

## FOREWORD

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*This issue is dedicated to Jerome McCristal Culp, Jr. (1950–2004), who mentored and nurtured many of the contributors to this issue during his life and who continues to teach and to motivate us through his writings. It is also dedicated to Amos Mills, III, who has been and continues to be a passionate and committed advocate for the rights of poor and oppressed people everywhere. Professor Culp’s and Mr. Mills’ enthusiastic support for young scholars generated the idea—implemented in this symposium issue—to pair, where possible, junior and more senior academics in scholarly collaboration.*

The idea for this symposium issue evolved over time. In 2006, my colleague Paul Carrington and I edited a compilation of essays for a book entitled *Law and Class in America: Trends Since the Cold War*.<sup>1</sup> The essays, written by leading experts in a variety of substantive areas of the law, considered the effects of legal reforms over the last twenty-five years on different socioeconomic classes. In the preface to the book, we wrote,

In the last half-century our law has often concerned itself with issues of race, religion, gender, age, disability, national origin and sexuality. Issues of wealth distribution have been linked to these other issues of hierarchy. But they have a pervasive significance of their own, and that significance seems to us to have fallen into neglect.<sup>2</sup>

We thus tried to center the book on class. We did not aspire to produce a volume about race or gender with class as an add-on or an afterthought. Although we did not instruct our contributors to omit examination of other status markers, our goal was to avoid having race or gender overshadow the class analysis. Yet, even while we were pursuing this objective, I had doubts about whether this approach was conceptually and practically feasible, or even advisable, given the complex ways in which class interacts with other variables. I was afraid of essentializing—that is, assuming that all people of a particular class share a universal experience unmediated by race, gender, national origin, et cetera.<sup>3</sup>

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1. *LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR* (Paul Carrington & Trina Jones eds., 2006).

2. *Id.* at vii.

3. See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (examining the failure of anti-discrimination law to account for the multiple influences of racism and sexism on the lives of Black women); Angela P. Harris, *Race and Essentialism in Feminist*

As the essays from our contributors flowed in, our approach was, to some extent, vindicated. It is possible, and perhaps even useful, to explore the common effects of governmental policies on various socio-economic classes without explicitly examining other status markers. Because, however, people of color in the United States are disproportionately represented among the poor,<sup>4</sup> it would be a mistake to conclude that the analysis ends there. Policies directed at all poor people, without differentiation, may be inadequate to address those whose identities rest at the intersection of two low-status markers.<sup>5</sup> To understand the effects of these policies, we must study the interplay and overlap between class and race and how that interplay serves to situate people in the United States.

While Professor Carrington and I were assembling the essays for *Law and Class in America*, the United States witnessed the ravages of Hurricane Katrina. In the days following the storm, I recall looking at the televised images of all of those people trapped in New Orleans with no place to go. Many were poor. Many were Black. I could not separate these two aspects of their identities or disconnect the people from the racialized space they occupied. The images raised a host of questions in my mind, and undoubtedly in the minds of others, about the demographic characteristics of these individuals and why the U.S. government responded so abysmally to them and to the chaotic nightmare in which they were mired. A few years after Hurricane Katrina, after much had been written about the storm and its aftermath, I found myself in conversation with Professor Terry Smith and Professor Audrey McFarlane, two of the contributors to this volume, about the need to examine more directly the intersection of race and class.

During roughly the same period (2005–2007), I sought medical assistance in the emergency room of a local hospital. As I sat for twelve hours awaiting care, I was astonished by the dismissive and disrespectful treatment receptionists and queue handlers were meting out to those seeking medical assistance. I became increasingly angry and impatient, yet I noticed that many around me wore an aura of fatigued acceptance. Through conversation, I learned that many of these individuals had been through this stultifying process before and began to realize that I was staring into the faces of some of the more than forty-six million Americans without health insurance.<sup>6</sup> Many were older.<sup>7</sup> Many were of color.<sup>8</sup>

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*Legal Theory*, 42 STAN. L. REV. 581 (1990) (criticizing gender essentialism).

4. In 2008, 39.8 million people lived in poverty. U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008 at 13, available at <http://www.census.gov/prod/2009pubs/p60-236.pdf>. The poverty rate was 8.6% for non-Hispanic Whites, 24.7% for Blacks, 11.8% for Asians, and 23.2% for Hispanics. *Id.*

5. Such policies may not only fail poor people of color, they may also impede the development of cross-racial coalitions among poor Whites and poor Blacks. See Martha R. Mahoney, *Class and Class Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 804 (2003) (discussing the costs of analyzing race and class separately); John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355, 398–406 (2007) (demonstrating how the oppositional use of race and class harms all Americans).

6. U.S. CENSUS BUREAU, *supra* note 4, at 20 (2008 figures).

Some appeared to be undereducated. These were people living on the margins of society, people for whom the emergency room was a primary-care physician. They were largely invisible to those of us who take insurance coverage for granted. I knew *I* had other options if my emergency room visit was unsatisfactory. But, I began to wonder, did they?

Following my night in the emergency room, I went home deeply disturbed. After contacting my primary care physician and others who insured that I could see the necessary specialists within a matter of hours, I called my mother. I grumbled and complained about inequality in the United States. I am sure I slammed a few doors. Finally, after calming down, I decided to proceed with this symposium. And, thankfully, the contributors to this volume agreed to join my quest to better understand and explain the relationship between race and class and how that relationship influences the life experiences of persons in the United States.

In this symposium, we do not seek to establish whether race or class is the larger barrier to opportunity in this country. Rather, our goal is to illuminate the complex interplay between race and socioeconomic class and to explore some of the unique challenges this interaction presents for policymakers. As contributors, we have tried to provide more than a descriptive snapshot of the status quo (for example, who benefits and who is harmed) in our particular areas of expertise. We have also sought to refrain from simply pointing out that discrimination based upon one status indicator (for instance, race) is appalling and is doubly so when another variable (for instance, socioeconomic class) is added. Instead, we have sought to reflect critically on the ways in which racism has contributed to socioeconomic disadvantage and, conversely, the ways in which socioeconomic disadvantage has spurred further racism. We consider the role of the law in reinforcing these dynamics, and suggest, where appropriate, creative legal interventions that may produce better outcomes. Ultimately, we hope this symposium will provide readers with a more sophisticated understanding of law's influence on racial and socioeconomic inequality in the United States and a better sense of the likely consequences of various policy choices.

In setting the stage for the articles that follow, it is perhaps useful to consider a few definitional matters and some of the challenges to eliminating racial and socioeconomic barriers to opportunity. To start, the United States in

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7. The uninsured rate for people age sixty-five and older has been steadily decreasing over the last four decades. In addition, persons over the age of sixty-five are eligible for Medicare. Thus, it is not immediately apparent why so many elderly people were present except of course that older people may experience more urgent health care needs. See [http://www.nj.com/news/index.ssf/2007/12/emergency\\_room\\_visits\\_by\\_elder.html](http://www.nj.com/news/index.ssf/2007/12/emergency_room_visits_by_elder.html) (noting that ER visits by the elderly increased by 34% between 1993 and 2003 and citing difficulties accessing primary care physicians and the fact that more elderly are surviving with chronic conditions as possible causes).

8. In 2008, the uninsured rate was 10.8% for non-Hispanic Whites, 19.1% for Blacks, 17.6% for Asians, and 30.7% for Hispanics. U.S. CENSUS BUREAU, *supra* note 4, at 21. Not surprisingly, the proportion of people without insurance is lower among those with higher incomes. *Id.* at 25.

2008 consisted of approximately 304 million people.<sup>9</sup> Approximately 66% identified themselves as White, 12% as Black or African American, 4% as Asian, and 15% as Hispanic or Latino.<sup>10</sup> In defining race, scholars have persuasively argued that race and racial classifications are social constructions rather than biologically driven realities.<sup>11</sup> In other words, racial classifications as lay people understand them are not genetically determined: racial groups are not hardwired to have certain moral, behavioral, or intellectual proclivities. Rather, race results from the meanings we attach to certain visual (for example, skin color, hair texture, facial features) and nonvisual (for example, ancestry, voice, names) cues. These cues, however, are not race. Race is a constantly evolving product of the ways in which society construes group differences and attaches meaning to those differences.<sup>12</sup> Importantly, race is dynamic, fluid, and relational, varying over time and space.<sup>13</sup> For example, although there is certainly overlap, what it means to be Black, Brown, or Asian in the United States may differ from what it means to be Black, Brown, or Asian in Brazil.<sup>14</sup> And conceptions of race and races in the United States today are similar to, yet different from, conceptions of race and races 200 years ago, or even fifty years ago.

Unlike race, one can reasonably argue that class has been under-theorized in recent decades in the United States, as least within the legal academy.<sup>15</sup> When

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9. U.S. CENSUS BUREAU, POPULATION DIVISION, TABLE 3: ANNUAL ESTIMATES OF THE POPULATION BY SEX, RACE, AND HISPANIC ORIGIN FOR THE UNITED STATES: APRIL 1, 2000 TO JULY 1, 2008 (May 14, 2009), *available at* <http://www.census.gov/popest/national/asrh/NC-EST2008-srh.html> (estimating that the U.S. population was 304,059,724 in 2008).

10. *Id.* The Census Bureau defines Hispanic or Latino as an ethnic category as opposed to a racial classification. Persons selecting this category can be of any race. U.S. Census Bureau, State and County Quick Facts, *available at* [http://quickfacts.census.gov/qfd/meta/long\\_RHI725206.htm](http://quickfacts.census.gov/qfd/meta/long_RHI725206.htm).

11. See Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L. J. 1487, 1493–94 (2000) (reviewing this literature).

12. See powell, *supra* note 5, at 358 (describing race as a set of cultural and institutional interactions involving all Americans); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) (defining race as “neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions”).

13. Lopez, *supra* note 12, at 7.

14. See, e.g., Tanya Kateri Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States–Latin America Comparison*, 87 CORNELL L. REV. 1093, 1106–07 (2002) (discussing the construction of race in Brazil); see also Keith Aoki, *Representing Representation*, 2 HARV. LATINO L. REV. 247 (1997) (discussing how understandings of race shift depending upon context).

15. Class has received increased attention in recent years due to the excellent and insightful work of organizations like LatCrit and scholars like Dorothy Brown, Angela Harris, Emma Coleman Jordan, Martha Mahoney, Deborah Malamud, and john a. powell. See, e.g., EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS* (2005); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997); Mahoney, *supra* note 5; Deborah C. Malamud, “Who They Are—Or Were”: *Middle-Class Welfare in the Early Deal*, 151 U. PA. L. REV. 2019 (2003) [hereinafter *Middle-Class Welfare*]; Margaret E. Montoya, *Foreword: Class in LatCrit: Theory and Praxis in a World of*

Americans consider class, they appear to think largely in economic terms. People are perceived as upper-, middle-, or lower-class<sup>16</sup> depending upon how much they earn. It is important, however, not to equate class with income. As skin color is with race, income is merely one indicator that people use in making class assignments. Class is the hugely complex set of stereotypes and beliefs that we attach to this indicator,<sup>17</sup> and these stereotypes and beliefs are every bit as dynamic and fluid as those associated with race.<sup>18</sup> In addition, although people tend to fixate on income, income is not the only indicator of class. Wealth,<sup>19</sup> educational background, occupational skill and status, consumption patterns and practices, and residential location, among other things, are also used to assign class.

Interestingly, unlike race, class is often viewed more as a status, or an economic location, than as an identity. Professor Angela Harris observes in her article in this symposium,

Although Americans are no strangers to class struggle, and at various points in our history have participated in lively debates over economic rights and social citizenship (not to mention bloody labor struggles), most people in the United States at present do not understand “class” as a crucial category either for personal identity or for political struggle.<sup>20</sup>

She nonetheless notes that

[t]aste is evident in the things one has, or aspires to have, and having “good” taste or not displays to others where one is (or hopes to be) in the economic hierarchy. Taste, therefore, has a lot to do with consumption. What you buy, or have, says a lot about where you are in the class hierarchy.<sup>21</sup>

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*Economic Inequality*, 78 DEN. U. L. REV. 467 (2001); john a. powell, *The Race and Class Nexus*, *supra* note 12.

16. These categories may not accurately track or depict class divisions in the United States today, as the emergence of “professional” classes and “underclasses” suggest. *See* Angela P. Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, 72 LAW & CONTEMP. PROBS. 37, 40–44 (Fall 2009); *see also* Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1863–66 (1996) (discussing various ways of representing economic inequality).

17. For example, poor people are stereotyped as unintelligent, unsophisticated, sexually promiscuous, lacking in morals (or overly moralistic depending upon context), lazy, dirty, and more suited to manual labor than professional occupations, among other things. When one begins to consider the similarities between stereotypes of poor people and stereotypes of people of color, one begins to see the ways in which race and class are sometimes inextricably interwoven. *See* Trina Jones, *Race, Economic Class, and Employment Opportunity*, 72 LAW & CONTEMP. PROBS. 57, 62–70 (Fall 2009) (discussing stereotypes commonly ascribed to poor people).

18. Mahoney, *supra* note 5, at 803 (“Both class and race are moving targets, their meanings forged through social processes and human relationships that change over time.”).

19. “Wealth is what people own, while income is what people receive from work, retirement, or social welfare. Wealth signifies the command over financial resources that a family has accumulated over its lifetime along with those resources that have been inherited across generations.” MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 2 (2006).

20. Harris, *supra* note 16, at 37.

21. *Id.* at 41.

Although I have described them separately, race and class cannot be neatly divided. It is axiomatic that everyone has (and performs)<sup>22</sup> a race and everyone has (and performs)<sup>23</sup> a socioeconomic class. Understanding the ways in which these two markers interrelate, however, is challenging. To be sure, people of color tend to be disproportionately represented among the poor given their numbers in the population,<sup>24</sup> whereas Whites tend to be disproportionately represented among the wealthy.<sup>25</sup> But these facts alone tell us very little about the ways in which race and class interact to situate people differently in the United States. Considering privileged Whites and poor Whites, both in relation to each other and in comparison to privileged Blacks and poor Blacks provides a glimpse of the complexities of this interaction. In comparing privileged Whites and poor Whites, race is virtually invisible and is rarely discussed. It lurks in the background, out of focus, almost disappearing from view.<sup>26</sup> Yet, viewed more closely, race arguably plays a critical role in how the two groups are conceptualized and stereotyped. With privileged Whites, class and race are mutually reinforcing. Whiteness connotes power, and power is manifested through wealth, occupational status, educational pedigree, et cetera. Thus, privileged Whites are presumably more likely to be privileged because they are White. And, by the same token, being wealthy, educated, and so forth, reinforces what it means to be White. In contrast, the interaction between race and class is different with poor Whites. If whiteness is presumed to confer access to power, then being White *and* poor suggests a failure to take advantage of this opportunity. Poor Whites become somehow viewed as less than White. They are unfortunately characterized as “white trash”—throw-away, embarrassing, dispensable white people.<sup>27</sup> Their poverty renders them both unable to access, and perhaps deemed unentitled to, the privileges of whiteness.

With people of color, the interaction between race and class also plays out in fascinating ways.<sup>28</sup> For example, privileged Blacks<sup>29</sup> appear to violate an

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22. By racial performance, I mean the degree to which an individual chooses (consciously or subconsciously) to exhibit characteristics associated with a particular race. Performativity scholars recognize that race is not merely the result of others’ perceptions (i.e., something that is thrust upon an individual). It is also a product of the institutional structures, social interactions, and performances through which individuals come to understand and to define themselves.

23. See Mahoney, *supra* note 5, at 832 (“Class is not just about structure or position but something dynamic that includes the ways people understand themselves and their lives. Therefore, there is a relationship between how people understand their situations and how they act which moves in both directions; action affects consciousness, and consciousness affects action.”).

24. See U.S. CENSUS BUREAU, *supra* note 4, at 12.

25. See OLIVER & SHAPIRO, *supra* note 19, at 99–106.

26. See Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2009–29 (1995) (examining white transparency).

27. See Jones, *supra* note 17, at 62.

28. To be sure, this interaction varies among minority groups. For example, the association between race and class differs when one considers privileged Asians. There, the stereotype of the model minority may create an expectation that Asians will prosper. *But see* Robert Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81

unstated, though perhaps changing, norm: Blacks are not supposed to be privileged, and the privileged are not supposed to be Black.<sup>30</sup> For Blacks, race (in a stereotypical as opposed to a “real” sense) does not positively correlate with prosperity in the way that it does with Whites. Privileged Blacks are wealthy notwithstanding constructions of and assumptions about blackness; their race does not reinforce their upper class status. On the other hand, wealth can ameliorate, though it does not totally erase, the negatives associated with blackness. That is to say, wealth can render a Black person more acceptable in some circles.<sup>31</sup> Yet, as this symposium’s article by Professor Angela Onwuachi-Willig and Professor Osamudia James shows, privileged Blacks do not completely escape the negative stereotypes accorded lower-class Blacks, as characterizations of Senator Barack Obama during the 2008 presidential campaign illustrate.<sup>32</sup>

In contrast, with poor Blacks, constructions of race and class are mutually reinforcing. For poor Blacks, race and racial stereotypes positively correlate with poverty, not prosperity. That is, negative stereotypes and beliefs about Blacks increase the likelihood of Black people being poor (for example, because they are unable to secure employment). And, as the number of Blacks living in poverty increases, poverty becomes a constitutive element of blackness. In other words, class and race become inextricably linked with poor Blacks. Individuals are poor because they are Black and Black because they are poor.<sup>33</sup> The convergence of race and class may help explain why Blacks are disproportionately poor in this country.<sup>34</sup> It may also help explain why programs that benefit all poor people (the bulk of whom are White) often get labeled as

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CAL. L. REV. 1241 (revealing flaws with the model-minority myth and examining the substantial cultural and economic variation within Asian American communities).

29. It is worth noting that the middle-class or privileged status of many Blacks is somewhat tenuous as that status relies heavily on income as opposed to wealth. OLIVER & SHAPIRO, *supra* note 19, at 7–8.

30. See Mahoney, *supra* note 5, at 829–30 (“[M]iddle class’ is presumptively white or non-African American, a notion easily identified by distinguishing the frequency with which ‘black’ qualifies ‘middle class’ in ways that ‘white’ or ‘Asian’ do not. In contrast, the category ‘underclass’ is presumptively non-white, and the term is particularly likely to be used to refer to African Americans.”); see also PAT WILLIAMS, SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE 34–35 (1998) (noting that the term “underclass” is a euphemism for Blackness and “middle-class” is a euphemism for Whiteness).

31. Middle-class Blacks are sometimes “praised” as “honorary Whites” or “not really Black” (or conversely “berated” for “acting White”) as if their class privilege somehow erases or decreases negative stereotypes associated with their race.

32. See Angela Onwuachi-Willig and Osamudia James, *The Declining Significance of Presidential Races?*, 72 LAW & CONTEMP. PROBS. 89 (Fall 2009).

33. In other words, because of the similarity in stereotypes associated with blackness and poverty, being poor reinforces negative conceptions of blackness. See John A. Powell, *The Race and Class Nexus*, *supra* note 5, at 358 (“[R]ace and class are distinct and at the same time mutually constitutive, recursive processes in the United States that render race and class radically incoherent without understanding their interactive nature.”).

34. See U.S. CENSUS BUREAU, *supra* note 4, at 12.

Black programs (that is, are negatively viewed as benefiting primarily people of color).<sup>35</sup>

In addition to these complexities, other challenges to the study of race and class bear mention. First, it is hard to talk publicly about race. Given this country's troubled history of racial oppression, discussions of race tend to generate passionate emotion and sharply diverging views. These discussions may be more difficult in this moment of transition when people differ about whether we are in a post-racial America<sup>36</sup> and about whether we should shift the focus of equality efforts from race to class.<sup>37</sup> Second, notwithstanding continuing racial disparities revealed by statistical data, it is hard for some people to make the causal connection between racial discrimination and inequality. Although the United States is less than fifty years removed from de jure, or state-sanctioned discrimination, it seems that many contemporary Americans either do not understand or resist acknowledging the ways in which past practices have been institutionalized and the ways in which advantage and disadvantage are passed intergenerationally. This is in part because the nature of discriminatory practices has changed. In lieu of the blatant, in-your-face discrimination of the past, discrimination today is more subtle and discreet, and it is often unconscious.<sup>38</sup> Instead of the outright exclusion of people of color, we are more likely to see intragroup preferencing, in which decisionmakers screen out a subgroup of employees of color based upon things like the relative lightness or darkness of skin tone<sup>39</sup> or the degree to which employees choose to assimilate, or cover their racial identities (for example, by hiding their accents

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35. See, e.g., Dorothy Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007) (discussing how the Earned Income Tax Credit, whose beneficiaries are mostly White, is seen as primarily benefiting Blacks and explaining how this characterization harms all low-income people); Morgan Doran & Dorothy Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386 (2002) (discussing the ways in which welfare policy in the 1980s became heavily associated with Blacks).

36. Claims that the United States has entered a post-racial era, where race is no longer salient, have been made with seemingly increasing frequency since the election of Barack Obama as President. See, e.g., Shelby Steele, *Obama's Post-Racial Promise*, L.A. TIMES (Nov. 5, 2008), available at <http://www.latimes.com/news/printedition/opinion/la-oe-steele5-2008nov05,0,1642069.story>; Juan Williams, *Obama's Color Line*, N.Y. TIMES, Op-Ed (Nov. 30, 2007) available at <http://www.nytimes.com/2007/11/30/opinion/30williams.html>. On the flawed assumption of a post-racial America, see Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L. J. (forthcoming 2010); John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785 (2009); Trina Jones & Mario L. Barnes, *Post-Racial? The U.S. Is Not Ready To Drop Safeguards*, L.A. DAILY J., Aug. 28, 2009, at 1.

37. For a summary of the debate over the primacy of class or race, see OLIVER & SHAPIRO, *supra* note 19, at 12; see also Mahoney, *supra* note 5, at 804 (discussing the paradox of "doing race" or "doing class" when the two in fact intersect).

38. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498–528 (2005); Charles Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329–44 (1987).

39. See generally Jones, *supra* note 11; Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000).



or refraining from wearing ethnic attire).<sup>40</sup> Finally, examination of race is difficult because the way in which people experience race and racism varies both within and across racial groups. As has been often said, people of color are “raced” differently.<sup>41</sup> Sometimes the basis for differentiation is skin color. Sometimes it is religion. And, as Dean Kevin Johnson’s examination of the effects of U.S. immigration laws on Latino immigrants shows, sometimes it is language and national origin.<sup>42</sup>

If discussing race is hard in part because people are so passionately invested in it, then discussing class may be equally difficult, but for the opposite reason.<sup>43</sup> Notwithstanding politically correct and polite professions of concern, there is reason to doubt whether Americans really care all that much about poor people. To be sure, Americans pay lip service to the idea of greater socioeconomic equality, and from time to time are even kind to homeless people passed on the streets. But one suspects that lingering in a lot of people’s minds is the belief that socioeconomic class is a factor over which individuals have control. Indeed, this idea reflects the essence of the American Dream. Although this dream is becoming increasingly unobtainable for many people,<sup>44</sup> Americans are socialized to think that if they work hard, good things will come their way.<sup>45</sup> Consequently, many people seem to believe that those who fail to pull themselves up by their bootstraps in this land of plenty are solely to blame for their plights.

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40. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 718–20 (2001); Flagg, *supra* note 26, at 2009–29.

41. By raced, I mean the process through which race is assigned to individuals in society and the consequences of that assignment. Although there is overlap, the indicators used in racial categorization vary. For African Americans, skin color serves as a primary indicator of race. For Asian Americans, the key indicator may be facial features. For Latinos, language may serve this role. In addition, the stereotypes associated with various racial groups sometimes differ. Thus, African Americans are sometimes stereotyped as intellectually inferior but athletically or physically strong. Asians are sometimes viewed as a model minority, whereas Latinos are sometimes stereotyped as drunkards and lazy.

42. See Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 23–34 (Fall 2009).

43. On the lack of discourse about class in the United States, see BENJAMIN DEMOTT, *THE IMPERIAL MIDDLE: WHY AMERICANS CAN’T THINK STRAIGHT ABOUT CLASS* 17–29 (1990); BELL HOOKS, *WHERE WE STAND: CLASS MATTERS* vii (2000).

44. See JULIA ISAACS, ISABEL SAWHILL, & RON HASKINS, *GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA* (Brookings Inst. 2008) (revealing increasing income inequality and decreased rates of social mobility in the United States in recent decades) available at [http://www.economicmobility.org/assets/pdfs/PEW\\_EMP\\_GETTING\\_AHEAD.pdf](http://www.economicmobility.org/assets/pdfs/PEW_EMP_GETTING_AHEAD.pdf).

45. See ISABEL SAWHILL & JOHN MORTON, *ECONOMIC MOBILITY: IS THE AMERICAN DREAM ALIVE AND WELL?* at 5–6 (May 2007), available at [http://www.economicmobility.org/assets/pdfs/PEW\\_EMP\\_AMERICAN\\_DREAM.pdf](http://www.economicmobility.org/assets/pdfs/PEW_EMP_AMERICAN_DREAM.pdf).

But the problem goes deeper than simply overcoming a lack of empathy. Analysis and understandings of class are complicated because class is for the most part invisible in American social discourse.<sup>46</sup> As one scholar notes,

It is a fleeting image, a rarely detected underlayer to the complex texture of race, ethnicity, and gender that captures our society's attention. For many, America stands as the model of the classless society, one in which most people think of themselves as middle class (or at least as potentially so, with hard work and a little luck) and in which middle-classness is the socio-economic face of "American-ness." The recognized exception, the chronic poor, is seen as an aberration rather than evidence of a general system of class in the United States.<sup>47</sup>

In their article in this symposium, Professors Mario Barnes and Erwin Chemerinsky demonstrate that the invisibility of class in our national consciousness is reflected in, and perhaps a product of, the failure of U.S. constitutional and statutory law to recognize class as a protected classification.<sup>48</sup> Professor Harris adds a further critique, observing that the failure to recognize economic and social rights is built into the overlapping structures of U.S. governmental and economic systems.<sup>49</sup> One cannot help but wonder, in this time of economic uncertainty, to what extent the invisibility of class hierarchy will determine whose issues will be seen, prioritized, and addressed.<sup>50</sup> Will the United States reprioritize and reassess the relative contributions of members of this society, or will it default to treating groups according to existing norms and values?

In addition to these challenges, examinations of class are made thornier by the fact that many scholars who study class operate from a position of relative economic privilege. Although some may have hailed from working class backgrounds or may have had past exposure to impoverished conditions, academics are generally not among the 13.2% of the U.S. population, or approximately 39.8 million people, who live in poverty.<sup>51</sup> Thus, many scholars may not understand what it means to live under or near the poverty threshold, which in 2008 was \$20,614 for a family of four.<sup>52</sup> An annual income of \$20,614 equates to approximately \$1700 a month or \$396 a week. To understand better

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46. Mahoney, *supra* note 5, at 800–02 (observing that although there has been a recent resurgence of interest in class in legal scholarship, this new interest is “not rooted primarily in concern with the conditions of low wage workers or the unemployed,” but rather is “a new twist on the topic of race” as activists try to circumvent judicially imposed barriers to racial equality).

47. *Middle-Class Welfare*, *supra* note 15, at 2019.

48. See Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109 (Fall 2009).

49. Harris, *supra* note 16, at 44–50.

50. See generally Malamud, *Middle-Class Welfare*, *supra* note 47 (showing that during the New Deal, federal welfare administrators prioritized the needs of unemployed white-collar workers and in the process both defined and entrenched a vision of the American class hierarchy with white-collar work as the most salient determinant of middle-class status).

51. See U.S. CENSUS BUREAU, *supra* note 4, at 13.

52. U.S. CENSUS BUREAU, POVERTY, POVERTY THRESHOLDS FOR 2008 BY SIZE OF FAMILY AND NUMBER OF RELATED CHILDREN UNDER 18 YEARS, available at <http://www.census.gov/hhes/www/poverty/threshld/thresh08.html>.

what these figures mean, consider that it costs in-state residents about \$18,000 per year to attend a public university like the University of North Carolina at Chapel Hill.<sup>53</sup> The average new car costs \$28,400.<sup>54</sup> On March 2, 2009, a gallon of gas sold for a nationwide average of \$1.93.<sup>55</sup> The average rent for a two-bedroom apartment in the Raleigh–Durham area of North Carolina is about \$815.<sup>56</sup> Being poor means having less access to quality education, to decent housing, to healthcare, to employment, and to a host of other opportunities. It is relatively easy to write about poverty and to theorize it from a distance. It is almost impossible to understand the reality of being poor without having recently walked in a poor person’s ravaged shoes.

It is within this framework and in recognition of these considerable challenges that the contributors to this volume agreed to undertake this project. All of the articles touch upon themes raised in this Foreword, with some directly expanding upon these themes through richly detailed and textured analysis. For example, Dean Kevin Johnson probes the relationship between race, class, and citizenship in his examination of U.S. immigration laws. He observes that these laws are “nothing less than a ‘magic mirror’ into the nation’s collective consciousness about its perceived national identity—an identity that marginalizes poor and working immigrants of color and denies them full membership in American social life.”<sup>57</sup> The connection between class and race, and class and other identity markers, is also explored in Professor Harris’ sophisticated theoretical examination of gender *and* class, gender *as* class, and class *through* gender,<sup>58</sup> in Professor McFarlane’s investigation of what it means to really take class into account and her examination of the ways in which class can both positively and negatively affect racial experience,<sup>59</sup> and in my own treatment of race and class in employment.<sup>60</sup> And a comparative analysis of race and class centers Professor Barnes and Dean Chemerinsky’s critique of the “impoverished treatment” of class in U.S. constitutional jurisprudence.<sup>61</sup>

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53. See [http://www.admissions.unc.edu/Aid\\_and\\_Scholarships/Tuition\\_and\\_Fees/default.html](http://www.admissions.unc.edu/Aid_and_Scholarships/Tuition_and_Fees/default.html) (estimating a 2009–2010 cost of \$18,000 for North Carolina residents, which includes tuition and fees, room and board, books and supplies, and personal expenses).

54. FEDERAL TRADE COMMISSION, FACTS FOR CONSUMERS, available at <http://www.ftc.gov/bcp/edu/pubs/consumer/autos/aut11.shtm>.

55. U.S. DEPARTMENT OF ENERGY, ENERGY INFORMATION ADMINISTRATION, WEEKLY U.S. RETAIL GAS PRICES, REGULAR GRADE available at [http://www.eia.doe.gov/oil\\_gas/petroleum/data\\_publications/wrgp/mogas\\_home\\_page.html](http://www.eia.doe.gov/oil_gas/petroleum/data_publications/wrgp/mogas_home_page.html).

56. See Raleigh–Durham–Chapel Hill NC Apartment Rental Rates, <http://www.apartmentratings.com/rate?a=MSAAvgRentalPrice&msa=6640> (last visited Oct. 23, 2009) (calculating average prices from renters’ disclosures of monthly rental rates on a web site).

57. See Johnson, *supra* note 42, at 2.

58. See Harris, *supra* note 16.

59. See Audrey G. McFarlane, Operatively White?: *Exploring the Significance of Race and Class Through the Paradox of Black Middle-Classness*, 72 LAW & CONTEMP. PROBS. 163 (Fall 2009).

60. See Jones, *supra* note 17.

61. See Barnes & Chemerinsky, *supra* note 48, at 110–18.

Although some articles expand directly upon the themes raised in this Foreword, others use the themes as a starting point for analysis before venturing in other provocative directions. Professor Ruth Gordon examines poverty and inequality from a global perspective and considers whether the current global economic crisis, spurred on by the failure of western financial systems, may lead to a “new, new international economic order” in which people of color and nations that were formerly subject to colonialism and other forms of economic and political domination will assume a more central role.<sup>62</sup> Two of the articles probe the role of race and class in the U.S. political process. Professor Onwuachi-Willig and Professor James expose the ways in which race and class were strategically employed to influence electoral outcomes during Senator Barack Obama’s 2008 bid for the presidency.<sup>63</sup> Professors Ross and Smith take on the political process from a different vantage point, contending that the system, with its two-party competition model, responds insufficiently to the interests of politically marginalized groups. To address this concern, they propose the use of a “minimum responsiveness” standard to measure compliance with constitutional and democratic requirements of representative government.<sup>64</sup> In their article, Professor Goodwin and Professor Richardson examine the role of trust and loyalty in fiduciary relationships and ask whether tort-law damage calculations should include inquiry into the reasonableness of a patient’s reliance upon the services of medical practitioners.<sup>65</sup> Equally interesting is the thought experiment Professor Goodwin engages in with Nevin Gewertz, in which the authors examine whether the participation rate of Blacks in organ donation would increase if organ donors could select the race of organ recipients.<sup>66</sup>

We are excited by this collection of articles. We acknowledge, however, that even with the excellent contributions of Professor Harris and Dean Johnson, this symposium issue does not include enough discussion of status markers like gender, religion, and national origin. Nor does it provide detailed coverage of education, crime, and other tremendously important areas. Perhaps remedying these shortcomings will be the goal of our next collaborative effort. For now, we hope the reader will be engaged and stimulated by our initial attempts to begin unraveling the complex tapestry of race and class.

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62. See Ruth Gordon, *The Dawn of a New, New International Economic Order?*, 72 LAW & CONTEMP. PROBS. 131 (Fall 2009).

63. See Onwuachi-Willig & James, *supra* note 32.

64. See Bertrall L. Ross II & Terry Smith, *Minimum Responsiveness and the Political Exclusion of the Poor*, 72 LAW & CONTEMP. PROBS. 197 (Fall 2009).

65. See Michele Goodwin & L. Song Richardson, *Patient Negligence*, 72 LAW & CONTEMP. PROBS. 223 (Fall 2009).

66. See Michele Goodwin & Nevin Gewertz, *Rethinking Colorblind State Action: A Thought Experiment on Racial Preferences*, 72 LAW & CONTEMP. PROBS. 251 (Fall 2009).