a law professor examined continuity and change in business law. Deborah W. Post, *Continuity and Change: Partnership Formation under the Common Law*, 32 VILLANOVA L. REV. 987 (1987).

⁷ Exec. Order No.13780, 82 Fed. Reg. 13209 (March 6, 2017) FEDERAL REGISTER, <https://www.federalregister.gov/documents/2017/03/09/2017-04837/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states>. See also, *Temporary Protected Status*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/humanitarian/temporary-protected-status> (last visited October 11, 2018).

⁸ Maria Sacchetti, *ICE arrests of “noncriminal” immigrants double under Trump*. THE WASHINGTON POST, April 16, 2017, https://www.washingtonpost.com/local/immigration-arrests-of-noncriminals-double-under-trump/2017/04/16/98a2f1e2-2096-11e7-be2a-3a1fb24d4671_story.html?utm_term=.f9929f371f63

⁹ Some of the more controversial arrests are recounted in the Washington Post article cited in footnote 8 but see also Joseph Dits, *Granger restaurant owner Roberto Beristain deported*, SOUTH BEND TRIBUNE, April 6, 2017. Mr. Beristain had three children and his wife said they had tried many times over 17 years to gain legal status for him. Samantha Schmidt, *A Noncriminal Mother of Four Was Deported. Now in Mexico She Fears for Her Safety*. THE WASHINGTON POST, April 28, 2017, https://www.washingtonpost.com/news/morning-mix/wp/2017/04/28/a-non-criminal-mother-of-four-was-deported-now-in-mexico-she-fears-for-her-safety/?utm_term=.1fcac7ced33f

not about securing the border or deporting dangerous people. It panders to the anti-immigrant sentiment that is a part of the current populist movement.

Trump's first foray into racism as a candidate was his anti-immigrant screed: his depiction of Mexican Americans as criminals and rapists.¹⁰ But the most shameful ploy that Trump used to inflame his base was his exploitation of family members of victims of violent crimes committed by undocumented immigrants. He put their grief on display, parading them in circus sideshow fashion before crowds in Phoenix, Arizona and even at the State of the Union address. The loss and heartbreak of families who have lost sons and daughters to violent crime is not, and was not, proof that *all* Mexicans in the United States illegally are criminals and rapists. But Trump had no compunctions about using the misfortune of women, particularly those he denominated "angel mothers," and the sympathy we all felt for them, to support a patently untrue sweeping generalization about the criminality of undocumented workers.

The anti-immigrant sentiment that Trump exploited in his campaign has been a political trope almost as long as the United States has existed. Xenophobia has fueled populist movements in the United States for more than two centuries. Even those Americans who are familiar with the Chinese Exclusion Act of 1882, or the internment of the Japanese American citizens during World War II, might not understand how deep and pervasive anti-immigrant sentiment has been throughout the history of the United States. They may have heard of the trial of Sacco and Vanzetti during the height of anti-immigrant, nativist hysteria after World War I, but did they know that Italian immigrants were lynched in New Orleans in 1891¹¹ or that Irish who immigrated to the United States during the potato famine were attacked and had their homes burnt because of anti-immigrant sentiments?¹²

In my travels around Philadelphia, where I now live, I pass a Ukrainian church which has a sign outside that reads "Pray for Ukraine." I recently saw a movie about the Holodomor,¹³ the famine genocide that occurred in Ukraine when it was occupied by Russian troops after World War II. I realized that without an understanding of its history, I could not truly understand the

¹⁰ In his state of the union address, President Trump institutionalized his use of "angel mothers" as a justification for massive deportation with the creation of an office called VOICE, Victims of Immigration Crime Engagement, in the Department of Homeland Security. David Nakamura, *Trump Calls for Creation of Office to Support Victims of Crimes by Illegal Immigrants*, THE WASHINGTON POST, Feb. 28, 2017, https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/real-time-fact-checking-and-analysis-of-trumps-address-to-congress/trump-calls-for-creation-of-office-to-support-victims-of-crimes-by-illegal-immigrants/?noredirect=on&utm_term=.13f6a9964e43.

¹¹ Over a period of 40 years, approximately 300,000 Italians moved to New Orleans. When a local police chief was killed, the police rounded up hundreds of Italians. Eventually 9 men were tried and six were found not guilty and there was a mistrial in three cases. Armed men stormed the jail and dragged out those nine and others who had not been accused of the crime. The mob shot and killed eleven men and their bodies were torn apart. Erin Blakemore, *The Grisly Story of America's Largest Lynching*, HISTORY, <http://www.history.com/new/the-grisley-story-of-americas-largest-lynching> (last visited April 11, 2017).

¹² The potato famine in Ireland led thousands of Irish to immigrate to the United States. The hostility to this group of immigrants in the 1830s took the form of mob attacks on the homes of the immigrants and Roman Catholic Churches. It was religion as much as ethnicity that fueled the anti-immigrant sentiment. Zachary M. Schrag, *Nativist Riots of 1844*, ENCYCLOPEDIA OF GREATER PHILADELPHIA, <https://philadelphiaencyclopedia.org/archive/nativist-riots-of-1844/> (last visited October 11, 2018).

¹³ BITTER HARVEST (2017).

current struggle by Ukraine to remain independent in the face of Russian aggression and the occupation of Crimea. I also realize that my classmates in upstate New York who had names like Oluszek, Yowenski, Kowalaski, Kehoskie, Bazarnik, and Behuniak were probably the children of immigrants who fled Poland or Ukraine to escape the predation and terror in their native countries.

I knew at least one classmate whose mother did not speak English and I suppose there were other mothers and fathers who spoke Polish and Ukrainian. I also had classmates whose forebears might have arrived with the Italian immigrants who built the Erie Canal or who arrived after World War II. Still, I wonder how many of my former classmates now subscribe to an anti-immigrant agenda believing that those who flee civil war or natural disasters are somehow different from their own ancestors? Is it the failure to teach American History in a meaningful way or unconscious absorption of an American zeitgeist that impedes understanding and empathy for today's immigrants?

The Trump campaign and presidency elevated to a national stage and a national platform contemporary anti-immigrant sentiment that previously had been expressed in ordinances adopted by local governments. The first and most famous of these local ordinances was adopted in Hazleton, Pennsylvania in 2006 and imposed penalties on landlords who rented to undocumented immigrants and employers who hired them.¹⁴ The same antipathy led citizens of Long Island and their government officials to try in a much less systematic way to drive out undocumented immigrants. The first article republished in this edition of the Journal discusses the eviction of undocumented immigrants living in Farmingville, Long Island a year or more before the Hazleton ordinance was enacted.

A couple of years after the Farmingville evictions, residents of Long Island were shocked by the murder of Marcelo Lucero, an immigrant from Ecuador, who was beaten to death by seven high school students in Patchogue, Long Island in 2008.¹⁵ Violence is a logical consequence of policies and rhetoric that demonizes immigrants. In Long Island, the policies hostile to immigrants emanated from the office of the Suffolk County executive, Steve Levy.¹⁶

¹⁴ The enforcement of the city ordinance was enjoined by a federal district court and the injunction was upheld by the 3rd Circuit court of appeals. The city appealed to the Supreme Court, which remanded the decision to the 3rd Circuit. The 3rd Circuit upheld the injunction a second time holding that federal immigration laws preempted state or local attempts at regulation of immigration. *Lozano v. Hazleton*, 724 F.3d 297 (3rd Cir. 2013), cert. denied 134 S.Ct. 1491 (2014).

¹⁵ *Patchogue Plus Three: A Look Back at a Fatal Hate Crime*, METROFOCUS, Sept. 21, 2011, 2:39 PM), <http://www.thirteen.org/metrofocus/2011/09/patchogue-plus-three-a-look-back-at-a-fatal-hate-crime/>.

¹⁶ During the election campaign for President Trump, John Lavallo, the chairman of the Suffolk County Republicans, invited Donald Trump to speak in Patchogue, the site of the killing of the immigrant Marcelo Lucero. As the editorial board of the New York Times noted at the time of the rally in Patchogue, "Anti-immigrant sentiment has been a chronic condition" in Long Island and during the 1990s and 2000s, day laborers were "abducted and beaten and residents were firebombed in their homes." Steve Levy was the "county executive who avidly played the role of nativist hater, rallying Long Islanders to his intolerance." Editorial, *Mr. Trump Reopens the Wounds of a Hate Crime*, N.Y. TIMES, (April 8, 2016), <https://www.nytimes.com/2016/04/09/opinion/mr-trump-reopens-the-wounds-of-a-hate-crime.html>.

Two Cases, Two Reactions, Same Lingering Problem

Newsday, September 25, 2005

Suffolk County is grappling with the issues of population growth, immigration, and poverty. If the evictions in June and this month are representative, our political leaders are not handling the challenges we face very well.

The use of the power of condemnation to remove undesirable residents is not a new strategy. It is, however, questionable from a political and moral standpoint. The disparate reactions to the evictions in Farmingville and Bay Shore illustrate why.

In the first case, undocumented Latino workers living in Farmingville were evicted by the Town of Brookhaven from their overcrowded homes. In the second case, the Town of Islip this month condemned an apartment complex in Bay Shore that housed elderly and disabled persons as well as many working poor. If we accept the justification offered by the towns, the motive in each case was the protection of the tenants' health and safety. Yet, Suffolk County's official reaction was different in the two cases. County Executive Steve Levy enthusiastically endorsed the Farmingville evictions. He has been much more reticent about Bay Shore.

The similarity in the two cases is as striking as the disparity in Levy's reaction to them. The identity of the tenants in both places suggests that race, ethnicity, and class had a role to play in these actions by local government and Levy's reaction.

In Farmingville, we witnessed the mobilization of a community against illegal immigrants. Longer term residents of Long Island, some of whom moved here from Queens and Brooklyn not all that long ago, are passionate about preserving the value of their homes. Perhaps Levy simply voiced their sentiments when he suggested that Brookhaven was acting to "preserve suburbia as we know it." Since the suburbia we know on Long Island is highly segregated along race and class lines, it is not much of a leap to assume that what the towns and the County are policing is not just health and safety.

But then maybe Levy did not intend anything racist at all. There are those who argue that minority communities such as North Bay Shore are under-policed and that residents there want greater safety and security in their lives. Blacks and Latinos, according to this line of reasoning, actually welcome the discretionary enforcement of housing codes and regulations because this makes their communities safer. Any concerns about potential discrimination in applying the law are secondary.

The evictions in Farmingville and Bay Shore disprove that theory. In both cases, it appears that local government abused its discretionary authority by targeting vulnerable communities. In the Farmingville case, public officials were reacting not only to health and safety problems precipitated by the absence of affordable housing but also to the identity of the tenants, most of whom were undocumented immigrants. It was not the health and safety of the tenants at issue. That was evident in the post-eviction, unapologetic disregard for the well-being

of those evicted. Suffolk County did not assist the displaced residents because of their status as illegals.

The political struggle over immigration in this country is expressed in a variety of ways, including gun-toting civilian militia patrolling the border with Mexico and lobbyists for big agriculture demanding guest worker status for immigrant farm labor. Steve Levy and the Town of Brookhaven waded into this political fray, even though local government is not charged with enforcing immigration laws. You can get a lot of political mileage attacking unpopular groups while taking decisive public action to protect property values.

After Farmingville, the recent condemnation of the Fairwood Gardens apartment complex in Bay Shore, with its 62 units and only 100 residents, was predictable. The success of government action in Brookhaven established a precedent. The motive in Islip with respect to the tenants was not anti-immigrant sentiment. Those evictions reflect the more complicated and intractable problem of the relationship between race and class.

It is difficult to sort out racial discrimination, which is not permitted under our housing laws and Constitution, and discrimination on the basis of class which is, unfortunately, entirely legal. Still, if the allegations are true, a well-connected developer is pulling strings at Islip Town Hall to get the rights to build on the Fairfield Gardens site. Worse yet, if Islip Town Supervisor Peter McGowan did not know that his fire marshal and code enforcement officer were about to empty out an apartment complex and evict more than a hundred people, we are faced with something equally pernicious: the kind of political incompetence and cronyism that is now all too familiar.

Neither poor people nor undocumented aliens are guaranteed any special protection under the Constitution, although we all know that both groups are politically vulnerable. If there is any protection to be found, it will be public outrage at the failure to provide for people in need as we saw in the instance of the government neglect of the victims of hurricane Katrina. The elderly and the disabled get a lot of sympathy, which explains why the Town of Islip appears to be deeply ambivalent about what it has done. The Town seems to be flip-flopping – fire marshals have told residents they don't have to leave – or perhaps it is just watching to see which way the political winds blow.

Meanwhile, sympathy for the displaced tenants in Farmingville is in short supply. Those victims arrived here uninvited and without permission. Even though they bus our tables, wash our cars, clean our homes, and even take care of our children, we don't ask where they came from and we don't care where they live. The generosity of the American people, evident in recent days, has its limits.

Past as Present: A Racial Imperative Drives White Men to Violence in Defense of the Honor of White Women.

In 2006, a tragedy occurred on Long Island. It was a tragedy precipitated by the belief on the part of the white community, but most particularly white men, that black men cannot resist white women or that white women are continuously at risk of sexual assault by black men. The

image of black men as over-sexualized predators should never have existed. Certainly, it should not have any power almost 70 years after the era when blacks were shot, hanged, dismembered and mutilated, lynched by mobs in remote places or as part of a public spectacle.¹⁷

Ida B. Wells¹⁸ a journalist, civil rights leader and leader of the anti-lynching campaign compiled a list of black men lynched in 1893.¹⁹ More recently, Bryan Stevenson, head of the Equal Justice Institute compiled a list that has over 4000 names of people lynched in 12 states. In 2015 EJI announced its intent EJI to build a memorial in Montgomery Alabama, to honor the lynching victims.²⁰

The reaction of many whites may be that this part of American history should be forgotten. I do not agree. If it had not been forgotten or ignored, Daniel Cicciaro might still be alive. Ignorance of our own past and the triggers for racial violence -- the stereotypes and prejudices that precipitate violent confrontations between whites and blacks -- have tragic consequences. That was certainly the case in Miller Place in August of 2006.

In my op-ed, there is a reference to the closing statements made to the jury by Clarence Darrow in the trial of Ossian Sweet. When Dr. Sweet and his family moved into an all-white neighborhood in Detroit, a crowd of armed white men assembled across the street from his house. Dr. Sweet shot one member of the mob, and he and several others who were in the house were arrested and tried for murder. It occurred to me that the circumstances in the Sweet case and the White case were similar.

Darrow was renowned as an attorney, well known for his eloquence, but what impressed me most, in this case, was his suggestion and his request, that the jury put themselves in the position of the Sweets and that meant they had to imagine what it meant to be black.

¹⁷ The Equal Justice Initiative published a report "Lynching in America," which reported on research on some 4,075 lynchings. Editorial, *The Horror of Lynchings Lives On*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/opinion/sunday/the-horror-of-lynchings-lives-on.html>. In 2016, the United States Justice Department began an investigation of the Moore's Ford Bridge lynching, which occurred in 1946, where four blacks were tied up and shot more than 60 times. In 2017, the police chief of LaGrange, Georgia, Louis Dekmar, apologized for the lynching of Austin Calloway in 1940. Alan Blinder and Richard Fausset, *Nearly 8 Decades Later, an Apology for a Lynching in Georgia*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/us/lagrange-georgia-lynching-apology.html>. Moreover, in 2016, a woman, Carolyn Bryant Donham, admitted that the testimony she gave that led to the death of Emmet Till, a fourteen-year-old black boy, was not true. He did not grab her or threaten her sexually. Richard Perez-Pena, *Woman Linked to 1955 Emmett Till Murder Case Tells Historian Her Claims Were False*, N.Y. TIMES, (Jan. 27, 2017), <https://www.nytimes.com/2017/01/26/us/lagrange-georgia-lynching-apology.html>.

¹⁸ Ida B. Wells, *Lynch Law*, HISTORY IS A WEAPON, <http://www.historyisaweapon.com/defcon1/wellslynchlaw.html> (last visited April 11, 2018).

¹⁹ See *The Horror of Lynchings Lives On*, *supra* note 17.

²⁰ EJI Announces Plans to Build Museum and National Lynching Memorial, EJI (Aug. 16, 2016), <http://eji.org/news/eji-announces-plans-to-build-museum-and-national-lynching-memorial>.

I ask you just for the short space that you will pass judgment upon these defendants to put yourselves in their place, and nobody can judge his fellow man in this world unless he does put himself in the other person's place and understands what is back of him and around him and everything that urges him on; you can't do it. ...

You gentlemen, and I am confident that you want to be fair, you gentlemen cannot decide this question in cool deliberation as you sit here. You must imagine yourselves in the position of these eleven over here, with their skins, with the hatred, with the infinite wrongs they have suffered on account of their skin, with the hazards they have taken every day they live, with the insults that are heaped around them, with the crowd outside, with the knowledge of what that crowd meant, and then ask the question of whether they waited too long or stopped too quick.²¹

Fear and Race Ruled the Day

Newsday, December 30, 2007

Joanne Cicciaro, whose teenage son was shot dead by John White in August 2006, said after White's manslaughter conviction last week that the case "was never about race. It was about individuals and individuals' actions." The sentiment that race is irrelevant, that it is somehow behind us, is fairly commonplace. But how can we make this claim when the facts in the White case are so eerily reminiscent of events and circumstances that should be part of our collective memory?

The night that 17 year old Daniel Cicciaro Jr. was killed in Miller Place, this is what occurred hours before the shooting: A young white girl made an allegation that a young black male wanted to rape her. Young white males got in their cars and drove to the home of the black teen and his family and screamed threats and racial epithets. When and where do young white men learn that they must protect the virtue of white women from the black men? Probably the same place youngsters who have recently hung nooses and painted swastikas on public buildings learn that these symbols inspire fear, even though they were born generations after the Ku Klux Klan and the Nazis were powerful.

Daniel Cicciaro Jr. probably never heard of Dr. Ossian Sweet, a black physician whom Clarence Darrow defended in 1925 after Sweet was charged with shooting and killing a white man in the mob in front of his home. The Sweets had recently moved into an all-white neighborhood in Detroit, where an organization called the Waterworks Park Improvement Association had been formed for the purpose of keeping blacks out of the neighborhood. Crowds formed outside the house the first night the Sweets moved in. The second night, after rocks had smashed a window, a shot rang out from inside the house, killing a neighbor and wounding another man.

All 11 people in the house were charged with murder. The first trial ended in a deadlock. A second trial of the man who allegedly fired the shot resulted in an acquittal. Clarence Darrow headed the defense team, which stressed the "state of mind" of those inside the house – "induced

²¹ Clarence Darrow, *Summation in the Sweet Case*, LAW AS LITERATURE 46, 358 (Ephraim, London ed. 1960).

by what has happened to others of their race, not only in the South...but even in the North.” Apparently Darrow’s strategy succeeded in convincing the jury to acquit his client. He noted that “the danger of a mob is not what it does, but what it might do... the mob was waiting to see the sacrifice of helpless blacks. They came with malice in their hearts.” In Detroit in 1925, they knew it was all about race.

In Long Island in 2008, one of the most segregated areas in the United States, people are reluctant to admit that race had any role to play in the tension filled summer night when a gang of white boys came to confront a black teenager who was falsely accused of posting an online message threatening to rape a white woman.

John White does not deny the source of his fear. It is one that is shared by most black Americans whether they have witnessed a meeting of the Ku Klux Klan in Alabama or Long Island. Cautionary tales are passed down from parent to child in every family. My own father told his children about a mob of white men who gathered on the corner of Genesee Street and Chapman Avenue, the top of a hill that led into a black neighborhood where we lived in Auburn, New York. Auburn is the town where Harriett Tubman settled after she fled slavery and where she brought many of the slaves she led to freedom, including my great grandfather, John Henry Waire. In my father’s story, the mob dispersed when armed black men from the neighborhood marched up to meet them with their own weapons.

Any member of any group that has been the victim of violence or the palpable threat of violence because of who he or she is understands the message in this story. Passivity is unacceptable; self-respect and self-defense are inextricably linked.

Fred Brewington, one of White’s lawyers, is a fine attorney but I suspect even he would agree that he is no Clarence Darrow and Darrow struggled with the way to handle race in the Sweet trial. How do you explain racial violence to an all-white jury or, in White’s case, an almost all white jury?

The reason I say these questions are more problematic today than they were in 1925, ironically enough, is the success of the modern civil rights movement. Jim Crow Laws have been dismantled, although racial segregation persists. We have anti-discrimination laws on the books. We have had two decades of affirmative action, a race conscious attempt to reverse or remedy past discrimination. More importantly, we have agreed collectively that racism is wrong. It is not just wrong, it is immoral.

When racism is considered immoral, people were unwilling to admit to sharing racist beliefs or sentiments. It follows, therefore, that a jury would conclude that the fears of black men like White were irrational. There was no real or imminent risk of violence from a crowd of teenage boys outside his home yelling racial epithets and demanding that his son come out and face them. He could have called the police or left his gun in the house. That would have led to a better outcome.

As in Detroit in 1925, and other times and places in the United States, and in Miller Place today, “race had nothing to do with it” is a form of self-delusion that affects whites and blacks

alike. The only one on White's jury who appeared to not be suffering from it was a white man who lived under apartheid in South Africa. Juror No. 4, Francois Larche, said after the trial that he fought bitterly with fellow jurors to acquit White because he thought White's defense was compelling. Ultimately, he surrendered to the pressure of the looming Christmas holiday.

Sad to say, but the progress we made in the past and our failure to remember our own history may be the greatest obstacle to racial equality in the future.

Racial Reparations and the Politics of Inclusion

For as long as there have been African Americans in the United States, there have been legal battles by Black or Interracial parents challenging the exclusion of their children from white schools. Between the time of Emancipation and the Reconstruction Amendments and *Brown v. Board of Education*, law suits that challenged the exclusion of black children from white schools were brought over and over again in virtually every state. I collected more than forty examples in my research and I am certain there are many, many more cases-- both reported cases and those that did not end up in court.

In the cases I found, even in states where abolitionists held sway such as Massachusetts²² and our own state of New York²³, parents or guardians sued to challenge the exclusion of their children from white schools. It is true that the challenges to segregation prior to and immediately after the Civil War and the enactment of the 14th Amendment sometimes resorted to perverse arguments that challenged only the classification of the child as black when the child or children had a white parent or grandparent. In early cases, courts referred to anti-miscegenation and blood quantum statutes to determine if a student was white, or if they could rely on appearance or reputation within a community.²⁴ Prior statutes that established blood quantum tests for race were disregarded when it suited them and if reputation did not work because there was conflicting testimony as to whether a family was white or colored, sophistry was sufficient. A court might decide that blood quantum was irrelevant if there was any ancestor, no matter how remote in time, who was African or a colored. They might conclude that if the law created separate schools used

²² *Roberts v. The City of Boston*, 59 Mass. 198, 5 Cush. 198 (1849).

²³ *People ex rel. King v. Gallagher*, 93 N.Y. 438 (1883); *People ex rel. Cisco v. School Board* 161 N.Y.598 (1900).

²⁴ Blood quantum laws were ubiquitous but when used to challenge the exclusion of mixed race children from white schools, they were generally disregarded. *See, e.g.* *Enos v. The Board of Education of the Village of Logan*, 9 Ohio St. 406 (1959) (children who were three-eighths African and five-eighths white were legally white but though racial classifications consisted of three categories, white, black and mulattoes); the school districts had only two classes – white and colored. The court concluded that the term “colored” justified the exclusion of “all who were less than white.”) *See also* *State ex rel former Board of School Commissioners of Mobile County*, 226 Ala. 62 (1933) (state policy preserving racial autonomy meant children of family that was “creole” were negro without regard to the number of generations earlier an ancestor who was black had lived). *Wall v. Oyster*, 36 App. D.C. 50 (1910) (parents and grandparents were white, mulatto and quadroon and father was 1/8 black but race was a matter of reputation and appearance); *State v. School District No. 16*, 154 Ark. 178 (1922) (where there was conflicting testimony as to the racial identity of children, the school directors had authority, even when there was no “visible admixture of African blood” to exclude children from white schools. “As much confusion and disorder would result from admitting children in the white schools who have a trace of negro in them, though not disclosed by their appearance, as from admitting children who possess a visible and distinct admixture of African blood”).

a classification that separated “white” from “colored any amount of African or Negro blood made a child “colored.”

African American parents also challenged the unequal funding of black schools or argued that the taxes collected for schools were not being allocated to their communities to support their schools.²⁵ In the East or West, North or South, where laws were enacted which provided for the creation of school districts, these laws also gave Boards of Education or Trustees the power to create separate schools for white and “colored” children. And these schools were never equal. As the Supreme Court of *Oklahoma in Jones v. Board of Education of the City of Muskogee* candidly admitted:

It is quite obvious that from reading the agreed statement of facts that the separate or colored schools have been shamefully discriminated against. ...The fact that a fund of \$438,095 or 104.23 per capita in the high school and 65.46 per capita in the grade schools, was allowed for the maintenance of the whites schools for the school year 1922-23, while a fund of only \$64,575 or 43.26 per capita in the high school and 19.53 per capita in the grade schools was allowed for the maintenance of the separate schools ... convinces us that those responsible for financing, operating, and controlling the separate schools of Muskogee are willfully disregarding the Constitution of Oklahoma, and intentionally ignoring the statutes of this state.”²⁶

The Civil Rights Movement, which we associate with the activism of the 1960s, was a national movement to eliminate racial discrimination that began much earlier.²⁷ It was a struggle to eradicate de jure *and* de facto segregation in a society fractured by a black/white binary’s strict rules of inclusion and exclusion. “Whites only” signs might have been commonplace in the South, but de facto segregation existed in most of the rest of the nation. The legal strategy devised by Charles Hamilton Houston and executed by Thurgood Marshall and the NAACP led to *Brown v. Board of Education*, decided in 1954, was thought to be the culmination of the long battle to end de jure segregation in education.²⁸

²⁵ *Maddox v. Neal*, 45 Ark. 121 (1885). In *Maddox v. Neal*, the School Board apportioned funding for white and colored schools on a per capita basis when there were 105 white students and 40 colored students. Consequently no teacher was hired for the colored school. The Court held that the discretion of the Board was limited and it had a duty to provide the colored school with a teacher for the same length of time, 3 months, as the white school. *But see Cory v. Carter*, 48 Ind. 327 (1874) where the Supreme Court of Indiana dismissed an argument based on the 14th Amendment and used rules of construction regarding fidelity to legislation and history that predated the Civil War, to hold that students of color were entitled to an education only to the extent allowed by the pro rata (based on number of children) share of taxes collected to support public education. *Jones v. Board of Education of Muskogee*, 90 Okla. 233 (1923) (white schools allocated \$438,095.25 for operation, Colored Schools received only \$46,575. But since it was the excise board of Muskogee County that rejected the budget for the board of education, and no money could be transferred from funds allocated to white schools to cure deficiencies in the colored schools, no remedy was available to the plaintiffs. Although the Board of Education sued the excise board and lost at trial, it did not appeal that decision).

²⁶ *Id.* at 418

²⁷ For a discussion of the legal strategies developed in the civil rights movement, which began far earlier than the 1960s when the activism was televised, and especially the role played by Charles Hamilton Houston *see* CHARLES J. OGLETREE, *ALL DELIBERATE SPEED* (2004).

²⁸ “*Brown v. Board of Education* had a profound and indelible impact on the United States. Declared the ‘case of the century’ it established that intentional segregation was unconstitutional. This ruling served to fuel the civil rights movement and to challenge the legitimacy of all public institutions that embraced segregation.” *Id.* at 124.

For a period of time courts enforced the decision. President Eisenhower sent troops to protect young black students integrating a public school in Little Rock Arkansas in 1957.²⁹ John F. Kennedy federalized the National Guard when Governor George Wallace stood in the school house door at the University of Alabama to prevent two black students from enrolling.³⁰ But in 1976, when I was a student in law school, the resistance to forced busing to achieve integration in Boston was just as violent as anything that occurred in the South.³¹ Finally, whites in Boston simply abandoned the city and moved to the suburbs.³²

The arguments made prior to *Brown*, including early cases decided in Boston and New York, upheld separate schools for blacks and white, deferring to the judgment of school administrators who were thought to be most qualified to judge what was in the best interest of all children.³³ In the 21st Century as local governments and school boards make an effort to create diversity in their schools, there is no such deference. The Supreme Court has retreated to a policy of “colorblindness” which would seem to thwart self-conscious policy driven attempts to create integrated schools.³⁴

It is not possible to be colorblind in the United States. The only possible solution to the racism is integration -- contact and interaction between the races; not when they are already adults, but during their formative years. It is disingenuous and pure sophistry to argue that using race to ensure the engagement and interaction among children of different races is an evil equivalent to race consciousness fueled by racial animus.

On Long Island there is no explicit policy that creates black and white schools. There are, however, political choices that ensure that schools are racially segregated. Long Island has 125 school districts.³⁵ Many of the districts are only a few miles apart in adjacent communities. One perverse consequence is that children in “failing” school districts who might have transferred to a better school under the federal No Child Left Behind³⁶ legislation have no place in which to

²⁹ Governor Faubus of Arkansas called up the National Guard to prevent the integration of the school in Little Rock. President Eisenhower sent in the army, federalized the National Guard and sent them to protect the students who entered the school and attended classes on September 23, 1957. *Id.*

³⁰ To hear part of Governor Wallace’s speech on that day, see https://www.npr.org/2003/06/11/1294680/wallace-in-the-schoolhouse-door?utm_source=npr_newsletter&utm_medium=email&utm_content=20180328&utm_campaign=npr_email_a_friend&utm_term=storyshare (visited March 28, 2018).

³¹ The Boston Globe story describing the first day of busing to integrate South Boston schools, *History Rolled in on a Yellow School Bus* can be found at: https://www.bostonglobe.com/metro/2014/09/06/boston-busing-crisis-years-later/DS35nsuqp0yh8f1q9aRQUL/story.html?s_campaign=8315 (visited March 28, 2018). The image that I associate with that time is a photo taken by Stanley Forman called “the Soiling of Old Glory.” It shows Ted Landsmark, a Yale educated lawyer attempting to enter city hall, restrained by member of a mob while a young white man lunged at him with the sharp point of a flag pole.

³² <https://www.nytimes.com/2012/10/05/education/new-boston-busing-debate-4-decades-after-fervid-clashes.html>.

³³ *Supra* note 19.

³⁴ *Parents Involved in Community Schools v. Seattle School District No.1*, 551 U.S. 701 (2007).

³⁵ For information on school districts and segregation on Long Island, see *Interactive map: A Decade of Change, School Segregation on Long Island*, ERASE RACISM, <http://www.eraseracismny.org/our-work/497> (last visited October 11, 2018).

³⁶ No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (2002), 20 U.S.C. § 6301 (2012).

transfer. They cannot transfer to a school in another district. They are stranded in their failing schools.

Diversity Has Distracted Us

Newsday, May 16, 2004

Fifty years ago this week, the U.S. Supreme Court declared in *Brown v. Board of Education* that school segregation was unconstitutional on the grounds that it violated the Equal Protection Clause of the 14th Amendment. Today it is common wisdom that integrated schools are preferable to segregated ones. Yet for Blacks on Long Island, the benefits are not so clear.

As part of an Island wide celebration of *Brown v. Board of Education* this spring, Touro Law School invited students from Central Islip, Huntington and Northport High Schools to a lecture by a Constitutional Law professor. At one point the professor asked “Do any of you attend a segregated high school?” expecting an affirmative response from the students at the predominantly white Northport High School.

There was silence. Finally, one of the students raised his hand and asked “Do you mean non-diverse?”

I take some comfort in the student’s use of the term “non-diverse.” It signifies a certain aversion to the label “segregated.” No one wants to be called racist and no one, including Trent Lott, would defend segregation.

But the term “non-diverse” is also disquieting. It is dishonest – a euphemism for “segregated” just as doctrine of “separate but equal” rejected the court in the *Brown* decision was dishonest. Separate was never equal. Nor are mostly white schools “non-diverse.” There may be a great deal of diversity in such schools – children with different interests, different religions, and even different ethnicities. What is missing is children of color brown and black children. Their absence is what we commonly mean by “segregation.”

The student’s discomfort with the word “segregated”, which he shares with many, suggests two possibilities: either people are ashamed at how racially separate schools continue to be, or the widespread aversion to black people hasn’t disappeared. It just cannot be taken out and flourished in polite company.

In *Brown v. Board of Education*, the Supreme Court spent a lot of time discussing the effect of segregation on black children. “Segregation” the court wrote “...generates (in black children) a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way that is unlikely to be undone.”

What segregation generated was not just a feeling, but an understanding of the existing social reality. Jim Crow in full regalia was a legal regime that created and maintained a relationship of dominance and subordination between whites and blacks.

Perhaps the court would have done better if it focused on the effect of segregation on white children as well. Does segregation encourage the belief that blacks and whites are innately different? This is the thinking that was justification for the separate but equal doctrine the court abandoned with *Brown*. Fifty years later we seem to have settled for schools that are separate and unequal.

Young black conservatives like John McWhorter point to the prevalence of interracial couples in white popular culture, as in the movie “Save the Last Dance for Me,” as an example of racial progress. I will not dispute the social and political advancement of African Americans, but I live on Long Island where far too many black and white children attend segregated schools because black families are excluded from white neighborhoods.

I find no comfort in the assurances of people like David Wilmott, publisher of *Suffolk Life*, who once editorialized that residential segregation on Long Island is not motivated by a desire to exclude blacks but by whites’ desire to live with other people just like them. Isn’t that the same thing as saying that blacks are inherently and unbearably different? Black people suspect that a belief in racial difference (inferiority) is what motivates real estate agents and landlords to steer blacks away from white areas.

When black parents in Hempstead recently called on school administrators in Garden City, arguing that they were legally entitled to send their children to their schools under No Child Left Behind legislation, I have no doubt that they wanted a better education for their children. They wanted their children to have the chance to study Japanese or Chinese in third grade and all the other amenities in schools in affluent communities. But I suspect they also wanted to make a very different point, my child was born the equal of your child. My child has as much potential as your child.

When the transformative power of law is discussed, the *Brown* ruling is the case that is cited most often. As Ted Shaw, the new director of the NAACP Legal Defense Fund, put it, *Brown* “broke the back” of the U.S. version of apartheid. It marked the beginning of the modern civil rights struggle.

There is good reason to celebrate this important and visionary decision. If nothing else, *Brown* reminds Americans of our finest aspirations, which include the ideal of equality for all.

Acting on those ideals is another matter. For those of us who live on Long Island, this would require abandoning an expensive system of gerrymandered school districts. We would have to confront the fact of school segregation and housing discrimination.

We have to get back to where we began, before the rhetoric of diversity diverted attention from the task at hand, before racial diversity became something highly valued in college and graduate schools but ignored and neglected in public elementary and high schools.

The Supreme Court in *Brown* made this very point. However important it was for students in professional schools to have an opportunity to “engage in discussions and exchange views with other students (s)uch considerations apply with added force to children in grade and high

schools.”³⁷ Somewhere along the way we lost sight of the single most important idea in *Brown*. If we ever expect to have a color-blind society, it is our children who will show us the way.

After Obama: The Resurgence of White Supremacy in the Wake of an alleged “Post Racial” moment.

We have moved from an era of wishful thinking about the elimination of racism to a period of political unrest that explicitly relies on racism as a strategy for mobilizing voters and supporters of a presidential candidate. The fact that white supremacists, who call their organization the National Policy Institute, celebrated the election of Donald Trump with Nazi salutes,³⁸ the fact that their leader, Richard Spencer, claims that America “belongs” to whites, the fact that white supremacists marched and chanted “blood and soil” in Charlottesville in 2018, are just some of the many incidents that demonstrate the current resurgence of racist ideology.³⁹

A belief in racial superiority and entitlement runs deep in American society and can be tapped with little or no effort to divert attention of mostly white working class and poor men and women from the real source of their misery. Racism persists because it is “bred in the bone” in the United States and because it is an effective instrument of control. It redirects anger about downward mobility and diminished earning power, anger which should be directed at policies and institutions that perpetuate enormous economic disparities in this country.

The “occupy” movement, which began in New York’s Zuccotti Park,⁴⁰ as well as the candidacy of Bernie Sanders for President,⁴¹ tapped into the idealism of many young people and liberals who believe that economic inequity exists and should be addressed with structural change. But in the end, it was Trump’s constant assertion that President Obama was not an American citizen that fueled his political aspirations and led to his campaign for President.⁴² Attacks on minorities by Donald Trump, during a campaign where he was advised by Stephen Bannon of Breitbart News, mobilized many white rural and working class whites. Keeping faith with his

³⁷ *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L. Ed. 873 (1954), supplemented sub nom. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

³⁸ Joseph Goldstein, *Alt-Right Gathering Exults in Trump Election with Nazi-Era Salute*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/2016/11/21/us/alt-right-salutes-donald-trump.html>.

³⁹ A lengthy article with photographs chronicling the events at the rally in Charlottesville was published in the Washington Post. Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, THE WASHINGTON POST, Aug. 12, 2017.

⁴⁰ Ben Feier, *The Occupy Movement Comes of Age*, FORTUNE, (May 24, 2016), <http://fortune.com/2016/05/24/the-occupy-movement-comes-of-age/>.

⁴¹ Tessa Stewart, *In The Battle for New York, Occupy Wall Streeters Turn Out for Bernie*, ROLLING STONE, (April 19, 2016), http://www.rollingstone.com/politics/news/in-the-battle-for-new-york-occupy-wall-streeters-turn-out-for-bernie-20160419?utm_source=email.

⁴² Alana Abramson, *How Donald Trump Perpetuated the ‘Birther’ Movement for Years*, (Sep. 16, 2016, 4:27 PM ET), <http://abcnews.go.com/Politics/donald-trump-perpetuated-birther-movement-years/story?id=42138176>.

followers and his anti-immigrant stance, one of the first acts of the new President was to ban immigrants from predominantly Muslim countries.⁴³

One of my high school classmates, posted on Facebook:

I hope everyone understands what this election is about. This election is not about Trump or Hillary. This election is about we the people taking back the power from our corrupt, elitist government. The reason the Republicans, the Democrats, and the Media are so against Trump is not because of who he is, its (sic) because of what he represents. He represents the voice of the people.

Although the Facebook post references elitism, this is not a critique of the wealthiest people in the United States. I believe it is a rant about the pedigree of the first Black president, especially when you compare Obama's sophistication, education, empathy, humanity, intelligence and competence to the "chaos" and the always bellicose, sometimes base and vulgar, behavior of Donald Trump. The "elitist" government under Obama passed a law providing health care to millions of people who had not had it in the past,⁴⁴ provided a safety net to those whose mortgages were under water after the Great Recession,⁴⁵ and Obama used an his power as President to make priorities for deportation by INS and ICE clear and his policy, Deferred Action for Childhood Arrivals⁴⁶ protected hundreds of thousands of undocumented residents who arrived in the U.S. as children from deportation.

⁴³ The Muslim Ban was litigated and criticized widely by legal scholars. See, e.g. *Executive Disorder: The Muslim Ban, Emergency Advocacy, and the Fires Next Time*, Abed Ayoub and Khaled Beydoun, 22 MICH.J.RACE & L. 215 (2017),

<https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1071&context=mjrl>; Sahar F.Aziz, *A Muslim Registry: A Precursor to Internment?* 2017 BYU L. Rev. 779 (2017), <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=3106&context=lawreview>; *Crimmigration – Counterterrorism*, 17 WISC. L. REV. 955 (2017); Eric Yamamoto, Maria Amparo Vanaclocha Berti, Jaime Tokioka, "Loaded Weapon" Revisited: *The Trump Era Import of Justice Jackson's Warning in Korematsu*, 24 ASIAN AM. L.J. 5 (2017) <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1224&context=aalj>.

⁴⁴ Patient Protection and Affordable Care Act, PL 111-148, March 23, 2010, 124 Stat 119 (codified as amended in scattered sections of 42 U.S.C.).

⁴⁵ Both the Home Affordable Modification Program and the Home Affordable Refinance Program were established to deal the fallout from the banking crisis in 2008. Many homeowners were "under water" as their homes lost the value created by a market bubble, inflated values created by speculation when mortgages were securitized. See *Making Home Affordable, Home Affordable Modification Program (HAMP)*, U.S. DEPT. OF THE TREASURY, (last visited October 11, 2018) <https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/hamp.aspx>; Looking to refinance an underwater mortgage, HARP, Federal Housing and Finance Agency, (last visited October 11, 2018), <https://www.fhfa.gov/Homeownersbuyer/MortgageAssistance/Pages/HARP.aspx>.

⁴⁶ It was not an executive order but as President Obama established enforcement priorities and policies for the Department of Homeland Security. Jon Greenberg, *Did Obama Say He Didn't Have The Right to Issue DACA?* POLITIFACT, (Jan. 9, 2018), <https://www.politifact.com/truth-o-meter/statements/2018/jan/09/donald-trump/obama-hedged-didnt-say-he-lacked-legal-right-daca/>. Trump obviously has exercised the same sort of power in prioritizing for Homeland Security and ICE the deportation for different immigrant groups.

The unrest of workers has been omnipresent in the United States whether we are talking about plant closing under Reagan's trickle-down theory of economics⁴⁷ or the video that went viral when workers at Carrier in Indiana were given notice that the plant was moving a plant to Mexico.⁴⁸ Trump might have been promising working class people that their industries could be restored when he coined the slogan "Make America Great Again." He was certainly tapping into their economic distress. But the chants at his rallies were not about corporate America (which was promised and received a huge tax break), but "building a wall" on the border with Mexico and locking up Hillary Clinton.

The candidacy of Donald Trump and his election as President was perceived as a win by the most virulent racists who believed that their world had been set right. These individuals do not make up a majority of the population in the United States, but they are a significant minority. What these numbers signify, at least to me, is that there is an obvious ideological divide in the United States-- about taxes, tariffs, free trade but also about nationality, race and gender.

The backlash against Hillary Clinton was a significant factor in the election of Donald Trump. It was as much about Hillary Clinton as it was about President Obama. In both instances, however, we can posit an underlying resentment and a belief that whites, and particularly white men, had been deprived of the power and prestige that is their social and political patrimony.

The following op-ed was written at the time Barack Obama was elected President. I had some reservations about the significance of that momentous achievement, particularly as pundits and commentators speculated that this meant we were a "post-racial" society. The complexity of race in the United States cannot be overstated. Nor should we discount the divisive and pernicious effects of a black/white binary on children of mixed marriages or recent immigrants from *any* part of the world where the skin tone may vary from light brown to ebony.

⁴⁷ Supply side economics, also known as trickle-down economics by its critics, was the economic policy implemented during the Reagan administration. During the 1980s the precipitous rise in the number of plant closing, throwing hundreds of thousands of blue collar workers out of work, was associated with this economic policy. The unemployment and loss of wages also had a ripple effect on local businesses and supplier. *See e.g.* the story of a plant closing of the Western Electric plant in Northern New Jersey, Robert Hanley, *Kearny Plant is Dying, Along with an Old Era*, N.Y. TIMES, (Jan. 29, 1983), <https://www.nytimes.com/1983/01/29/nyregion/kearny-plant-is-dying-along-with-an-old-era.html>.

⁴⁸ The video was described in the following way: "What made it special (Carrier's decision to move its plant to Mexico) was a recording of the Feb. 10 announcement and the reaction among the thunderstruck workers, which was promptly posted on YouTube and went viral. ... That (the video) made the event emblematic of the impact of corporate-suite economic policies on rank-and-file- employees, not least because the manager delivering the news seemed put out at the employees' unkind response to what he said was 'strictly a business decision' that 'would allow us to maintain high levels of product quality (and) competitive prices'." The article reported that only 730 rather than 1100 employees were retained and only when Indiana gave Carrier a \$7 million tax reduction over ten years. Vice President Pence, of course, is the former Governor of Indiana. Michael Hiltzik, *Trump's Carrier Jobs Triumph Looks More Like a Sham Every Day* L.A. TIMES, (Dec. 7, 2016, 3:05 PM), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-trump-carrier-20161207-story.html>; Additional layoffs took place at the Carrier factory in Indianapolis in 2018, leaving about 1100 workers at the plant. *More Layoffs at Carrier Factory Trump Touted Last Year*, (January 11, 2018, 8:29 PM) CBS NEWS, <https://www.cbsnews.com/news/carrier-factory-layoffs-indianapolis-factory-trump-touted/>.

One of the topics briefly mentioned in the following opinion piece is the emergence of a movement to permit individuals to identify as biracial or multiracial. The vociferous advocacy for this option on census and college applications and other forms or applications where an individual has to pick a racial category of ethnic identity with which he or she identifies is something which I elaborated on in an article I wrote sometime later.⁴⁹

A Fresh Look at Prejudice
Newsday, November 9, 2008

The victory of Barack Obama is widely seen as the culmination of the struggle by many blacks and whites, over many decades, to change the meaning of race in the United States. But does it mean, as some commentators have claimed, that we have become a “post-racial” society?

Looking back over the long campaign, I understand why Obama is often described as a man who “transcends” race. His first surprising victory in Iowa, a very white state, might be explained by taking into account the fact that he is the child of a white mother and black father. Theoretically, he is capable of crossing racial boundaries, free to express loyalty to both races. In his major speech on race, I noted that Obama did not say “I am a black man.” He did say “I am the son of a black man from Kenya and a white woman from Kansas. “ He described Michelle, his wife, as a black woman “...who carries within her the blood of slaves and slave owners.” Obama thus establishes in his wife and children a biological connection to the white community.

Still, we all know that Barack Obama considers himself a black man. He has said so many times and is identified by most Americans and the rest of the world as the first African American President. When Michelle Obama was asked on 60 Minutes whether her husband’s candidacy made her afraid for his life, she replied, “As a black man, Barack can get shot going to the gas station.”

On election night, the talking heads reflected on Obama’s calm demeanor as a crucial factor in the outcome, because this distanced the candidate from the stereotype of the angry black man. But Obama’s self-identification as a black man produced a retort from Susan R. Graham, founder and president of Project Race, which promotes the use of “multiracial” and “biracial” as standard checkoffs on applications and forms. She sniped that Obama is free to “identity as black, white, magenta, green or whatever he wants” but “genes are genes and his genes are multiracial.”

All this talk of blood and biology is not consistent with the argument that Obama has transcended race. Blood and genes and biology are the stuff used in the past to decide racial classifications and protect the privileges of the white race. Recall the “one drop rule” that classified anyone with one drop of black blood in his ancestry, no matter how remote, as black.

⁴⁹ Deborah W. Post, *Cultural Inversion and the One Drop Rule: An Essay on Biology, Racial Classification, and the Rhetoric of Racial Transcendence*, 72 ALBANY L. REV. 909 (2009), http://www.albanylawreview.org/Articles/Vol72_4/72.4.0005%20Post.pdf. For a discussion of litigation and allegations of discrimination with respect to biracial or multiracial individuals, see TANYA KATERÍ HERNÁNDEZ, *MULTIRACIALS AND CIVIL RIGHTS, MIXED RACE STORIES OF DISCRIMINATION* (2018).

When I was growing up in upstate New York in the 1950s, the daughter of a white mother and black father, I was always “black” to my white neighbors and classmates. I grew up in the black community, in an extended family of aunts, uncles, and cousins, all members of my father’s family.

My mother was born in Canada of German and Dutch origins. She somehow made her way to Rochester where she met my father. She had four daughters, all of **them** a shade of brown, whom she defended vigilantly. One day she was wheeling her three babies down the street and a white woman called us “cute little pickaninnies.” My mother responded by spitting in her face. She was incensed at racial prejudice, but not because she thought people need to recognize the whiteness in us. She defended us because we were living in a world where she recognized racial animus even when presented in the guise of flattery.

Maybe what we are seeing today in Obama’s speech on race and in the claims of Susan Graham is a form of cultural inversion. Blood and genes are taken as measures of inclusion instead of exclusion, allowing a claim of hybridity by a black man who might use this as a tool to bring about racial reconciliation. The fact that Obama chose not to make an issue of race during the campaign does not mean that we have transcended race.

There are lessons to be learned from his approach. In his speech on race, Obama said that he could not disown his white grandmother because she raised him, “sacrificed again and again” for him and loved him as much as “anything in this world.” Yet “she once confessed her fear of black men who passed by her in the street,” and he heard her resort to “racial and ethnic stereotypes.”

Living with whites who love us and whom we love and learning to deal with their racism does not make race irrelevant. In a society in which racial animosity is always a possibility, a black person who lives with white relatives, as Obama did, learns how to forgive and to make accommodations. You learn the difference between prejudices that are reflexive and almost unconscious and racial attitudes that are truly malignant and dangerous. Knowing the distinction does not make a black man white or in-authentically black, but it might well make him avoid confrontation and reject anger as a logical response to insult or humiliation.

This life experience might suggest an approach to racial relations that does not demand of whites an acknowledgment of individual or collective guilt, public apology or reparations for past injuries. It could lead one to believe that shared problems and common goals will be enough to minimize the significance of race. That is what appears to have happened to thousands of Obama supporters.

I think it is safe to conclude that while we have not transcended race in this “defining moment” we might be learning to live with it. If we believe that race is not the measure of difference with real social or political significance, that no claim of superiority or inferiority can be made on the basis of race, then the election of Barack Obama is a transformative moment in history.

Postscript

If only it had been so.....