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Reflection on a Dream World: Race, Post-Race and the Question of Making it Over

Mario L. Barnes*

We Dream A World
A world I dream where black or white,
Whatever race you be,
Will share the bounties of the earth
And every man is free¹

INTRODUCTION

Fifteen years ago, as a third-year law student, I published my book note² in the inaugural issue of the *African-American Law and Policy Report (ALPR)*. The note was inspired both by the book reviewed—Derrick Bell’s, *Confronting Authority: Reflections of an Ardent Protester*³—and an Alice Walker poem that encouraged African Americans to help each other in our mutual struggle against oppression.⁴ The note sought to analyze the pitfalls, and ultimately, what I saw as the triumph in Professor Bell’s protest against Harvard Law School’s refusal to hire a tenured/tenure track black female professor. Even though his immediate efforts ended well before Harvard Law School ever tenured an African-American woman, a central theme of *Confronting Authority* is that protest and struggle are often more about the journey than the destination.

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1. THE COLLECTED POEMS OF LANGSTON HUGHES 311 (Arnold Rampersad, ed. 1994).

2. Mario L. Barnes, “*Each One, Pull One*”: *The Inspirational Methodology Behind and Impassioned Though Somewhat Flawed Protest*, 1 AFR.-AM. L. & POL’Y REP. 89 (1994).

3. The book retold the events that lead up to Professor Derrick Bell giving up his tenured position at Harvard Law School, due to their failure to offer a tenured/tenure track position to an African-American woman.

4. ALICE WALKER, *Each One, Pull One (Thinking of Lorraine Hansberry)* in HORSES MAKE A LANDSCAPE MORE BEAUTIFUL 50 (1984).

Returning to the pages of the *ALPR* (now *Berkeley Journal of African-American Law and Policy* (*BJALP*)) to resituate Bell's work in a contemporary context and ponder how the world has changed for the *Journal* and its mission since the first publication, the question that arises is: whether the protest that was represented in Bell's decision to sacrifice his tenure for the benefit of ensuring more meaningful diversity in an elite, majority-white institution is still relevant? This question emerges for a number of reasons. First, in the narrowest sense, Harvard Law School is no longer without a tenured black woman.⁵ For that matter, neither is Yale Law School.⁶ Bell's book however was about more than the specific challenge that led to his protest and dismissal from Harvard. It was about how to respond in a principled and "soul-saving" manner when majority-white institutions practice racial tokenism and otherwise only lightly value minority faculty members.⁷ The most powerful message from the book was that under circumstances such as those at Harvard Law at the time—where the affronts to his call for greater diversity were pronounced and repeated—perhaps, the most liberating act one can take is to sacrifice the prestigious, if not inherently second-class, appointment in such an institution. Doing so will not only ease one's conscience but allow the world to take note of the hardened nature of institutional racism. At bottom, Bell's story was about taking a principled stand against the subtle but deeply entrenched forms of racist exceptionalism⁸ practiced within elite, majority-white institutions and American society.

Given that this country has just elected its first African-American president, the question arises as to whether one can legitimately claim that hardened forms of racism still exist? Significant portions of the Barack Obama narrative suggest that America has, in fact, substantially overcome the longstanding effects of racism, and perhaps, its national obsession with race.

5. Lani Guinier was appointed to the Harvard Law faculty in 1998. See Ethan Bronner, *Lani Guinier Joins Faculty at Harvard*, N.Y. TIMES, Jan. 24, 1998, at A12. She is currently the Bennett Bosky Professor of Law. See <http://www.law.harvard.edu/faculty/guinier>.

6. Formerly of the University of Chicago, Professor Tracy Meares joined the Yale Law School faculty as the Walton Hale Hamilton Professor of Law in January 2007. See *Meares Appointed Walton Hale Hamilton Professor*, YALE BULLETIN & CALENDAR, Feb. 1, 2008, available at <http://www.yale.edu/opa/arc-ybc/v36.n16/story8.html>.

7. DERRICK A. BELL, JR., *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTOR* 150-51 (1994) [hereinafter BELL, *CONFRONTING AUTHORITY*].

8. This concept was demonstrated in the attitudes of Bell's colleagues at Harvard who avoided voting an offer to a black, female visitor who had recently visited by suggesting that the next black female, visitor would be better. BELL, *CONFRONTING AUTHORITY*, *supra* note 7, at 84-86. Additionally, he felt the faculty invested in tokenism, with a willingness to hire the first but not the second minority candidate. *Id.* at 77. As I mentioned in the original book note, Stephen Carter described practices such as this as designed to produce the "best black"—the one black (woman) qualified for the position. See STEPHEN CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* 50 (1992). In the book note, however, I described exceptionalism somewhat differently—as the tendency of employers to make black worker competence the exception to their preferred rule (norm), which presumed black worker incompetence. Barnes, *supra* note 2, at 106-07.

President Obama's ascendance—which I did not believe was possible within my lifetime when I published my book note—is historic and bound to have lasting implications for race relations in this country. At this point, however, the full effects of his breakthrough are unclear. In this reflection, I will attempt to explore some of those potential effects, to inquire into whether the dream of equality that Langston Hughes wrote of has now materialized in the form of the so-called post-racial political moment signaled by President Obama's election,⁹ and to suggest what this world portends for the multiple black communities whose interests *BJALP* seeks to represent. Then, I briefly reflect on whether the Obama election marks our transition from a raced to a post-race society, and lastly, I consider what embracing a post-race reality might mean for *BJALP*, legal scholarship and the greater society. While acknowledging that the salience of race may be declining, I conclude by suggesting that *BJALP* and other identity-focused journals must persist (for now) until the dream of post-race is a reality for people unlike President Obama—persons of the color “at the bottom.”¹⁰

RACE VERSUS POST-RACE?

Within the format of this commemorative reflection it is not possible to fully analyze the details of the emergence and expanse of the so-called post-racial moment. The meaning of the moment, however, is the subject of ongoing scholarly analysis within a number of disciplines¹¹ and has recently commanded the attention of distinguished scholars at legal academic conferences and gatherings.¹² Here, I will mostly address the specific question

9. See Matt Bai, *Is Obama the End of Racial Politics?*, N.Y. TIMES MAG., Aug. 6, 2008, at MM34 (describing the difference between Barack Obama and the previous generation of civil rights-era black politicians).

10. This is a specific reference to Professor Mari Matsuda's work which calls for law-makers to guide their actions by considering the narratives of the disenfranchised. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

11. See, e.g., Jessica Millward, *Teaching African-American History in the Age of Obama*, CHRON. OF HIGHER EDUC., Feb. 27, 2009, at B20 (discussing the effect Obama's election and the post-racial moment on the teaching of African-American history).

12. As part of the speakers series leading up to the 20th Anniversary of Critical Race Theory Conference, Professor Lani Guinier gave a talk on post-race. Lani Guinier, Address, CRT 20 Speakers Series at the University of Iowa College of Law. (Apr. 2, 2009). At the January 2009 Association of American Law Schools Conference, one of the four “Hot Topics” panels examined, in part, the following: “post-racialism as both an idea and a political practice through the convergence of four issues: (1) the election of the first Black President of the United States, (2) the passage of Nebraska's anti-affirmative action initiative and Colorado's rejection of a similar measure, (3) the financial meltdown and the attendant rhetoric about “under-qualified” minority borrowers as at least one source of the crisis and (4) the recent controversy over UC admissions in which a member of UCLA's undergraduate admissions committee resigned to protest alleged violations of Proposition 209's ban on racial preferences in admitting Black students.” A full description of the panel and panelists is available at: http://www.aals.org/events_am2009.php. Finally, at a recent Yale Law conference, Berkeley Law

of whether the rise of post-race signals the death of the salience of race as a factor relevant to social ordering. If so, what does that death mean to enterprises—such as *BJALP*—which are still committed to interrogating legal and social problems through a racial lens, despite the decline of the prevalence of more overt forms of race discrimination.¹³ I will do so, however, by first contrasting the tenets of a post-racial existence with the perspectives of scholars such as Derrick Bell, whose work evinces a commitment to the idea that race not only matters, but operates as a basis to create real consequences in the lives of those negatively marked by it.

STORIES FROM A TIME WHEN “RACE MATTERED”¹⁴

To the extent that Professor Bell long ago theorized how African Americans might manage the effects of discrimination in a world where racism is permanent, he appeared to be a committed “race man.” On one hand, “race man” refers to a generation of African Americans (mostly men at the time) who openly aligned themselves with a commitment to black excellence or “representing the race.”¹⁵ In a contemporary context, the phrase is used to connote that Bell also believes in the power and relevance, if not truth, of race.¹⁶ This dichotomy exists because while scholars have called attention to the socially constructed nature of race,¹⁷ they have also observed that race

Professor Ian Haney Lopez gave a keynote lecture entitled: *Post-Racial Racism: Policing Race in the Age of Obama*. Ian Haney Lopez, Keynote Address at Frontiers in Social Justice Lawyering: Critical Race Revisited Conference at Yale Law School (April 16, 2009). The program for the conference is available at <http://islandia.law.yale.edu/crt/schedule.html>.

13. Professor Charles Lawrence famously surmised over twenty years ago that the problem of discrimination was not limited to instances of overt racism. See Charles Lawrence, *The Ego, the Id and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (describing the operation of unconscious bias). Beyond unconscious bias, recent scholarship has suggested that rather than race per se, proxies for race have been used as a basis to discriminate. See, e.g., LU-IN WANG, *DISCRIMINATION BY DEFAULT* (2006); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name: On Being 'Regarded As' Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283; and Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004).

14. This reference is not only rhetorical. At the time Professor Bell published *Confronting Authority*, using the same publisher—Beacon Press—Professor Cornel West published an aptly-titled set of thought provoking-essays, exploring myriad aspects of race. CORNEL WEST, *RACE MATTERS* (1994).

15. See HAZEL V. CARBY, *RACE MEN* (THE W. E. B. DU BOIS LECTURES) (2000).

16. For instance Bell has repeatedly contended that black interests are typically only advanced when the mirror white interests. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 174 (1993) [hereinafter BELL, *FACES AT THE BOTTOM OF THE WELL*] (one of the characters in a Bell allegory claiming that “we all know that black rights, black interests, black property, even black lives are expendable whenever their sacrifice will further or sustain white needs or preferences”).

17. See, e.g., Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27 (1994) (deriding the biological significance of race); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and*

remains a significant ordering force within the lives of individuals, however dubious its claimed biological underpinnings.¹⁸ When I published my book note, part of the innovation of Professor Bell's work was that it used allegory to make plain the saliency of race and sought remedies—legal and otherwise—to the costs of racial difference.¹⁹ Additionally, he did not espouse the position that society would need to move beyond race in order to secure a better reality for African Americans. In fact, Professor Bell's suggestions for political and legal solutions to improve the lives of racial minorities often began with the presumption that racism is permanent.²⁰

While not all of the scholars who have published in *BJALP* over the years have necessarily subscribed to Bell's theories on race relations, most have operated within the sphere of accepting race—or at least the consequences of racism—as real. While we have hoped for a day when race would no longer be used as a basis to award and deny opportunity, our writings generally suggested that such a day had not arrived. Moreover, I am not certain that many of us believed we would ever see a day that would present strong evidence that the world had ostensibly changed. In the African-American gospel tradition that emanated, in part, out of the experience of slavery, reaching that day of reward or the “promised land”—literally a reference to heaven in this context—was often referred to as “getting over” or “making it over.”²¹ To the extent that the

the Racial Self, 83 GEO. L.J. 437, 439-42 (1993) (referring to race as an “incoherent fiction”); and D. MARVIN JONES, *RACE AND THE MYTH OF THE BLACK MALE* (2005) (alternatively describing race as a myth).

18. See, e.g., Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 2 AFR.-AM. L. & POL'Y REP. 207, 214-17 (1996) (acknowledging that society treats race as an observable fact, even though it does not represent real physical or cultural difference).

19. See, e.g., BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 16, DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) [hereinafter, BELL, *AND WE ARE NOT SAVED*]; and DERRICK BELL, *GOSPEL CHOIRS: PSALMS OF SURVIVAL IN AN ALIEN LAND CALLED HOME* (2000) [hereinafter BELL, *GOSPEL CHOIRS*] (all using fictional narratives to explicate how law did or did not work within the context of civil rights and antidiscrimination issues). In the text of *Confronting Authority*, the companion allegory was the story of Xercis and the Citadel—which told of an existence where a group of dominant highlanders used tokenism and exclusion to substantially lock out lowlanders, against the efforts of a sympathetic insider, Tamar, and with the complicity of the hand-picked token lowlanders that were admitted.

20. For example, in one of his books, Professor Bell suggested the Racial Preference Licensing Act. Rather than attempt to eradicate racism, this law would allow businesses to discriminate in employment and service practices as long as they paid for the right to do so. See BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 16, at 47-64. In that same book, he wrote a chapter entitled the *Space Traders*, an alien invasion story where America legally justified, after passing a constitutional amendment to facilitate it, trading all of its African Americans to a group of aliens in exchange for substantial resources. *Id.* at 158-94.

21. For example, these phrases are prominently featured within the spiritual *How I Got Over* which was famously recorded and performed by gospel great, Mahalia Jackson, and includes the lyrics, “How I got over . . . You know my soul looks back and wonders how I did I make it over.” Mahalia Jackson, *How I Got Over*, on *THE BEST OF MAHALIA JACKSON* (Legacy/Columbia Records 1995). Derrick Bell, himself, often invoked biblical and gospel references within his work. See BELL, *CONFRONTING AUTHORITY*, *supra* note 7 at 164 (ending the book by

Obama victory signifies the demise of the salience of race, there is a suggestion that Blacks have, indeed, finally made it over. While many of us who believe that race still matters are very excited about the great significance of the Obama moment, some of us are also concerned that it is too early to proclaim the moment as signaling the end of race as a socially relevant construct and racism as a debilitating enterprise. Yes, we have long dreamt of the world of racial equality that Langston Hughes wrote of, but for so many years we have dreamt in color.²² As much as one may wish to choose to believe, America's history of race relations cautions that we should not embrace an ostensible changed reality that turns out merely to be a dream for the many who will be left behind. Or, to restate the sentiment as it was once expressed in a path-breaking American situation comedy: if African Americans have, indeed, finally made it over, there are many in our community that have not received the notice.²³

POST-RACE: NEW "WHINE" IN OLD BOTTLES?²⁴

While the Barack Obama victory has revitalized a discussion about the declining significance of race that has been most recently described as a "post-race" moment, this may be only a newer version of a conversation that has been ongoing for some time. For example, William Julius Wilson previously queried the continued salience of race in his book, *The Declining Significance of Race*. There he declared race had become less powerful than class as a tool

encouraging us to emulate slaves who created humanity by singing of freedom and a "City Called Heaven" even as they toiled with no way out); BELL, *GOSPEL CHOIRS passim* (1997) (bible scriptures and the lyrics to spirituals open and close each chapter and are used liberally throughout the book), BELL, *AND WE ARE NOT SAVED*, *supra* note 19, at 258 (ending by quoting a negro spiritual, and the title of the book is a reference to *Jeremiah* 8:20).

22. For one, our commitment to undermining the negative of aspects of racial difference has been decidedly color-conscious and steeped in identity politics. See, e.g., Frances Lee Ansley, *A Civil Rights Agenda for the Year 2000: Confessions of an Identity Politician*, 59 *TENN. L. REV.* 593 (1992). At the time the book note was published, color was typically regarded as a proxy for race. More recently, scholars have sought to complicate the discussion of the relationship between color and race. See, e.g., Angela P. Harris, *From Color Line to Color Chart: Racism and Colorism in the New Century*, 10 *BERKELEY J. AFR.-AM. L. & POL'Y* 52 (2008) (discussing discrimination based upon color or the performance of race); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 *DUKE L.J.* 1487 (2000) (discussing the differential privileges and disadvantages meted out based on skin color, even within race).

23. On the first episode of the once top-rated situation comedy, *The Jeffersons*, upon starting her employment for the African-American Jefferson family and learning that another of their affluent neighbors was also black, their new housekeeper, Florence Johnston, remarked, "How come we got over and nobody told me?" *The Jeffersons: A Friend In Need* (CBS television broadcast, January 18, 1975) (I owe a debt to my friend and Miami colleague Ricardo J. Bascuas for reminding me of this humorous but apropos moment from television history).

24. The somewhat tongue-in-cheek question about the potential dangers of dressing up old arguments in new language, perhaps, fittingly, also has biblical origins. See *Matthew* 9:17 ("Neither do men put new wine into old bottles: else the bottles break, and the wine runneth out, and the bottles perish: but they put new wine into new bottles, and both are preserved.").

for directing life outcomes.²⁵ Additionally, before the emergence of the concept of post-race there were longstanding debates about race versus meritocracy,²⁶ individual responsibility and not race as the cause for the life circumstances of some persons of color, and the relevance of colorblindness.²⁷

In the foreword to the first issue of this very journal, the late Professor Jerome McCrystal Culp, Jr., and his co-authors asked what it meant to be a journal of color in a colorblind world.²⁸ That question was particularly timely because as the first issue of *BJALP* was being published, affirmative action was in rapid decline within the University of California system and under attack throughout the country.²⁹ One could maintain then that the current post-race world may not be any different for *BJALP*, especially given that the *Journal* has always existed in a world that was presumed—by some—to be “equal.” Perhaps, all that has changed is the evidence that will be used to prove that race makes little difference to life outcomes. Prior to Obama, other prominent Blacks such as Oprah Winfrey and Bill Cosby were often referenced to prove that with hard work anyone could achieve the American dream. Barack Obama becomes the latest and penultimate black success story, which proves that unsuccessful Blacks merely do not work hard enough.³⁰

25. The question of the interplay of race and class has also captured the attention of legal scholars. See John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 *LAW & INEQ.* 355, 356 (2007) (criticizing as inaccurate any claim that the analysis of race is separable from an analysis of class); EMMA COLEMAN JORDAN AND ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER IDENTITY AND ECONOMICS* (2005) (discussing how race, gender and class are intertwined). Even more recently the journal *Law and Contemporary Problems* has dedicated an issue to interrogating the overlap between race and class. See, e.g., Trina Jones, *Foreword*, 71 *LAW & CONTEMP. PROBS.* (forthcoming 2009) (copy on file with author); and Mario L. Barnes and Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 71 *LAW & CONTEMP. PROBS.* (forthcoming 2009) (calling for courts to be mindful of instances where race and class issues should be considered together) (copy on file with author).

26. See Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 *CALIF. L. REV.* 1419 (1997); and Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 *GEO. L.J.* 1711 (1995). Cf. Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 *CALIF. L. REV.* 853 (1995).

27. Berkeley Law Professor Margorie Schultz and a group of co-authors chronicled the claims of a group of conservative scholars who largely ignored systemic disadvantage to describe race as both irrelevant and a crutch. See MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003). There was also already a multiracial call for an emphasis on personal responsibility and for Blacks to “pull themselves up by their bootstraps.” See SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (1990).

28. Jerome McCrystal Culp, Jr., et al. *A New Journal of Color in A Colorblind World: Race and Community*, 1 *AFR.-AM. L. & POL'Y REP.* 1 (1994).

29. The UC Regents had voted to end considerations of race in admissions and Proposition 209, which ultimately ended the consideration of race in education and contracting within the state, was being proposed. See *id.*

30. I have previously written of the dangers of valorizing “integration success stories”. See Mario L. Barnes, *“But Some of [Them] Are Brave: Identity Performance, the Military, and the Dangers of an Intergration Story*, 14 *DUKE J. GENDER L. & POL'Y* 693 (2007). Barack Obama’s

Despite challenges that remain for significant segments of black communities, it is hard not to embrace the Obama success story. Additionally, it is more forceful than other Blacks having merely obtained a measure of success in sports, entertainment, politics or any one field. The U.S. Presidency throughout the history of the office has been an all-white, all-male club, and some of us believed it would be the last job in America to succumb to race and/or gender integration. The disruption of continuous and undisturbed whiteness in that most privileged of work spaces—the White House (aptly named for myriad reasons one might suggest)—has been so great that it has provided a sense that the world has been dramatically altered forever. For example, as Professor Angela Onwuachi-Willig indicated in comments following the election, her children will have always grown up in a world with a normalized understanding that it is possible for a black man to be president.³¹ Additionally, Professor Jessica Millward has suggested that this new reality both undermines a longstanding belief about the limits of race, and provides an example to populations who have historically been discriminated against, especially the children of these groups, that they can achieve anything they set their minds to.³²

The irony of the Obama victory serving as the embodiment of the post-race moment is that discussions of race permeated the election.³³ First, there were some who appeared to engage in obvious, old fashioned racism in their treatment of the candidate.³⁴ Second, there were more subtle claims about Barack Obama's presentation or performance of his identity. He was at once accused of being too black and not black enough to be elected. Some attempted to infer that his poise, articulate manner, and overall elegance—the

success has the potential to be wielded as a great weapon against poor minorities who will be perceived as equally capable of succeeding despite the fact that many lack material resources and are the subjects of varying forms of legal and illegal discrimination.

31. See *UI Law Professor Says Obama Election Moves Us Closer to Racial Equality*, UNIVERSITY OF IOWA NEWS SERVICES, Nov. 5, 2008, <http://news-releases.uiowa.edu/2008/november/110508lawprof-obama.html>.

32. See Millward, *supra* note 11.

33. See Shelby Steele, *Obama's Post-Racial Promise*, L.A. TIMES, Nov. 5, 2008 (acknowledging the hopefulness signaled by the election of Barack Obama, but claiming that those who embrace him as a symbol of post-race “unwittingly embrace race as their primary motivation”).

34. For example, there was a questions as to whether the use of racial imagery in *The New Yorker* magazine cover depicting Barack Obama in Muslim garb and Michelle Obama as a black revolutionary, engaging in a “fist bump,” was racist rather than a fair political parody. See Philip Kennicott, *It's Funny How Humor Is So Ticklish*, WASH. POST, July 15, 2008, at C1. Additionally, the candidate's race was implicated by various organizations and business enterprises placing his image on a \$10 food stamp and box of waffles. See Angela Onwuachi-Willig and Osamudia James, *The Inclining Significance of Presidential Races*, 71 L. & CONTEMP. PROBS. (forthcoming 2009) (describing the latter action as being taken by Chaffey Community Republican Women in California); and *Breakfast of Chumps*, L.A. TIMES, Sept. 15, 2008, <http://opinion.latimes.com/opinionla/2008/09/in-addition-to.html> (discussing the waffles being sold at the Values Voters Forum in Washington, DC).

signs of his elite education—were problematic for a black man.³⁵ Then there was the Reverend Wright controversy,³⁶ which led to the candidate delivering a poignant speech on the subject of race that suggested he did not consider himself beyond race, but that he understood that race still very much matters.³⁷ So perhaps race as a concept is not dead, so much as some are seeking to now obscure its importance.

To be fair, the emphasis on post-race may not be about denying that race still matters. Beyond buttressing a story about colorblindness, meritocracy and individual responsibility, post-race may just signal the death of a predominant, but overly-simplified, narrative of racial difference in this country. Barack Obama's international and multiracial heritage facilitates a discussion of race that is not limited to American Blacks. Throughout his historic campaign there were questions pertaining to the significance of multiracialism, African immigration and the relationship between the children of immigrants and those descended from slaves.³⁸

Whether post-race is a rehashed version of a longstanding debate over deserts or actually signals the emergence of a new idea, the most pressing question is what does it mean for lives in black communities? Next, I shall briefly consider this question.

THE IMPLICATIONS OF THE POST-RACE WORLD

Before we quickly embrace the post-race world, we should ask what this world might entail. I imagine we would need to first qualify for whom?³⁹ If we interrogate the moment vis-à-vis citizens and the government, the embrace of post-race likely creates the expectation that each person is responsible for his or her own success or the lack thereof. So post-race enables the purely meritocratic vantage point which suggests the even more rapid demise of any race-based benefits or systems of evaluation.⁴⁰ Perhaps, class still matters in

35. See Onwuachi-Willig and James, *supra* note 34.

36. See, e.g., Jeff Zeleny, *Obama Adds to Distance From Pastor and Opinions*, N.Y. TIMES, Apr. 29, 2008, <http://www.nytimes.com/2008/04/29/us/politics/29wright.html>.

37. The speech was transcribed by the on-line version of the *New York Times*, see *Barack Obama's Speech On Race*, <http://www.nytimes.com/2008/03/18/us/politics/18text-obama.html>.

38. This latter point has also recently commanded the attention of scholars writing on race. See Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141(2007); Kevin Brown and Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Education Institutions*, 69 OHIO ST. L.J. 1229 (2008).

39. TOMMIE SHELBY, *WE WHO ARE DARK: THE PHILOSOPHICAL FOUNDATIONS OF BLACK SOLIDARITY* 83-88 (2005) (discussing how intra-racial distinctions with regard to socioeconomic class represent a challenge to black political solidarity).

40. While race-based affirmative action programs have fallen out of favor, post-race commitments might lead to hastened scrapping of doctrines such as the diversity rationale as compelling interest in higher education admissions, which Justice O'Connor had previously suggested would likely not be needed twenty-five years after the decision to preserve it in *Grutter*.

the post-race world, but pre-Obama we understood that class while substantially overlapping with race in terms of poverty and minority status, was not an effective tool to eradicate the effects of racism.⁴¹

Beyond alleviating the government of any need to provide race-based remedies, the rise of post-race would significantly challenge identity politics as we know them. Perhaps, race is only the first identity-category to be overcome on the road to post-gender, post-sexuality and post-socioeconomic moments. If this is so, then it might also mean the end of the need for journals focused on identity, such as *BJALP*. Post-race might also be understood as undermining the continuing relevance of contemporary theories of race. For example, another of Professor Bell's prominent theories—interest convergence—suggested that Whites would be most inclined to assist in racial progress, where the programs that benefited minorities also provided some benefit to Whites.⁴² Does this theory survive post-race?

In this new world, rather than writing about the scholarship of Derrick Bell and other race-conscious scholars, the narrowed discourse on race might be limited to the work of scholars such as John McWhorter,⁴³ Richard Ford⁴⁴ or Randall Kennedy,⁴⁵ who focus on the ways that race is improperly used to excuse certain behaviors. We would also have a re-imagining of other prominent CRT theories. Clearly it would be inappropriate to talk about whiteness or blackness as property in the post-race world.⁴⁶ If race is no longer salient, what about oppression based on inhabiting multiple identity categories?⁴⁷ Will we engage questions related to the effects of multiple forms/bases of discrimination? What do we do with larger claims about identity and assimilation in the post race world? Returning to Derrick Bell, the world where race is overcome leaves no room for the idea that racism is

Grutter v. Bollinger, 539 U.S. 306, (2003).

41. See Onwuachi-Willig and James, *supra* note 34, and Katheryn K. Russell, *Affirmative (Re)Action: Anything But Race*, 45 AM. U.L. REV. 803 (1996).

42. See Derrick A. Bell, Jr., *The Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

43. JOHN MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* (2001); JOHN MCWHORTER, *ALL ABOUT THE BEAT: WHY HIP-HOP CAN'T SAVE BLACK AMERICA* (2008).

44. RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* (2006) and RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* (2008).

45. Randall Kennedy, *Racial Critiques in Legal Academia*, 102 HARV. L. REV. 1745 (1989).

46. See Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (a germinal piece of critical race theory scholarship, detailing the property interest in race—the many privileges that are afforded along racial lines). For an analysis of the ways that blackness works as a negative property interest, see Mitch Crusto, *Blackness as Property. Sex, Race, Status, and Wealth*, 1 STAN. J.C.R. & C.L. 51 (2005).

47. In other words, do anti-essentialism and intersectionality concern us in the post-race world? See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Kimberle W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

permanent. This result would be acceptable if the evidence of the death of racism—rather than being the election of a racial minority—was a significant change in the life circumstances of a greater number of persons of color.

Perhaps the Barack Obama election is not so much the harbinger of post-race as it is a moment of racial transition. As Angela Harris has recently written, society may be moving away from traditional categorical racism to norm based racism—different treatment premised upon physiognomy and performance.⁴⁸ So rather than disproving the salience of race, Obama's ascendance is a powerful example of the theories of performativity—all blacks are not acceptable, but based on his presentation of his identity he is the “right kind” of black for a great many people.⁴⁹ Even if one sets performativity claims to one side, more than anything his election may just signal that the relevance of identity turns on common experience—that the more one has in common with the majority, the more accessible we generally become. This idea is represented in the work of a group of scholars who have been writing about race since the book note. Based on the work of these scholars, Barack Obama's rise can be as a function of the acceptance he gained from “covering” and “working” his identity.⁵⁰ In a world where race really does not matter, we would not need to speak of managing identity to ensure assimilation. Interestingly, if these scholars are correct, this type of management may or may not be conscious, and therefore, race may matter without us knowing that we are working with or against stereotypes.⁵¹

Beyond post-race nullifying a generation of legal writing on race, the question remains what does it mean to the real lives of individuals?⁵² No matter what a post-racialist might wish to declare with regard to race, the statistics show that disadvantage in this country is still experienced along racial lines. With regard to employment, education, wealth accumulation, access to adequate healthcare, treatment within the criminal justice system and every important aspect of life, disparities exists along racial lines.⁵³ Until we solve

48. See Harris, *supra* note 22.

49. See Onwuachi-Willig and Barnes, *supra* note 13, at 1297-1312.

50. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON CIVIL RIGHTS (2006); Devon Carbado and Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000). Cf. SHELBY STEELE, A BOUND MAN: WHY WE ARE EXCITED ABOUT OBAMA AND WHY HE CAN'T WIN (2007) (claiming that Obama is forced not only alter his identity to cater to Whites but also needs to prove his racial authenticity to Blacks).

51. See Angela P. Harris, *Love and Architecture: Race, Nation, and Gender Performances Inside and Outside the State*, 52 CLEV. ST. L. REV. 121, 121-22 (2005).

52. See Steele *supra* note 33 (ultimately rejecting Barack Obama as the proof of the rise of true post-race and opining with regard to his effect on the greatest number of Blacks: “But the larger reality is the profound disparity between black and white Americans that will persist even under the glow of an Obama presidency.”)

53. See *id.* (discussing black-white disparities in literacy, educational achievement, and imprisonment). In recent weeks the National Urban League released its annual *State of Black America* publication, and included the following description in the accompanying press release: The report this year takes a look back at the past five years of the Equality Index to view trends of

these problems, I am not sure how the concept of post-race helps us. I do know that the focus on individual examples of success as a way to undermine group problems seems ill-conceived. If we want to really inquire into the status of the greatest portion of American Blacks, for example, we will not be able to do so by focusing on the singular experience of one multi-racial graduate of Ivy League institutions. Relying upon the insightful work of Professor Mari Matsuda, if we are to fully consider the implications of the post-race movement, we must do so by considering its meaning for those who are most vulnerable, with the greatest amount to lose—those at the bottom.⁵⁴ In this case it also likely means those who are often perceived not as multi-racial, but “just black” and who are without the social capital conferred by Ivy League educations.⁵⁵

CONCLUSION

Rather than signaling transcendence or representing the end of minority status as debilitating, the effects of President Obama’s background have yet to fully manifest themselves.

There is another connection between Bell’s *Confronting Authority* and Barack Obama—the manner in which autobiography can be transformative. Bell’s story—which at least I am not willing to retire as no longer germane—takes place in a world of pitched unfairness, where Blacks may be required to sacrifice something important for a greater cause of exposing the breadth and depth of entrenched racism. We are not sure of the full measure of the world in President Obama’s story, but it certainly includes elements that suggest that overcoming race may be possible, at least for some racial minorities. Until we know how this will all play out for the greatest number of us, perhaps it is wise to accept one more bit of advice from Professor Bell. He has previously written that when he was a young attorney litigating civil rights cases in the south, even where the judges were pre-committed to ruling against him, he saw his function as “making the record” for an appeal.⁵⁶ So it is now incumbent

progress and decline. Between 2003 and 2007 the poverty rate and home ownership rate declined for blacks but increased for whites. Even as both groups made progress in educational attainment, the progress was slower for blacks. During the same period while white children saw increases in “preprimary” enrollment of about 3 percent, black children saw a decline of about 1 percent, causing the education gap to grow, not shrink. The report this year shows the trend continues. This year’s National Urban League report reminds the country that the election of President Obama does not mean the work of civil rights is done. Press Release, National Urban League, National Urban League’s *The State of Black America 2009 Report Shows Black and White Equality Still Needs Work* (Mar. 25, 2009), available at: http://www.nul.org/PressReleases/2009/2009_SOBA_press_release.pdf

54. Matsuda, *supra* note 10.

55. Some claim that it was Barack Obama multiracial background as well as his Ivy League education, made him atypical and less threatening. Still many before him with those traits had failed to capture the confidence and imagination of a majority of the citizenry.

56. Derrick Bell and Linda Singer, *Making a Record*, 26 CONN. L. REV. 265 (1993).

upon us moving forward to carefully collect evidence of all that transpires—to make a record for how race still matters, should we find ourselves needing to appeal on behalf of those who are left behind in the post-race world. In the initial stages of formulating this record, my own contention is that we should hold off disbanding anti-discrimination and anti-subordination watchdogs like *BJALP*—important record keepers of racial disadvantage—at least until we are certain that most of us have “made it over.”