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## WHITE PRIVILEGE AND AFFIRMATIVE ACTION

by

Sylvia A. Law\*

As we approach the new century, the Nation is at a critical juncture with respect to race relations and the law. For the past two decades “affirmative action” has been the central mechanism through which we have promoted racial integration, and, at the same time, a central issue of controversy.

Since 1996, many authoritative voices challenge the legitimacy of affirmative efforts to achieve racial integration. The Supreme Court has struck down many affirmative action programs. The Court has not upheld any affirmative action program since 1989, when, by a 5-4 decision, it approved a narrowly targeted Congressional program to encourage minority ownership of broadcast licences.<sup>1</sup> In 1996, California voters approved Proposition 209, broadly prohibiting any form of affirmative action on the basis of race or gender. In the same year, in the *Hopwood* decision, the Fifth Circuit held that the University of Texas could not give any consideration to race in determining admissions to its law school.<sup>2</sup> In November 1998, the First Circuit Court of Appeals held that the affirmative action admission policies of Boston Latin High School were unconstitutional.<sup>3</sup> Before I discuss affirmative action, I would like to put the issues into a new analytic framework, suggested by my title -- White Privilege.

### I. WHITE PRIVILEGE.

#### A. *The General Concept.*

Stephanie Wildman, in her magnificent book *PRIVILEGE REVEALED*, notes that “The notion of privilege . . . has not been recognized in legal language and doctrine. This failure to acknowledge privilege, to make it visible in legal doctrine, creates a serious gap in legal reasoning, rendering law unable to address issues of systemic unfairness.”<sup>4</sup>

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\* Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry, NYU Law School. This was originally presented as The Mansfield Lecture, at The University of Akron School of Law, Jan. 28, 1999. Many people gave me helpful comments and research leads. I am grateful to: Ben Ensminger-Law, Kenneth Huber, Paul Finkelman, Kenneth T. Jackson, Alice Law (my mom who studies the history of our homesteading family), Josh Meisler, John Reid, Michael Schill, and Stephanie Wildman. Adam Wendell, NYU 2000, provided magnificent research help. My assistant, Leslie Jenkins, is an invaluable aid. NYU Law School’s Filomen D’Agostino and Max E. Greenberg Faculty Research Fund provided financial support.

<sup>1</sup> *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). This was one of Justice Brennan’s last decisions and many observers see it as a farewell tribute to him.

<sup>2</sup> *Hopwood v. State of Texas*, 84 F.3d 720 (5<sup>th</sup> Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

<sup>3</sup> *Wessman v. Gittens*, 160 F.3d 790 (1<sup>st</sup> Cir. 1998).

<sup>4</sup> STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES*

White privilege is the pervasive, structural, and generally invisible assumption that white people define a norm and Black<sup>5</sup> people are “other,” dangerous, and inferior. Peggy McIntosh observes that privilege can “take both active forms, which we can see, and embedded forms, which as a member of the dominant group one is taught not to see.”<sup>6</sup> Ruth Frankenberg observes:

Naming “whiteness” displaces it from the unmarked, unnamed status that is itself an effect of its dominance. Among the effects on white people of race privilege and of the dominance of whiteness are their seeming normativity, their structured invisibility . . . . To speak of whiteness is to assign *everyone* a place in the relations of racism. . . . [It is more difficult] for white people to say “Whiteness has nothing to do with me -- I’m not white” than to say “Racism has nothing to do with me -- I’m not a racist.”<sup>7</sup>

Careful studies show that by the time children are in kindergarten they are aware of race. Both white and Black children attach positive value to whiteness and negative value to Blackness.<sup>8</sup> Thus Black parents must do serious work to educate their children to deal with daily acts of racism that they will experience. We white parents experience much greater discretion in deciding whether and how to guide our children in relation to race.

When people are asked to describe themselves in a few words, Black people invariably note their race and white people almost never do.<sup>9</sup> Surveys tell us that virtually all Black people notice the importance of race several times a day. White people rarely contemplate the fact of our whiteness -- it is the norm, the given.<sup>10</sup> It is a privilege to not have to think about race.

The concept of white privilege, even if powerful and true, is so general that a reasonable person could fail to understand it. Indeed, reasonable people could question the sanity of someone who asserts the power of “invisible forces” shaping our civil life.

Concrete stories may help to make white privilege visible. All of my stories are personally embarrassing. I am more sensitive and politically correct on race issues than

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AMERICA 8 (1996).

<sup>5</sup> This capitalization choice is conscious. *See id.* at 4-6.

<sup>6</sup> Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, INDEPENDENT SCHOOL (Winter 1990).

<sup>7</sup> RUTH FRANKENBERG, *THE SOCIAL CONSTRUCTION OF WHITENESS* 6 (1993).

<sup>8</sup> FRANCES E. KENDALL, *DIVERSITY IN THE CLASSROOM: A MULTI CULTURAL APPROACH TO THE EDUCATION OF YOUNG CHILDREN 19-21* (1983).

<sup>9</sup> Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN.L.REV. 581, 604 (1990).

<sup>10</sup> *See* Martha A. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1662-67 (1995).

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many white people. I have been active in the civil rights movement since the early 1960s. I was jailed in Yellow Springs, Ohio in 1964, in a struggle to desegregate the local barber shop. Charges against me are still pending, at least theoretically. I try to avoid being a racist or discriminating on the basis of race. But I do enjoy white privilege. And I suspect that I notice it in a small fraction of the cases in which it occurs.

*B. Examples of White Privilege: Mobility.*

1. Taxi Cabs.

Whites are systematically more mobile than Blacks. That difference is largely invisible to white people. Taxi cabs are emblematic of white privilege.<sup>11</sup> Taxi's don't pick up Black people. I live in downtown Manhattan. Over the years, I have often said to a Black guest, "Let me walk you to the street and help you catch a cab." These are well dressed, middle-aged, professional people. Especially late at night, no one ever declines my offer. Cabbies don't like to pick up Black people.

Recently I was uptown, late on a cold night, with lots of bags. I walked to Central Park West to catch a cab. A well dressed Black couple was on the corner seeking a taxi. In accordance with City etiquette, they moved a half block up the street to get the first available cab. I understood that they were entitled to the first, and I to the next. A taxi came, drove right by them and pulled up next to me.

I could have held the door, yelled to them to come, and given them the cab. I could have taken the cabbie's number and reported him to the Taxi and Limousine Commission. I could have discussed his inappropriate behavior with him. I did nothing. The driver's behavior was not a matter of individual preference or taste. His action was illegal. Since Rosa Parks refused to sit at the back of the bus, and Congress passed the Civil Rights Act of 1964, it has been illegal for common carriers, including taxis to discriminate on the basis of race.<sup>12</sup> Nonetheless this happens all the time in New York City and everyone knows it. Our mayor, Rudolph Giuliani, is widely known as a man with zero tolerance for quality of life offenses. Aggressive law enforcement has rid the City of squeegee men and loud radios.<sup>13</sup> But there has been absolutely no

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<sup>11</sup> CORNELL WEST, *RACE MATTERS* xiv-xv (1993). West explains how, despite being dressed in a business suit en route to an important meeting, he was unable to hail any one of many empty taxis. *Id.*

<sup>12</sup> See Civil Rights Act of 1964, 42 U.S.C. §2000a (1998). Some state statutes actually specify that taxis are a public accommodation. See, e.g., *Totem Taxi, Inc. v. New York State Human Rights Appeal Board*, 480 N.E.2d 1075 (N.Y. 1985) (taxis are public accommodations under the New York State civil rights law); MINN. STAT. ANN. §363.03, Subdivision 3 (1998).

<sup>13</sup> See e.g., Mike Allen, *Giuliani to Ban Food Vendors on 144 Blocks*, N.Y. TIMES, May 24, 1998, at A27.

effort to enforce the anti-discrimination laws against taxi drivers.

Catching a cab in New York is a fine art form. Whites enjoy a serious privilege over Blacks. Most whites do not even notice. And those that do sometimes just take the privilege, as I did that night.

## 2. DWB or driving while black.

Driving presents another vivid example of white privilege. A couple of years ago my then teen-age son drove across the country with his teen friends. He had a long pony tail and drove a four-wheel-drive Yuppie van, with New York plates. In Iowa, he got pulled over in the middle of the night, driving 20 miles an hour over the speed limit. He told me with glee and pride how he had talked his way out of a ticket. I congratulated him. He observed that he had learned with the master. That would be me.

I have never been pulled over unless I have done something pretty egregiously wrong—speeding, running a “yellow” light that had long since turned red. And usually, like my son, I talk my way out of these encounters. When I get in the car, I know that if I obey the law, I will not be stopped. If I am stopped, I can usually avoid a ticket, with deference, charm and ditziness. Most white people can tell wonderful, funny, imaginative stories about how we danced out of a legitimate traffic tickets.

That is white privilege. A growing scholarly and academic literature documents the phenomena of DWB, or driving while black.<sup>14</sup> These studies suggest that when Blacks -- especially men and young people -- get behind the wheel, they can expect to be stopped, even if they obey the lights and the speed limits. A recent decision by a federal district court in Massachusetts recognized the reality of DWB.<sup>15</sup> In this case, the defendant was a middle aged Black man. He had a twenty-year history of steady employment and responsible, loving relations with an immediate and extended family. He was in the back seat of a car that was pulled over by the police. They found a weapon next to him on the seat and charged him with the serious federal crime of being a Felon in Possession of a Firearm. He did not challenge the basic charge. But under the Federal Sentencing Guidelines, federal judges are required to impose much more serious sentences if a defendant has a history of prior convictions. The judge noted that four of his prior convictions involved traffic violations many years earlier. In each case he had been pulled over by the police, even though, as the court observed, “not one charge involved driving erratically, or violating a traffic law.” Rather, *after* he was pulled over, officers found some defect in his car registration or insurance papers. For

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<sup>14</sup> Tracy Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 341-52 (1998); Christopher Hall, *Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence: Whren v. United States, United States v. Armstrong and the Evolution of Police Discretion*, 76 TEX. L. REV. 1083, 1088 (1998).

<sup>15</sup> *United States v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998).

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these paper infractions, on four occasions he was charged with a felony and sentenced to 10 days to 6 months in jail, with the sentence always suspended. The Federal Judge in Massachusetts, recognizing the phenomena of DWB, refused to allow these prior convictions to be used to impose a very harsh sentence.

In my career as a sometimes excessive driver, I have also had the occasional paperwork problem. The inspection sticker is out of date. The current insurance card or registration is in the other purse or in my office. In my experience, the normal legal rule is that if you have legal papers some place, you mail them in and there is no problem. Felony charges!? Jail terms, even if suspended?! No way!

This is white privilege. The embarrassing part of the story is that I did not notice it. During all the years in which I taught my son, by example, to talk his way out of perfectly legitimate traffic tickets, I never asked, "Honey, do you appreciate that whiteness is the *sine qua non* of our ability to do this." I never asked him and I never really noticed it myself.

#### C. More Examples of White Privilege: Home Ownership.

For most Americans, home ownership is our most important source of wealth. Home ownership is at the heart of the American Dream. It has a profound impact on inter-generational opportunity.

Our Founders understood that owning secure and productive property was a key foundation to the freedom and independence necessary to responsible citizenship and the exercise of all other liberties. The federal constitution allowed states to limit the franchise to property holders, and all states did so.<sup>16</sup> Today, after enormous historic struggle, the right to vote is not limited to white, male property owners. Further, "property" now takes many forms -- a license to practice law or medicine, taxi medallions, pensions, Social Security and so forth.<sup>17</sup> Nonetheless, home ownership remains a matter of core importance. Whether or not we, our parents, or our grandparents owned property matters. It matters to our children and grandchildren. In 1999, at every income level, vastly more white people own homes than Blacks.<sup>18</sup>

There are many reasons for this, but two big public moments in the past century go far to explain who owns a home and who doesn't. The first moment is the settling of the Midwest and the west at the end of the 19th and beginning of the 20th century. The second is the great housing boom at the end of World War II.

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<sup>16</sup> JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHTS* 47 (1992).

<sup>17</sup> Charles Reich, *The New Property*, 73 *YALE L.J.* 733, 734-37 (1964).

<sup>18</sup> MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 109 (1995).

## 1. Settling the Great Plains and West.

I grew up in the 1950s in Minnesota, the Dakota's and Montana. The land of *Fargo* and Garrison Keilor. No Black people lived there then and there are few now.<sup>19</sup> Everyone understood that the old money, the elders of the community, all came from the federal homestead program. Swedes, Norwegians, Germans. Virtually all the colleges and universities were federal land grant programs. We knew that the federal government had passed this wealth to the people who stepped up to claim it, and who would work the land.

The embarrassing part of this story is that it was not a few years ago that I asked, "Why were all the homesteaders white? Why were all the land grant colleges white? How did this vast area of our country, settled through federal largess, become all white?" I began asking friends, serious historians and legal scholars, to tell me why this vast area of our Nation that I know best is virtually all white. Most did not know. Some offered explanations that struck me as racist. "Blacks don't like cold weather." Most Nordics do not regard the cold as an affirmative good. "Blacks had deep attachments to their local communities." But in the post Civil War South these were communities of profound violence and economic exploitation. There is very little in the legal literature on the racial dynamic of the settlement of the United States.<sup>20</sup> Indeed, I have found only one book, Nell Irvin Painter, *Exodusters: Black Migration to Kansas after Reconstruction*, that discusses the issue. The reviews suggest that this study is unique.<sup>21</sup>

After the Indian Wars, in the mid-nineteenth century, people living in the Midwest sought the help of the federal government to give them legal title to land. Proposed

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<sup>19</sup> In 1950, African-Americans made up less than 0.1 percent of the population of North and South Dakota, and 0.2 percent of Montana. See U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION 1950, VOL. II: CHARACTERISTICS OF THE POPULATION 1-106 (1950). In 1990, African-Americans made up 0.6 percent of North Dakota, 0.5 percent of South Dakota, and 0.3 percent of Montana. See U.S. BUREAU OF THE CENSUS, CHARACTERISTICS OF THE BLACK POPULATION 1990 at 1 (1990).

<sup>20</sup> But see Phyliss Craig-Taylor, *To Be Free: Liberty, Citizenship, Property and Race*, 14 HARV. BLACKLETTER J. 45 (1998). Craig-Taylor assumes that Black people did not benefit from homesteading because by 1870 "the most significant period of public land divestiture in the history of the United States" was over. *Id.* at 57. Homesteading continued for another 60 years. See also Rev. Jessie L. Jackson, Sr., *America: Our Past, Present, and Possibilities*, 31 LOY. L.A. L. REV. 1339, 1340 (1998).

<sup>21</sup> David H. Donald, *North To Home: Exodusters*, N. Y. TIMES BOOK REVIEW, Jan. 30, 1977, at 7. "What makes this book so important, is. . . [that it] is the first full-length scholarly study of this migration and of the forces that produced it. . . ." *Id.* William Hair, *Exodusters: Black Migration to Kansas After Reconstruction*, 82 AMER. HIST. REV. 1079 (1977). The American Historical Review said this issue has "been undeservedly ignored. *Id.* Nell Irvin Painter has produced a book which rescues the Exodusters from obscurity . . ." *Id.*

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federal Homestead legislation was opposed by Southern legislators, “fearing development of non-slave states.”<sup>22</sup> When the Southern states seceded from the Union, the Republicans responded to the claims for legal title. In the midst of the Civil War, they passed the Homestead Act of 1862.<sup>23</sup> The Act gave any person over age 21 *or* a head of household, who was a citizen *or* intends to become one, the opportunity to claim ownership of 100 acres of land. From a modern perspective, it is interesting that the Act gave these rights to both citizens and those who intended to become citizens. To own the land, the homesteader had to live there for five years and make improvements to the property.

Why were all the homesteaders white? When the legislation was first enacted in 1862 Black people were not citizens, but rather property. So, it is not surprising that Black people did not become homesteaders at that time. But the Homesteading program continued until 1934.<sup>24</sup> Minnesota was the major homesteading state in the years immediately following the Emancipation Proclamation. Kansas and Nebraska lead homesteading in 1869-1879, and the Dakotas in the 1880s. Overall, the peak years for homesteading were: 1871, 1880 and 1902.<sup>25</sup> All these years are after the end of the Civil War.

At the end of the Civil War, abolitionists and Republicans were concerned about the economic situation of freed slaves. They believed that land ownership was the key to independence. However, no one encouraged freed slaves, experienced agricultural workers, to claim the 100 acre homesteads in the Midwest and the West. Rather, in 1866 Congress passed the Southern Homestead Act to give citizens loyal to the union, including former slaves, the opportunity to claim 40 acres of land in Mississippi, Arkansas, Louisiana and Florida.<sup>26</sup> Most of the land available to the Southern homesteaders was very poor. White southern land owners fiercely resisted federal efforts to give land, even poor land, to former slaves. Rather, the Southern plantation owners favored the share cropping system under which former slaves paid rent, worked the land, and were always in debt to their former masters.<sup>27</sup> The Southern Homestead Act was repealed ten years later in 1876.<sup>28</sup>

By 1876, former slaves appreciated that the share cropping system perpetuated the

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<sup>22</sup> Merrill G. Burlingame, *Montana*, 19 ENCYCLOPEDIA AMERICANA 395 (1995).

<sup>23</sup> 12 Stat. 392 (1862).

<sup>24</sup> The Taylor Grazing Act of 1934 ended homesteading in the continental United States, but continued it in Alaska. 14 ENCYCLOPEDIA AMERICANA 330 (1995). NELL IRVIN PAINTER, *EXODUSTERS : BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION* 255 (1976).

<sup>25</sup> By the 20th century, most of the good farming land was taken. In 1904 the Kincaid Act allowed homesteads of 320 acres on dry lands. 14 ENCYCLOPEDIA AMERICANA 330 (1995).

<sup>26</sup> 14 Stat. 66 (1866). *See also* Jackson, *supra* note 20 at 1340.

<sup>27</sup> Painter, *supra* note 24, at 54-70.

<sup>28</sup> 19 Stat. 72 (1876).

economic arrangements of slavery and that the laws and dominant social attitudes of the white South made it unlikely that they could acquire the property that they saw as necessary to independence. In 1877, 3,000 Black people, purporting to represent 29,000 former slaves, petitioned the President asking for help in finding land, either on the frontier or in Africa.<sup>29</sup> From 1877-1879, many Southern Blacks explored the possibility of emigrating to Africa, principally to Liberia, and some did so.<sup>30</sup> Beginning in 1877, a small number of Blacks from the Confederate states migrated to Kansas, and particularly to Nicodemus, in Graham County.<sup>31</sup> By 1880, the total Black population of Nicodemus was 700.<sup>32</sup> The settlement fared poorly during the winter of 1877-78, because they arrived too late to plant a crop and had few horses or mules.<sup>33</sup> But, “[n]ew settlers and a fresh growing season saved the Nicodemus colonists from the worst of their wants. By the next harvest they were on their feet again.”<sup>34</sup> The most fortunate of the Nicodemus settlers accumulated enough money to rent or buy farms. “The less fortunate -- and in 1880 these outnumbered the former -- remained in towns.”<sup>35</sup>

This small, marginally successful, community of Black people settling in the frontier, inspired a variety of southern Black people to think of migration to the frontier. Kansas had a particular attraction for Black people. As Painter explains:

Kansas represented something that Nebraska and the Dakotas did not. To make Kansas a Free State, blood flowed freely during the 1850s. It was the quintessential Free State, the land of John Brown, “a free state in which a colored man can enjoy his freedom.” . . . Now, Kansas made no special appeal to attract Black migrants; it offered them no special inducements. But old abolitionist, temperance Republicans ruled the state, and they held out precisely the same welcome to Black settlers as to white. This even-handed sense of fair play amounted to an open-armed welcome, in comparison to much of the rest of the country at the time.<sup>36</sup>

But more important than the affirmative attraction of Kansas, or any other frontier state, Blacks in the South in the 1870s were driven to leave by “terrorism and poverty” and the fact the federal government refused to protect Black people from massive violence.<sup>37</sup> In 1879, Southern Black leaders responded to this terrorism and enforced debt and poverty, petitioning Congress to adopt a program to provide former slaves, or

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<sup>29</sup> PAINTER, *supra* note 24, at 87.

<sup>30</sup> *Id.* at 137-145.

<sup>31</sup> *Id.* at 149.

<sup>32</sup> *Id.* at 150.

<sup>33</sup> *Id.* at 151.

<sup>34</sup> *Id.* at 152.

<sup>35</sup> PAINTER, *supra* note 24, at 153.

<sup>36</sup> *Id.* at 159.

<sup>37</sup> *Id.* at 190, 160-183.

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at least those who had served in the Union Army, land on the frontier, subsidized transportation and supplies and support for the first year.<sup>38</sup> The proponents of this concept did not seek a legally exclusive Black territory.<sup>39</sup> “The location of this territory remained indeterminate, although vague references in discussion and Senatorial debate mentioned Arizona or part of the Indian Territory.”<sup>40</sup> And, of course, Kansas still had its special appeal.

Congress never adopted this program. But the “Kansas Fever” idea captured the imagination of six thousand Black people from Louisiana, Mississippi and Texas.<sup>41</sup> They took families, belongings, and meager funds and got on river boats to take them to St. Louis. When they “learned on the Mississippi River banks or in St. Louis that there was no free transportation, no free land, no General Sherman, and no Negro state, it made no difference whatsoever. They still meant to leave the South, and once disembarked in St. Louis, they would not go back.”<sup>42</sup>

Other Black people who left the South in this period had a more realistic sense of their options. Some Black emigrants understood that in Kansas in 1879, the best quality land could be purchased for \$6 an acre, mediocre land for \$4 an acre, and the poorest for \$2 an acre. Homestead land provided 160 acres of the poorest land for \$18 in fees and an obligation to work it for five years.<sup>43</sup>

By 1879, when massive numbers of Southern Blacks sought to resettle in Kansas, most of the Kansas homestead land had been settled. In 1866, the federal government was willing to recognize that the end of slavery required that former slaves be given land to work.<sup>44</sup> That effort was designed to fail and did in fact do so. It required that former slaves live in close proximity with former masters.

By 1879, the former slaves appreciated that they needed to move out. But they needed help. Why didn’t we give it to them? Some Republicans in Congress sought federal aid, but it was not forthcoming.<sup>45</sup> By 1879, all the best land in Kansas had been claimed by homesteaders. The land that was available was in the Dakotas and in Montana. The Dakotas were mostly homesteaded in the 1880s and Montana in the early twentieth century. If the federal government had been willing to support the start up

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<sup>38</sup> *Id.* at 176-77.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> PAINTER, *supra* note 24, at 184.

<sup>42</sup> *Id.* at 195.

<sup>43</sup> *Id.* at 206.

<sup>44</sup> *See supra* notes 26-28 and accompanying text.

<sup>45</sup> Painter comments, “In the context of the political thinking of the late nineteenth century, it is not surprising that Congress appropriated no aid to the Exodusters. PAINTER, *supra* note 24, at 206.

costs of Black people who sought to leave the deep South, could they have made a successful life as homesteaders?

Jonathan Raban's book, *BAD LAND: AN AMERICAN ROMANCE*, provides a moving description of the homesteaders who settled eastern Montana in the early years of the twentieth century.<sup>46</sup> In 1909, in response to heavy lobbying from the railroad industry, Congress offered 320-acre tracts of land in eastern Montana, to anyone willing to claim them.<sup>47</sup> As Raban points out, in 1909, maps still identified eastern Montana as the Great American Desert. In the Dakotas, and even more so in eastern Montana, economic viability turned on rainfall. From the 1880s to 1913, the weather was kind to the homesteaders.<sup>48</sup> But it then turned harsh. Beginning in 1914, and especially during the 1930's, rainfall was slight, winters were brutally cold, grasshoppers invaded, hail and cyclones destroyed crops.<sup>49</sup> Some homesteaders survived and succeeded, some failed, and some moved west.

How would Black farmers have fared in this larger homesteading world? My ancestors homesteaded in Minnesota in 1881, in North Dakota in 1905 and in Montana in 1910. I asked my 82 year old mom, who is a serious student of this history, "Why didn't any African Americans claim homesteads in the Dakotas?" She answered, "There was a lot of prejudice against colored people."<sup>50</sup> Jonathan Raban confirms her perception. He reports that the homesteaders of Eastern Montana in the early 20th century came from many ethnic and religious backgrounds. Nordic, Irish, English, and German homesteaders built fences together, against the common enemy, the cow men.<sup>51</sup> People of very different religious belief lived in amicable proximity.<sup>52</sup>

Raban describes the central roll that local schools played in the homesteading communities, more important than local churches.<sup>53</sup> The federal government was interested in encouraging the local schools to convey the appropriate message of U.S. citizenship and promoted approved texts and lesson plans. Randall J. Condon, Superintendent of the Cincinnati Schools, and general editor of the Atlantic Readers series, "wrestles bravely with the shaping paradox of American nationalism -- that it

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<sup>46</sup> JONATHAN RABAN, *BAD LAND: AN AMERICAN ROMANCE* (1996).

<sup>47</sup> 35 Stat. 639 (1909). This Act also applied to land in Arizona, Colorado, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

<sup>48</sup> RABAN, *supra* note 46, at 207, 209.

<sup>49</sup> *Id.* at 208-42.

<sup>50</sup> Interview with Alice Ruth Nelson Law, author's mother (Jan. 22, 1999).

<sup>51</sup> RABAN, *supra* note 46, at 96-146.

<sup>52</sup> *Id.* at 224. Two families, the Wollastons and the Zehms, came to eastern Montana from the same Minnesota community. The Wollastons were Episcopalian and the Zehms Seventh-Day Adventists. They shared a boarder and held different values. *Id.*

<sup>53</sup> *Id.* at 162.

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must be multi cultural, a nationalism of all the nations.”<sup>54</sup> While the federally promoted educational program sought to promote respect and integration among various European ethnic and religious groups, it ignored race.

The nationalism of which Condon makes so much fuss in his forward turns out, in practice, to be a simple pride in America for having gathered so many traditions under one flag and for incorporating so many beautiful landscapes in one political geography. Native Americans get a fair shake; black Americans are nowhere to be found -- any acknowledgment of their presence in this generous land would have been hard to square with Condon’s “great dream” of “racial equality for all the people.”<sup>55</sup>

The former slaves knew farming, adversity and hard work. They could not settle Kansas, the Dakotas, Montana or anyplace else without some help, at least in the period 1880-1920. That would have been an affirmative action program, adopted in response to the recognition that slaves had been denied fair opportunity, on a massive scale. It would have transformed the culture of the Midwest. It would, I believe, have had a profound influence on the way we think about race today.

Today, it is very difficult for most white people to hold ourselves responsible for slavery. It is difficult to see ourselves as “privileged” by the patterns I just described. Patterns of land ownership in these areas of the country were set by federal policy in the late nineteenth and early twentieth Centuries. These patterns effectively excluded Blacks.

## 2. Financing Mortgages since World War II.

A similar story of white privilege can be told about the financing of residential housing in this century, since the Great Depression. It is a complex story, wonderfully told in Kenneth Jackson’s book, *THE CRABGRASS FRONTIER*.<sup>56</sup> In 1933, Congress created the Home Owners Loan Corporation to help refinance mortgages in danger of

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<sup>54</sup> *Id.* at 165. Condon urged that,

Far and near, selections have been sought that would help to deepen a sense of good will and fellowship and kindly consideration for others by emphasizing the fine qualities of all mankind. We have endeavored to teach that our pledge to the flag, ‘one nation indivisible, with liberty and justice for all,’ means a national unity of spirit that cannot be divided into groups or sects or races -- into rich and poor, into weak and strong, into those who work on farms, in factories, forests, and mines, and those who do not have to toil -- this nation to include all, with liberty of conscious and conduct for each . . . .

*Id.* at 165-66.

<sup>55</sup> *Id.* at 166.

<sup>56</sup> KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985).

foreclosure.<sup>57</sup> The government believed that it needed to protect its investment by surveying neighborhoods, appraising homes, and developing criteria. The system they developed assigned neighbors one of four grades: A or green, B, or blue, C, or yellow, and -- the least desirable -- D or red. That 1933 policy created the concept of “red lining” that remains with us today. When the FHA was created in 1934, to indemnify banks against the risk of default on home mortgages, it relied on the criteria developed by the HOLC.<sup>58</sup>

Jackson demonstrates how the criteria systematically disfavor urban areas and African Americans. Those criteria were applied in the great housing boom in the years following World War II.<sup>59</sup> Even though Blacks served in the war in disproportionately large numbers, they were disadvantaged in the administration of FHA loans after the war. Some developers, such as those who created Levittown and other major middle income housing projects, systematically excluded blacks. But, far more significant, the federal criteria for the banking community preferred suburban white neighborhoods over urban or integrated communities.<sup>60</sup>

For those of us who are white, our parents and grandparents benefitted from this form of white privilege. As the value of housing has appreciated over the past half century, we, and our children, are the direct economic beneficiaries of this white privilege.

Racial discrimination in relation to housing is not solely a matter of inherited history. Today most informed observers believe that racial discrimination is common in the contemporary housing market.<sup>61</sup> Nonetheless, there is little effort to enforce the anti-discrimination law.<sup>62</sup> In 1999, the U.S. Department of Agriculture agreed to pay \$300 million dollars to settle a sixteen year-old law suit in which Black farmers proved that the department had discriminated against them by denying loans and other subsidies.<sup>63</sup> Sadly for many Black farmers, the acknowledgment of discrimination came too late. In 1920, 14 percent of the nation’s farms were owned by Blacks; by 1992, the number had dwindled to one percent.<sup>64</sup>

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<sup>57</sup> *Id.* at 196-203.

<sup>58</sup> *Id.* at 203-18.

<sup>59</sup> *Id.* at 231-45.

<sup>60</sup> *Id.* at 231-45.

<sup>61</sup> Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1408 (1998); Michael H. Schill, *Local Enforcement of Laws Prohibiting Discrimination in Housing: The New York City Human Rights Commission*, 23 FORDHAM URB. L. J. 991, 993-98 (1996).

<sup>62</sup> Selmi, 45 UCLA L. REV. at 1406-04; Schill, 23 FORDHAM URB. L. J. at 1019-25.

<sup>63</sup> David Firestone, *Agriculture Department to Settle Lawsuit by Black Farmers*, N.Y. TIMES, Jan. 5, 1999, at A-1.

<sup>64</sup> Kevin Sack, *To Vestige of Black Farmers, Bias Settlement is Too Late*, N.Y. TIMES, Jan.

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## WHITE PRIVILEGE AND AFFIRMATIVE ACTION

*D. Objections to the Concept of White Privilege.*

In discussing this article with decent, anti-racist white men, I have encountered a lot of resistance to the concept of “white privilege.” First, they object because, as they struggle to make a decent life for themselves, they do not feel particularly privileged. I empathize. As I talk with my son, his Ivy League college friends, and my own students, I appreciate that they confront difficult choices among constricted opportunities. Life at the turn of the century is difficult, even for affluent, educated, straight white men. That honest difficulty triggers resistance to a recognition that whiteness is privileged.

Second, they perceive that the concept of “white privilege” implies a wrong doing and guilt on their part that they do not believe is justified. As I have suggested, while white people benefit from white privilege, it is systemic and invisible, and not a matter of individual wrong doing or guilt. I am not guilty of racism because a cab picks me up. I do not discriminate when cops don’t stop me for no reason, and then let me talk them out of a ticket. I am not a racist because my daddy got a good VA mortgage that parleyed into good housing for the rest of our lives. That is not the point. Like it or not, we white people do benefit from white privilege. And most of the time we do not even notice it.

Finally, my sensible anti-racist white friends protest that the real problem is discrimination against black people, not white privilege. I agree that as a practical matter, solutions must be found in anti-discrimination law. Nonetheless, understanding the contemporary reality of white privilege may illuminate our understanding of anti-discrimination principles.

White privilege is not recognized in our law. Rather the law deals with “discrimination” and seeks to define wrongs for which the law can provide a legal remedy. Even if we accept that white privilege is a pervasive yet invisible fact, it is not clear that it is a wrong for which there should be a legal remedy, or what form that remedy might take. Rather we must seek remedies in our anti-discrimination law. The next section demonstrates that our current concepts of discrimination perpetuate, rather than remedy, white privilege.

## II. LIMITS ON CURRENT CONCEPTS OF ANTI-DISCRIMINATION LAW.

*A. Intentional Discrimination.*

Until the Civil Rights Movement of the 1960s racial discrimination was blatant and explicit. With the adoption of the Civil Rights Act of 1964, and the Voting Rights Act

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6, 1999, at A-1.

of 1965, that became unacceptable. The Duke Power Company provided an early and vivid example of how discrimination and segregation could be perpetuated, even after the law prohibited racial classifications. Until 1964, the company maintained two categories of laborers, white and Black. The whites were paid more. Other than that, they did the same work. When the 1965 law prohibited paying white workers more because they were white, the company created two new categories. The favored group included incumbents and new applicants with a high school diploma. Few new applicants had a high school diploma. But those who did were all white. There was no evidence that a high school diploma was related to the ability to be a first class laborer. The Supreme Court rejected this effort to utilize job requirements that discriminate in effect. The Court recognized that the newly-minted academic requirement perpetuated the second-class treatment of Black workers.<sup>65</sup> The Court recognized that neutral rules -- the high school graduation requirement -- that have the effect of discriminating against Black people are presumptively invalid. They can only be defended if the employer shows that they are actually related to a legitimate purpose.

Sadly, the Court's commitment to a concept of equality that recognizes that discriminatory effects matter was short lived. In 1976, Black applicants to the Washington D.C. police department challenged a standardized test that excluded virtually all Blacks. There was no evidence that the test measured qualities important to being a good cop. Indeed, there was a lot of evidence that an overwhelmingly white police force in a predominately Black city was not functional. Nonetheless, in *Washington v. Davis*, the Court approved the standardized test that was discriminatory in effect. The Court held that the Constitution prohibits racial discrimination only when it can be proven to be *deliberate and intentional*.<sup>66</sup> In 1979, the Court drove home the principle that only deliberate, intentional discrimination matters when it held that:

“Discriminatory purpose,” however, implies more than intent as violation or intent as awareness of consequences. It implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of” its adverse affect upon an identifiable group.<sup>67</sup>

Thus, the bottom line is the only racial discrimination that counts in the law is explicitly articulated, intentional, conscious racism. Our anti-discrimination law itself embodies a form of white privilege.<sup>68</sup> The only perspective that counts is that of the white perpetrator. The effects on Black victims are irrelevant. And if, as is often the

<sup>65</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>66</sup> *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>67</sup> *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

<sup>68</sup> My friend, Dr. Richard Meisler, offered this observation at the Mansfield Lecture, University of Akron, School of Law, Jan. 28, 1999. Charles Lawrence has made similar observations. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

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case, whites do not notice that the neutral policy privileges whites and disfavors Blacks, the policies cannot be condemned.

This legal conception of discrimination is myopic. Only conscious intent to discriminate because of race counts. The anti-discrimination law replicates white privilege. The only thing that matters is the intent of the white person, not the impact on the Black.

*B. Biased Standards of Merit.*

Common standards of merit rely heavily on personal connections, references, legacies, and family contacts,<sup>69</sup> and upon standardized tests.<sup>70</sup> All of these measures of merit are heavily discriminatory. Further, there is little systemic effort to enforce the anti-discrimination laws, even in areas like taxis, law enforcement, and housing, in which we know that discrimination against Black people is common. In this environment — with narrow concepts of discrimination that look only to explicit discriminatory intent, standards of “merit” that systematically favor white people, and failure to enforce laws against intentional discrimination — affirmative action carries *all* the weight of promoting integration and diversity.

*C. Affirmative Action.*

Affirmative action should not need to carry all this weight. Affirmative action is a troubling, third-best solution to the deep problems generated by our history of slavery and racial discrimination. A far wiser approach would recognize that white privilege is pervasive and all too often invisible. It would pay attention to effects. If the effects of a policy, pattern, or practice hurt Black people, the law should ask, “Is there any good justification or reason for this policy, pattern, or practice?” Transforming our law to recognize discriminatory effects as a form of discrimination would require either a Constitutional amendment or overruling of decades of precedent. These moves are not on the political radar screen.

If the culture and law persist in denying the existence of white privilege and the relevance of discriminatory effects, then the third best solution -- affirmative action -- remains vitally important. Affirmative action programs are pervasive in the United States today. Business supports them. Traditional hiring methods -- the old boy network and standardized tests produce a workforce that is overwhelmingly white and male. Traditional criteria do not do a good job of predicting ability to perform. Employers find that tests screen out a substantial portion of the talent pool, depriving them of skills and strengths they need to succeed. Further, a workforce that is

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<sup>69</sup> HENRY J. HOLZER, WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS 127 (1996).

<sup>70</sup> See *infra* note 91 and accompanying text.

overwhelmingly white and male is not able to operate effectively in a diverse nation and global economy. For similar reasons, affirmative action is also common in education.

Affirmative race-conscious programs have always been allowed when they are used to remedy the continued effects of past discrimination. Indeed, when you have a situation of proven intentional discrimination, affirmative action is constitutionally required to remedy it. Under this principle, the school systems of most of the South and much of the North were under judicial order to implement affirmative action programs through the 1970s and 1980s.

In addition, in 1978 the late Justice Lewis Powell, in his opinion in the Supreme Court's famous *Bakke* decision, ruled that racial preferences are also permissible if their purpose is to improve racial diversity among students, and if they do not stipulate fixed minority quotas, but take race into account as one factor among many.

Today, it is not clear that the Court will continue to support *Bakke's* limited authorization for race conscious affirmative action programs. In the past twenty years the Court has found many affirmative action programs unconstitutional. Indeed, since 1990, the Court has not approved a single race conscious affirmative action program. In 1996, the Fifth Circuit Court of Appeals struck down the affirmative action program of the University of Texas. Two of the three judges said that the Supreme Court has already effectively overruled *Bakke*, and that *any* consideration of race in school admission is unconstitutional.<sup>71</sup> Also in 1996, the voters of California approved Proposition 209, which provides that no state institution may "discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin the operation of public employment, public education, or public contracting."<sup>72</sup> Most recently, in November 1998, the First Circuit Court of Appeals held that Boston Latin's affirmative action program violated the constitution. Like the University of Texas, Boston Latin, an elite public high school, was traditionally limited to white males. Unlike the Fifth Circuit, the First Circuit refused to declare that *Bakke* was dead. Rather, the court held that the affirmative action program utilized at Boston Latin did not meet *Bakke's* exacting standards.<sup>73</sup>

The Fifth Circuit's decision in *Hopwood* had immediate and, in the view of the Texas Law School's faculty, disastrous results. UT, which had been officially limited to white students until 1950 when they were ordered to admit Blacks,<sup>74</sup> had admitted

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<sup>71</sup> *Hopwood v. State of Texas*, 78 F.3d 932, *reh'g en banc denied*, 84 F.3d 720 (5<sup>th</sup> Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

<sup>72</sup> A federal judge in San Francisco stayed the enforcement of Proposition 209, but the Ninth Circuit Court of Appeals removed the stay, the Supreme Court refused to consider an appeal from that decision, and the Proposition is now in force.

<sup>73</sup> *Wessmann v. Gittens*, 160 F.3d 790, 800 (1<sup>st</sup> Cir. 1998).

<sup>74</sup> *See Sweatt v. Painter*, 339 U.S. 629 (1950).

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 31 Black students in 1996. In 1997, only four Black students were enrolled. Proposition 209 has had a similarly devastating impact on California schools. Boalt Hall Law School at Berkeley, the state's premier public law school, had enrolled an average of 24 Black students each year for the last 28 years. In 1997 it enrolled only one, and he had been admitted the previous year but had deferred entering.<sup>75</sup>

A strictly race-neutral policy of admission to undergraduate schools would reduce the numbers of blacks admitted by 50 to 75 percent.<sup>76</sup> Eliminating affirmative action would have a particularly stark impact on the legal and medical professions. Under race-blind policies, Blacks would make up only 1.6 to 3.4 percent of the students accepted to the 173 law schools approved by the ABA.<sup>77</sup> Eliminating affirmative action from medical education would reduce Black enrollment by 90 percent.<sup>78</sup>

### III. IS AFFIRMATIVE ACTION EFFECTIVE AND FAIR?

The question whether educational institutions should be allowed to take race into account and pursue policies that seek racial diversity raises two important issues. First, as a practical matter, do affirmative action programs actually benefit those who are directly helped and society as a whole? And second, is affirmative action fair as a matter of principle?

#### A. *Is Affirmative Action Effective?*

Much of the recent criticism of affirmative action asserts that it has been counterproductive in every way. People such as Stephan and Abigail Thernstrom, and Shelby Steele<sup>79</sup> claim that it has "sacrificed" rather than helped the Blacks admitted to the programs, perpetuating a sense of black inferiority among both whites and blacks themselves, and promoting black separatism and a race-conscious society rather than integration and a genuinely color-blind community.

We are blessed with a massive new study that addresses these questions. THE SHAPE OF THE RIVER, by William G. Bowen, former President of Princeton University

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<sup>75</sup> John E. Morris, *Boalt Hall's Affirmative Action Dilemma*, AMERICAN LAWYER, Nov. 1997, at 4.

<sup>76</sup> WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 351 (1998).

<sup>77</sup> *Id.* at 44.

<sup>78</sup> See *What if There Was no Affirmative Action in Medical School Admissions*, 19 J. OF BLACKS IN HIGHER EDUC. 11 (1998).

<sup>79</sup> STEPHEN & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1997); SHELBY STEELE, *A Negative Vote on Affirmative Action*, in DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION (Nicholas Mills ed., 1994).

and Derek Bok, former President of Harvard University, is the largest study of affirmative action ever undertaken.<sup>80</sup> Bowen and Bok are highly respected, mainstream scholars. They did a sophisticated examination of the largest data base ever examined about affirmative action. It contains extensive information about more than eighty thousand undergraduates who matriculated at 28 selective colleges in 1951, 1976, and 1989.<sup>81</sup> Here are some of the main findings.

First, the Blacks admitted under these programs are highly qualified. Indeed, the average SAT scores of black entrants to the most selective schools in 1989 was higher than the average of all matriculates in the same institutions in 1951. The authors suggest that “middle-age and elderly graduates should reflect on this fact before insisting that Blacks accepted through affirmative action programs are unfit for their universities.”<sup>82</sup>

Second, most Blacks admitted to these elite schools — 75% of the 1989 cohort — graduate within six years. That is not as high as the proportion of white students who graduate from these schools — 86% of the 1989 cohort. By contrast, only 59% of white students graduate from the 301 less elite schools that belong to Division I of the NCAA.<sup>83</sup>

Third, most whites and the overwhelming majority of Blacks expressed the view that having an experience of working with people of other races was an important part of their college experience. Those numbers rose steadily, particularly among whites, over the years.<sup>84</sup>

Fourth, the overwhelming majority of Blacks surveyed applaud race-sensitive policies, believe that Universities should expand them, and think that it has been good for them, not demeaning to them.<sup>85</sup>

Finally, the study finds that the affirmative action graduates “consistently provid[e] more civic leadership than its white peers. [This] indicates that social commitment and community concerns have not been thrown aside at the first sign of personal success.” Black physicians, for example, are twice as likely as their white counterparts to provide primary care services and to serve minority populations.<sup>86</sup> Nonetheless, even with

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<sup>80</sup> BOWEN & BOK, *supra* note 76, at xxvii.

<sup>81</sup> BOWEN & BOK, *supra* note 76, at xxvii-xviii.

<sup>82</sup> Ronald Dworkin, *Affirming Affirmative Action*, N.Y. REV. OF BOOKS 91, 94 (Oct. 22, 1998); *Is Affirmative Action Doomed*, N.Y. REV. OF BOOKS 56 (Nov. 5, 1998).

<sup>83</sup> BOWEN & BOK, *supra* note 76, at 57.

<sup>84</sup> *Id.* at 225.

<sup>85</sup> *Id.* at 265.

<sup>86</sup> *Currents of Health Policy: Impacts on Black Americans*, 65 MILBANK Q., Supp. 1 & 2 (1987). The prestigious New England Journal of Medicine reports that Blacks and women

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affirmative action, in 1985 there were only 53.7 Black physicians per 100,000 black people compared to 218.5 total physicians per 100,000 total U.S. population.<sup>87</sup> Eliminating Black medical students will have a devastating impact on black people already disadvantaged in obtaining medical care.<sup>88</sup> Given the influential role that lawyers play in every branch of state and federal government, as well as in the lives of people with legal claims, it is disturbing to contemplate a legal profession that effectively excludes all but a handful of Black people.

*B. Is Affirmative Action Fair?*

Two common arguments assert that affirmative action is unfair. First, it is claimed that, as a matter of principle, the Constitution demands that public policy be color-blind. The claim cannot be defended as a matter of historical understanding. The Framers of the Fourteenth Amendment and the Reconstruction Congress created the massive Freedman's Bureau program targeted to help the former slaves achieve economic and civil opportunity. They understood that race-conscious affirmative action is essential to overcome entrenched patterns disfavoring blacks. Further, and more generally, much scholarship suggests that the central purpose of the Fourteenth Amendment was not to mandate a color blindness principle of anti-discrimination, but rather to enact a principle prohibiting the subordination and subjugation of vulnerable groups.<sup>89</sup>

Reasonable anti-racist people disagree about whether color blindness should be our ultimate goal. Dr. King and the Civil Rights Movement often articulated a goal that said black or white, man or woman, should not matter. We are all just people. I find that integrationist vision powerful and attractive. At the same time, I think we can all appreciate a value to preserving the special cultures, traditions and voices of people of different groups defined by ethnicity. Whatever the ultimate goal, certainly we have not yet achieved color blindness. To pretend that we have defines whiteness as the norm. As Justice Blackmun noted, "In order to get beyond racism, we must first take account of race."<sup>90</sup>

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with identical presenting complaints are significantly less likely to be referred for potentially life saving cardiac catheterization or coronary-artery bypass graft surgery than are white men. Kevin A. Schulman, et al., *The Effect of Race and Sex on Physicians' Recommendations for Cardiac Catheterization*, 340 N. ENG. J. MED. 618 (1999).

<sup>87</sup> Ruth Hanft & C. White, *Constraining the Supply of Physicians: Effects on Black Physicians*, 65 MILBANK Q. 249-250 (1987).

<sup>88</sup> Even when we control for class, source of payment and clinical condition, Blacks receive significantly less medical care than their white counterparts. Kenneth C. Goldberg et al., *Racial and Community Factors Influencing Coronary Artery Bypass Graft Surgery Rates for All 1986 Medicare Patients*, 267 JAMA 1473, 1473-74 (1992).

<sup>89</sup> Lawrence, *supra* note 68, at 354-55.

<sup>90</sup> See *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J.,

The second, and much more popular objection to affirmative action is that it is unfair to individual white people to allocate valuable opportunities on the basis of anything other than “merit.” Evaluation of this claim requires us to examine the criteria that define merit. Schools increasingly rely on standardized tests. Those who write these tests caution us that their value is extremely limited.<sup>91</sup> Standardized tests measure two things: the ability to take other standardized tests and economic class. We all recognize that they do not tell us whether a person would be a good lawyer. They do not tell us whether a person will answer clients calls, work hard, listen well, and act morally.

Standardized tests have become more important in recent years for reasons unrelated to merit or affirmative action. Lots of organizations evaluate schools and make information available to perspective students and employers. The U.S. News and World Report ranking of law schools is one of the most influential. Many deans, including mine, have condemned this listing as superficial and misleading.<sup>92</sup> At the same time, almost everyone in legal education is concerned about where our school stands on this list. Students’ standardized test scores carry heavy weight on this list.

Standardized tests are not the only criteria for admission to higher education. In most schools, the children of alums, or of major donors get preferential treatment. At Harvard, despite affirmative action, more white students gain entry as “legacy admits” than do the total number of Black, Hispanic, and American Indian students.<sup>93</sup> Most schools seek a geographic diversity. Many schools favor people who came from an economically challenged background. At the college level, preferences for skilled athletes are pervasive. Prohibiting race-based affirmative action singles out race and says you can seek diversity with respect to any factor, except race.

Legal challenges to affirmative action are organized and financed by large, well-funded organizations, led by the Washington based Center for Individual Rights.<sup>94</sup> Their individual plaintiffs and poster children are white applicants who had standardized test scores slightly better than some of the minority students who gained admission. Their claims that they have been treated unfairly have powerful appeal.

But, on closer examination, the claims of individual unfairness become less

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concurring).

<sup>91</sup> Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV.1, 30-31 (1997).

<sup>92</sup> See Jan Hoffman, *Judge Not, Law Schools Demand of a Magazine That Ranks Them*, N.Y. TIMES, Feb. 19, 1998, at A1.

<sup>93</sup> John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J. L. AND SOC. PROBS. 491, 504 (1993).

<sup>94</sup> DWORKIN, *supra* note 82, at 56.

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compelling. Bowen and Bok's study reveals that if affirmative action were eliminated, the numbers of Black students would plummet. But the probability that any individual rejected white applicant would have been admitted would have risen only from about 25 percent to about 26.5 percent, because there were so many rejected white candidates at approximately the same level of test scores.<sup>95</sup> Except for the best testers, admission to college or law school involves a large element of chance.<sup>96</sup> UC Berkeley receives applications from people with "perfect scores" -- SATs and GPAs -- that would fill each first year class several times over.<sup>97</sup> Even if admission officers confine themselves to the "perfect people," choices must be made. The plaintiffs in *Hopwood* focused on the Black students who had been admitted with lower numbers. But a third of the white members of the admitted class also had numbers lower than the *Hopwood* plaintiffs. After the *Hopwood* plaintiffs won their victory of principle, they were denied admission to the law school because their numbers were no better than thousands of other rejected applicants.<sup>98</sup>

The fairness of admission practices to educational opportunities and employment opportunities raise profound questions. Personal and professional connections always weigh heavy. It is difficult to see this as wrong. We all trust the judgments of people we know and expect others to respect our judgments about people who we know well. I give a lot more weight to the endorsement of a discerning colleague who has real work experience with a person than I do to a standardized test score. But Black people have less access to this old boys, and increasingly old girls, network than white people.

### C. *Is the Bakke Standard Adequate?*

In closing, I would like to say a few words about the *Bakke* standard and the First Circuit's recent decision in the Boston Latin case. In *Hopwood*, the Fifth Circuit held that *Bakke* had implicitly been overruled by subsequent Supreme Court decisions. Race cannot be taken into account in any way, shape or form. The First Circuit held that *Bakke* is still good law, but that the Boston Latin program did not meet the *Bakke* standard.<sup>99</sup>

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<sup>95</sup> BOWEN AND BOK, *supra* note 76, at 33.

<sup>96</sup> Interview with student at Mansfield Lecture (Jan. 28, 1999). The student pointed out a similar phenomena in relation to handicapped parking spaces. He observed that when the parking lot is full, people without handicapped plates will often fulminate when they see an empty handicapped slot. I will confess that I have often thought, "They have designated too many of those places. That could be my parking place." But, the student pointed out, if it were not designated for handicapped parking, my shot at getting the place would be probabilistic, and slim.

<sup>97</sup> See Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decision in Higher Education*, 68 U. COLO. L. REV. 1065, 1119-1120 (1997).

<sup>98</sup> See *Hopwood v. Texas*, 999 F. Supp. 872, 896-97 (W.D. Tex. 1998).

<sup>99</sup> *Wessmann v. Gittens*, 160 F.3d 790, 800 (1<sup>st</sup> Cir. 1998).

*Bakke*, you will recall, ruled that racial preferences are permissible if their purpose is to improve racial diversity among students, and if they do not stipulate fixed minority quotas, but take race into account as one factor among many. Justice Powell relied on a Harvard model under which each applicant file is read and a wide variety of factors are considered to determine who should be admitted.<sup>100</sup>

Here is a brief description of the Boston Latin program. In 1975, the federal courts found that prestigious Boston Latin High School had a history of intentional race discrimination. To remedy this situation, the court ordered that “at least 35% of each of the entering classes . . . shall be comprised of Black and Hispanic students.”<sup>101</sup> That injunction lasted until 1987, when the court allowed the school board freedom to construct its own admissions criteria. The school board continued the quota for a number of years. Then, in 1996, a white student successfully challenged the flat quota,<sup>102</sup> and the school board adopted a new admissions program.

The 1996 program, challenged in *Wessmann*, works like this. All applicants are ranked by standardized test scores and GPAs. Applicants are divided into three groups. The group with the highest scores fill half the available class room places. They are selected strictly on the numbers. At the other end of the spectrum, about half the applicants are rejected, again solely on the basis of the numbers. The policy

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<sup>100</sup> See *Bakke*, 438 U.S. at 316-318. Harvard’s *amicus curiae* brief states:

In practice, this new definition of diversity has meant that race has been a factor in some admissions decisions. When the committee on Admissions reviews the large middle group of applicants who are ‘admissible’ and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates’ cases. A farm boy from Idaho can bring something to Harvard college that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer.

*Id.* at 316.

Commenting on this, Justice Powell wrote:

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a ‘plus’ on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

*Id.* at 318.

<sup>101</sup> *Wessman*, 160 F.3d at 792.

<sup>102</sup> *Id.* at 792-93.

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challenged applies to the group in the middle, i.e. those who have numbers high enough that they can be expected to do good work, but not the very highest. The classroom places are allocated to this middle group on the basis of the proportion of various ethnic groups in the community as a whole. 28% of those admitted from in this middle group were Black. But 42% were white. Sarah Wessman was in that middle group. She complained that some of the Black students admitted had numbers slightly lower than her's. The First Circuit held that this program, that takes race into account through the use of numerical quotas does not meet the *Bakke* standard, even though it applies to only a limited portion of the pool of qualified applicants, and even though it benefits whites as well as blacks.

Most informed observers believe that the most the civil rights community can hope for in relation to affirmative action is a reaffirmation of *Bakke*, and even that is unlikely. But the Boston Latin case underscores a deeper problem. Rich schools and small schools can follow the genteel model that Justice Power approves, giving full consideration to every applicant and making nuanced judgments. Similarly, we can do and indeed always do that in relation to faculty hiring. But a school that is big or poor is under much more pressure to use numbers as a short hand for merit. In practical effect, strict enforcement of *Bakke* may mean that small and elite schools can enjoy the benefits of diversity, but others cannot. That is disturbing.