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This Is a Time for Hope and Change

KEVIN BROWN*

I have agreed to comment on the paper delivered by Professors Angela Onwuachi-Willig and Mario Barnes¹ at a conference titled *Labor and Employment Law Under the Obama Administration: A Time for Hope and Change?* In his victory speech on the night of November 4, 2008, Barack Obama, the first black (African American, biracial?) President reaffirmed the themes of “hope and change” that were central to his campaign. He stated that his election was the answer “that led those who have been told for so long by so many to be cynical, and fearful, and doubtful of what we can achieve, to put their hands on the arc of history and bend it once more toward the *hope* of a better day.”² He went on to point out that “[i]ts [sic] been a long time coming, but tonight, because of what we did on this day, in this election, at this defining moment, *change* has come to America.”³ So with his reelection just a year away, now is an appropriate time to reflect on whether this truly is a time for hope and change.

Professors Onwuachi-Willig and Barnes entitled their piece *The Obama Effect: Understanding the Emerging Meanings of “Obama” in Anti-Discrimination Law*.⁴ They reject the idea that this is a time for either hope or positive change.⁵ They close their introduction with the following summary:

[W]e conclude that having a biracial, black-white president has had very little effect on the enforcement of anti-discrimination law. *Indeed, we contend that Obama’s campaign and election have, to an extent, had the opposite effect in the work environment. Rather than revealing that racism is over or that racial discrimination is diminishing in the workplace, Obama’s presence and prominence have developed a specialized meaning that has signaled an increase in or at the very least a continuation of regular discrimination and harassment within the workplace.*⁶

* Richard S. Melvin Professor of Law, Indiana University Maurer School of Law & Emeritus Director of the Hudson & Holland Scholars Program-Indiana University-Bloomington, B.S., 1978, Indiana University; J.D., 1982, Yale University. I also want to acknowledge the exceptional research done by Renee Turner, J.D., 2012, Indiana University Maurer School of Law, on this comment.

1. I want to start by acknowledging what a privilege it is to comment on the work of two outstanding scholars like Professors Onwuachi-Willig and Barnes. I have known both of them for years and admired their work for some time.

2. *Obama Victory Speech*, HUFFINGTON POST (Dec. 5, 2008, 5:12 AM), http://www.huffingtonpost.com/2008/11/04/obama-victory-speech_n_141194.html (emphasis added).

3. *Id.* (emphasis added).

4. Angela Onwuachi-Willig & Mario L. Barnes, *The Obama Effect: Understanding Emerging Meanings of “Obama” in Anti-Discrimination Law*, 87 IND. L.J. 325 (2012).

5. *Id.*

6. *Id.* at 327 (emphasis added).

To support their conclusion Onwuachi-Willig and Barnes point to “Obama’s own identity performance during his campaign, studies regarding the psychology of whites who supported Obama, and studies concerning implicit bias.”⁷ Onwuachi-Willig and Barnes note that during his campaign, Obama engaged in a number of racial-comfort strategies.⁸ He avoided discussions of race as much as possible and “black people [like Louis Farrakhan and Al Sharpton] . . . deemed to be ‘too’ racially defined.”⁹ Obama worked to produce an identity that countered stereotypes of blacks as too consumed with race and downplayed his status as a black man during the campaign.¹⁰ Onwuachi-Willig and Barnes also point out that Obama’s opponents used his race against him and his wife, often publicizing negative stereotypes about blacks.¹¹ These attacks continued even after the election, including the highly publicized use of stereotyped images by the Tea Party.¹² Onwuachi-Willig and Barnes mention studies that demonstrate that some whites voted for Obama as a means to make a statement about the irrelevancy of race to them and society.¹³ They indicate that psychologists have noted that some white voters who supported Obama did so simply in order to congratulate themselves for backing a black person.¹⁴ This statement, however, might provide persons with a license to support racism, because supporting Obama gave them the moral credentials to express their true feelings about race.¹⁵ Onwuachi-Willig and Barnes go on to contend that these psychological studies suggest that Obama’s election may actually increase racial discrimination, thereby requiring, but not necessarily resulting in, greater enforcement of anti-discrimination law.¹⁶

It is impossible to ground an evaluative judgment, using definitive measures of universally agreed upon objective and measurable criteria, that Obama’s election may have increased racial discrimination and had a negative effect on the work environment. To reach such a conclusion, scholars have to decide among innumerable possible factors which ones are worthy of consideration, and how much weight should be given to the particular aspects chosen.¹⁷ Alternatively, scholars could arrive at a conclusion like this motivated by particular concerns. Thus, the evaluative conclusion that Obama’s election may increase racial discrimination could represent a response to these concerns.

7. *Id.* at 330.

8. *Id.* at 330–36.

9. *Id.* at 330.

10. *Id.* at 332–34.

11. *Id.* at 334–35.

12. *Id.* at 335–36.

13. *Id.* at 336–38.

14. *Id.* at 337 (citing Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election ‘08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659, 697–98 (2010)).

15. *Id.*

16. *Id.* at 338.

17. *Cf.* Malcolm Gladwell, *The Order of Things: What College Rankings Really Tell Us*, THE NEW YORKER, Feb. 14, 2011, at 68 (making the point that in order to rank law schools, *U.S. News & World Report* selects some factors that are relevant and ignores other relevant factors).

I believe that to understand the conclusion of Onwuachi-Willig and Barnes, it is very important to notice how they begin their piece. Their article starts by remarking that Obama's election has

prompted many declarations from journalists and commentators about the arrival of a post-racial society, a society in which race is no longer meaningful. For many, the fact that a self-identified black man had obtained the most prominent, powerful, and prestigious job in the United States symbolized the end of an era in which Blacks and other racial minorities could make legitimate claims about the harmful effects of racism.¹⁸

They go on to note that after Obama's election, conservative talk show host and former Secretary of Education, William Bennett, stated that blacks no longer have any excuses for failures.¹⁹ Onwuachi-Willig and Barnes quote Academy Award-winning actor Will Smith, who after Obama's election said that he loved that all African American excuses have been removed.²⁰ They also observe that many conservatives point to Obama's election as justification for the argument that the Voting Rights Act is irrelevant in a society that elected Obama as President²¹: "[d]espite the fact that Obama had earned only one in four votes from whites in areas covered by Section 5 of the Act while earning nearly half of all votes from whites nationally."²²

The assertion that the election of Obama means that America has reached the post-racial society where legitimate claims about the harmful effects of racism have no place, alarms many scholars of color, particularly black ones—myself included. To understand why so many of us are so alarmed by this assertion, it is important to understand the reality of the historical experience of blacks in the United States. Race is the central feature in the historical experience of blacks in the United States, but there are two different aspects of that experience. One aspect involves victimization because of race, which occurs when blacks experience discrimination and subjugation due to their race.²³ For much of American history, dominant cultural attitudes viewed blacks as inferior to whites. This understanding helped to make the subjugation of blacks appear to be part of the normal order of things.²⁴ Thus, one aspect of the historical experience of discrimination for blacks is the experience of what it means to be "raced" or branded as inferior.²⁵ However,

18. Onwuachi-Willig & Barnes, *supra* note 4, at 325–26 (citation omitted).

19. *Id.* at 326.

20. *Id.*

21. *Id.*

22. *Id.*

23. See, e.g., Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 625–39 (1993) (outlining, in the context of reparations, the victimization of the African American consciousness, due to the subjugation of blacks because of their race).

24. For a brief description of this history, see KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION 41–72 (2005).

25. See, e.g., MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO &

against the background of racial domination in the United States, the descendants of the sons and daughters of the soil of Africa developed a counterdiscourse to how mainstream American culture normally viewed and treated them. From the vantage point of this second aspect of the historical experience, race was also the central characteristic that united African Americans. But, the counternarrative focuses upon the active engagement by African Americans and their allies in a collective struggle against their racial oppression.²⁶ Within the counternarrative, the American race problem was not black inferiority but white supremacy.²⁷ And, African Americans were not passive victims of racial oppression, but active participants in a collective struggle against it. However, since this aspect focuses attention on the struggle against white supremacy, it systematically discounts the progress American society has made towards weakening racism in order to generate the effort necessary to continue the struggle. Thus, the experience of the history of discrimination of African Americans in the United States is like a two-sided coin. On one side, race was—and is—the basis of the subjugation of blacks. On the other side, race was—and is—the immutable characteristic that bound African Americans as a people in a constant struggle against their racial oppression.

Beyond the election of Barack Obama, there are several other obvious developments that reflect a substantial weakening of the racism that has for so long had a deep hold on American society and dominant American cultural attitudes about blacks. Not only does Barack Obama occupy the White House as the popularly elected President, but unlike the past, Americans confront the reality of very successful black individuals on a daily basis. As Pulitzer Prize-winning journalist, Eugene Robinson, has recently pointed out, there is a small transcendent elite group of blacks, like Donna Brazile, Eric Holder, Valerie Jarrett, Vernon Jordan, Debra Lee, Soledad O'Brien, Franklin Raines, Juan Williams, and Oprah Winfrey,²⁸ with "such enormous wealth, power, and influence that even white folks have to genuflect."²⁹ In addition to the emergence of transcendent blacks, we are also witnessing changes in the racial and ethnic ancestry of black people in American society. Onwuachi-Willig and Barnes often refer to Obama as a "biracial, black-white" President to emphasize that the President's mother was a white woman from Kansas and his father was a Kenyan immigrant. Yet, the explosion in the numbers of interracial marriages, multiracial children, and foreign-born blacks in this country are additional signs that historical racism in American society has

KIMBERLÈ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 61 (1993); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 439–40 (1993) (arguing that racial categories are neither objective nor natural, but instead ideological and constructed, by which race is not so much a category but a practice: people are raced); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 443 n.52 (1990) (citing Kendall Thomas's comments at the *Frontiers of Legal Thought Conference* at Duke Law School, which argued that the status quo of institutionalized white supremacy remains even after deliberate racist actions subside).

26. For a brief description of this history, see BROWN, *supra* note 24, at 81–101.

27. *Id.* at 79.

28. EUGENE ROBINSON, DISINTEGRATION: THE SPLINTERING OF BLACK AMERICA 2–3 (2010).

29. *Id.* at 5.

weakened. When Obama was born, there were only 51,000 black-white married couples in the United States;³⁰ interracial marriages between blacks and whites were still illegal in over twenty states.³¹ However, according to the 2010 census counts, 12.5% of married black men and 5.1% of married black women reported having a spouse of another race.³² Younger blacks are even more likely to cohabit and marry outside of their race.³³ A recent Pew Research Center report noted that 22% of black male and 9% of all black female newlyweds married outside of their race.³⁴ Increased interracial dating, cohabitation, and marriage have also increased the percentage of mixed-race blacks. According to the 2010 census, 7.4% of blacks,³⁵ (up from 4.8% in 2000)³⁶ also indicated another racial category. As one might expect, the younger blacks are the more likely they are to be multiracial. The percentage of mixed-race blacks between the ages of ten and fourteen was 9.3% and under the age of five was 13.7%.³⁷ And, the percentage and

30. G. REGINALD DANIEL, *MORE THAN BLACK?: MULTIRACIAL IDENTITY AND THE NEW RACIAL ORDER* 98 (2002).

31. *Id.*

32. Of the 60,384,000 married couples in the United States, 3,869,000 were of two “black alone” individuals. In addition, the number of black alone husbands was 357,000 with a white non-Hispanic wife, 92,000 with a Hispanic wife, and 103,000 with a wife whose race was Other alone or any combination, but not Hispanic. Thus, the percentage of black alone men married to a spouse of a different race was 12.5% ($357,000 + 92,000 + 103,000 = 552,000$)/($552,000 + 3,869,000 = 4,421,000$). For married black alone women, there were 147,000 married to a white non-Hispanic husband, 37,000 married to a Hispanic husband, and 25,000 married to a husband who was Other alone or any combination not-Hispanic. Thus, the percentage of black alone women married to a spouse of a different race was 5.1% ($147,000 + 37,000 + 25,000 = 209,000$)/($209,000 + 3,869,000$). For a breakdown of the numbers, see *America’s Families and Living Arrangements: 2010*, U.S. CENSUS BUREAU, tbl. FG4 (Married Couple Family Groups by Presence of Own Children in Specific Age Groups, and Age, Earnings, Education, and Race and Hispanic Origin of Both Spouses: 2010), available at <http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html>.

33. A recent study of data from the 2000 census showed that interracial marriage and cohabitation were much more frequent among blacks married between the ages of twenty and thirty-four. See Zhenchao Qian & Daniel T. Lichter, *Social Boundaries and Marital Assimilation: Interpreting Trends in Racial and Ethnic Inter-marriage*, 72 AM. SOCIOLOGICAL REV. 68, 79 (2007).

34. JEFFREY S. PASSEL, WENDY WANG & PAUL TAYLOR, PEW RES. CTR., *MARRYING OUT: ONE-IN-SEVEN NEW U.S. MARRIAGES IS INTERRACIAL OR INTERETHNIC* 12 (June 15, 2010), available at <http://pewsocialtrends.org/files/2010/10/755-marrying-out.pdf>.

35. See KAREN R. HUMES, NICHOLAS A. JONES & ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, *OVERVIEW OF RACE AND ORIGIN: 2010* 7 tbl.3 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

36. NICHOLAS A. JONES & AMY SYMENS SMITH, U.S. CENSUS BUREAU, *THE TWO OR MORE RACES POPULATION: 2000* 7 tbl.5 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-6.pdf>.

37. According to the 2010 census, of the 3,294,000 individuals between the ages of ten and fourteen who were classified as Black or African American or Black or African American in Combination, 307,000 were classified as Black or African American in Combination ($307,000/3,294,000 = 9.3%$). See *Population by Sex and Age, for Black Alone and White Alone, Not Hispanic: 2010*, U.S. CENSUS BUREAU, tbl.1. (Numbers in thousands.

number of foreign-born blacks in the country has skyrocketed since Obama was born. Historically, very few blacks voluntarily immigrated to the United States, because either they found America a hostile place or America was not very willing to accept them.³⁸ In 1960, there were only 125,000 foreign-born blacks in the country, making up only 0.7% of the black population.³⁹ This percentage, however, has risen over eleven fold in the past fifty years, to 1.1% in 1970,⁴⁰ to 3.1% in 1980,⁴¹ to 4.9% in 1990,⁴² to 6.1% in 2000,⁴³ and to 8.8% in 2010.⁴⁴ Over this period, the number of foreign-born blacks in the United States has also increased nearly twenty-nine fold to almost 3,600,000.⁴⁵ Without the weakening of racism, there simply would not be a black (biracial, black-white) President, an emerging

Civilian non-institutionalized population1), available at www.census.gov/population/socdemo/race/black/ppl-ba09/ba09tab1.xls; *Population by Sex and Age, for Black Alone or in Combination and White Alone, Not Hispanic: 2010*, U.S. CENSUS BUREAU, tbl.1 (Numbers in thousands. Civilian non-institutionalized population1), available at www.census.gov/population/socdemo/race/black/ppl-ba09/ba09tab1.xls. For ages five to nine the corresponding figures were 3,415,000 and 407,000 (407,000/3,415,000 = 11.9%), and for under the age of five, the corresponding figures were 3,780,000 and 518,000 (518,000/3,780,000 = 13.7%). *Id.*

38. Between 1820 and 1970, official records show that over 45,000,000 people voluntarily immigrated to the United States. Roy Simon Bryce-Laporte, *Black Immigrants: The Experience of Invisibility and Inequality*, 3 J. BLACK STUD. 29, 33 (1972). However, during this 150-year period, only about 76,000 Africans immigrated to the United States. *2003 Yearbook of Immigration Statistics*, U.S. DEP'T. OF HOMELAND SEC., 12–13 tbl.2 (2004), <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/2003Yearbook.pdf>. Africans constituted about two-tenths of one percent of the legal immigrants during that period. *Id.* As late as 1980, blacks constituted only 53% of the nearly 102,000 Africans in the United States. Holly E. Reed & Catherine S. Andrzejewski, *The New Wave of African Immigrants in the United States* 15–16 tbl.5 (Population Association of America, 2010 Annual Meeting Program Working Paper), available at <http://paa2010.princeton.edu/download.aspx?submissionId=100606>. Thus, a significant portion of the Africans who immigrated before 1970 may have been white.

39. Campbell Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850 to 1990* 41–42 tbl.8 (U.S. Census Bureau, Population Div., Working Paper No. 29, 1999) (including the 1960 population of Alaska and Hawaii), available at <http://www.census.gov/population/www/documentation/twps0029/tab08.html>.

40. *Id.*

41. *Id.*

42. *Id.*

43. JESSE D. MCKINNON & CLAUDETTE E. BENNETT, U.S. CENSUS BUREAU, *WE THE PEOPLE: BLACKS IN THE UNITED STATES: CENSUS 2000 SPECIAL REPORTS 7* fig.5 (2005), available at <http://www.census.gov/prod/2005pubs/censr-25.pdf>.

44. U.S. CENSUS BUREAU, *NATIVITY AND CITIZENSHIP STATUS BY SEX, FOR BLACK ALONE OR IN COMBINATION AND WHITE ALONE, NOT HISPANIC: 2010* tbl.4 (2010), available at <http://www.census.gov/population/www/socdemo/race/ppl-bc10.html>.

45. *Id.* This rise in immigration to the United States was triggered by the independence of Caribbean countries and “the passage of the Hart-Cellar Act in 1965, which abolished the old country-of-origins quota, affirmed family connections as the principal basis for admission to permanent residence in the United States, and increased the total numbers of immigrants to be admitted to the United States.” Roger Waldinger, *Immigration and Urban Change*, 15 ANN. REV. SOC. 211, 212 (1989).

group of transcendent blacks, or such large numbers of interracial couples, multiracial children, and foreign-born black immigrants in the country.

Yet, despite these obvious and undeniable signs of progress in America's efforts to eradicate the effects of racial oppression root and branch, blacks as a group continue to lag far behind non-Hispanic whites on important socioeconomic measures. For example, the median family income of blacks was only 61.4% of whites in 2008;⁴⁶ the poverty rate of children below the age of eighteen was 34.4% for blacks compared to 15.3% for whites;⁴⁷ only 19.6% of blacks compared to 29.8% of whites over the age of twenty-five held college degrees;⁴⁸ and the life expectancy of blacks is 73.6 years compared to whites at 77.9 years.⁴⁹ In addition, after the recent economic catastrophe, the median net worth of black households fell to its lowest amount on record—just \$2200, compared to \$97,000 for white households.⁵⁰

From the side of the coin of the African American experience that focuses its attention on the historic struggle against racial oppression, despite the progress that has occurred, the continued existence of significant racial gaps in important socioeconomic measures means that there is still much work to do. As a result, one of the legitimate concerns of many black scholars since the election of President Obama is that his election will be used to signal a premature end of the struggle of American society to right the wrongs of the past and present. I believe it is this concern that animates the article written by Onwuachi-Willig and Barnes. I share this concern. However, I do not want to be dominated by it in this response. To consider the plight of African Americans always against the background of a constant struggle against racial oppression means that one systematically focuses attention on how much has to be done to reach the racial promised land, as opposed to how much has already been accomplished. It also tends to view African Americans as the victims of racial oppression as opposed to highlighting their efforts to attenuate it. At the risk of someone misinterpreting my remarks as a statement that America has done enough to eradicate the continuing impact of racial discrimination and oppression, I want to point to how the African American community may interpret the election of Obama and use it to weaken our society's continuation of racial oppression. Thus, I am far more optimistic about the positive effect of the election of Barack Obama on racial discrimination in the workplace.

46. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011 456 tbl.696 (2011), available at <http://www.census.gov/compendia/statab/2011/tables/11s0696.pdf> (demonstrating that the median family income of blacks was \$39,879 in 2008, while the median family income of whites was \$65,000).

47. *Id.* at 465 tbl.712, available at <http://www.census.gov/compendia/statab/2011/tables/11s0712.pdf>.

48. *Id.* at 149 tbl.225, available at <http://www.census.gov/compendia/statab/2011/tables/11s0225.pdf>.

49. *Id.* at 76 tbl.102, available at <http://www.census.gov/compendia/statab/2011/tables/11s0103.pdf>.

50. See Sylvia A. Allegretto, *The State of Working America's Wealth, 2011: Through Volatility and Turmoil, the Gap Widens*, in STATE OF WORKING AMERICA (Econ. Pol'y Inst., Briefing Paper No. 292, 2011), available at http://epi.3cdn.net/002c5fc0fda0ae9cce_aem6idhp5.pdf.

Despite all that has occurred since Obama's election, I steadfastly believe that this is a time of previously unimaginable hope and positive change.

As someone who entered the legal academy in 1987, I have been a law professor writing about issues of race for longer than most of the students that I now teach have been alive. I was there when the first meeting of Critical Race Theory occurred in Madison, Wisconsin in the summer of 1989.⁵¹ I was also at Loyola University Chicago School of Law in Chicago, Illinois in 1990, when the first meeting of the Midwestern People of Color Legal Scholarship Conference, the first People of Color Conference took place.⁵²

Among other things, Critical Race Theory became known for storytelling. I want to begin this analysis of Onwuachi-Willig and Barnes's conclusion with a story. I graduated from Yale Law School in the spring of 1982. One day shortly before graduation, a group of black law students were sitting around a table in the lunchroom. I cannot remember who exactly was at the table. However, among the blacks who attended Yale Law School with me at the time, a number of them went on to join the legal academy, including: Yvette Barksdale at John Marshall; Scott Brewer at Harvard; Sherri Burr at New Mexico State; Alyssa Christmas Rollock at Indiana University-Bloomington; Malina Coleman at Akron; Charisse Heath at Detroit Mercy; Michael Higginbotham at Baltimore; Randall Johnson at Georgia; Randall Kennedy at Harvard; Florise Neville-Ewell at Thomas Cooley; and Kendall Thomas at Columbia.⁵³

Byron Ndaki, an older black male from South Africa, attended Yale to pursue an LL.M. degree. In 1982, apartheid was deeply entrenched in South African society and the Reagan Administration followed a policy of what it called "constructive engagement" in South Africa.⁵⁴ Constructive engagement was a policy designed to encourage the white South African minority government to change the apartheid system through "quiet dialogue."⁵⁵ The South African government, however, viewed constructive engagement as helping to preserve and prolong apartheid.⁵⁶

Byron asked the group of black law students sitting around a lunchroom table, "Has there ever been a black elected President of the United States?"⁵⁷ Our

51. For a list of those who attended the initial Critical Race Theory Workshop in 1989, see Angela Onwuachi-Willig, *Celebrating Critical Race Theory at 20*, 94 IOWA L. REV. 1497, 1497 (2009).

52. See Linda S. Greene, *From Tokenism to Emancipatory Politics: The Conferences and Meetings of Law Professors of Color*, 5 MICH. J. RACE & L. 161, 161-62 (1999) (discussing the first meeting of the Midwestern People of Color Legal Scholarship Conference in February 1990).

53. In addition to the blacks who became law professors, James Bowen is currently an associate professor at John Jay College in the Department of Political Science.

54. See Sanford J. Ungar & Peter Vale, *South Africa: Why Constructive Engagement Failed*, 64 FOREIGN AFF. 234, 235 (1985).

55. *Id.* at 234.

56. *See id.* at 243.

57. As a black South African, Byron may have been aware of the impact of African Americans on the anti-apartheid struggle. If so, this might explain why he viewed African Americans in such high esteem, which made the possibility of a black American president more plausible. For a brief discussion of this involvement, see Kevin D. Brown, *African-Americans Within the Context of International Oppression* 17 TEMP. INT'L & COMP. L.J. 1,

collective response was to exercise what our constitutional law professor, Charlie Black, used to call the “sovereign prerogative of the philosophers.”⁵⁸ That is, we just laughed. We had difficulty taking such a naïve question seriously. We responded in unison, “not only have the American people never elected someone black to the office of the President, but they never will. This is the curse of democracy for us, the minority in America. For you, one day majority rule will lead to a black head of state in South Africa. For us in America, we are painfully aware of the ‘tyranny of the majority.’”⁵⁹

Simply put, we believed that Byron did not understand the magnitude or the depth of the racism in the United States that we encountered. I don’t want to be misunderstood. Like the White Queen in the book *Through the Looking-Glass and What Alice Found There*, we too could envision “six impossible things before breakfast.”⁶⁰ One, interracial marriage would be so accepted that a black man could be elevated to the Supreme Court of the United States even though he was married to a white woman.⁶¹ Two, African Americans would one day occupy the position of chief executive officer (CEO) of a number of Fortune 500 companies.⁶² Three, the

21–25 (2003). For a bibliography of works on the connection between blacks in the United States and South Africa, see GEORGE M. FREDRICKSON, *BLACK LIBERATION: A COMPARATIVE HISTORY OF BLACK IDEOLOGIES IN THE UNITED STATES AND SOUTH AFRICA* 325–26 n.4 (1995).

58. In his famous law review article, *The Lawfulness of the Segregation Decisions*, Professor Black asked the question:

[D]oes segregation offend against equality? Equality, like all general concepts, has marginal areas where philosophic difficulties are encountered. But if a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated “equally,” I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system answers to this description. Here I must confess to a tendency to start laughing all over again.

Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 424 (1960).

59. This is the title of a book by another Yale Law School graduate who is now a Harvard Law School professor. LANI GUINIER, *TYRANNY OF THE MAJORITY* (1994).

60. LEWIS CARROLL, *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE* 54 (Univ. Cal. Press 1983) (1871).

61. Paul Richter, *Virginia Thomas: A Wife Shares Husband’s Ordeal: Family: Although from Different Backgrounds, They Are Alike in Both Temperament and Politics, Friends Say. The Two Have Become Inseparable*, *L.A. TIMES*, Oct. 13, 1991, http://articles.latimes.com/1991-10-13/news/mn-1053_1_clarence-thomas.

62. Blacks have run some of the most powerful corporations in the world, including: Ursula M. Burns, Chairman and CEO of Xerox Corp.; Kenneth I. Chenault, Chairman & CEO of American Express Co.; Kenneth C. Frazier, President, CEO, and Director of Merck & Co., Inc.; Stanley O’Neal, Director of Alcoa; Richard Dean Parson, Chairman of Citigroup, Inc.; Don Thompson, President and Chief Operating Officer of McDonald’s Corp.; and Ronald A. Williams, Chairman and CEO of Aetna, Inc. For the complete list of African American CEOs of Fortune 500 companies, see *Current Black CEO’s of Fortune 500 Companies*, *BLACK ENTREPRENEUR PROFILE*, <http://www.blackentrepreneurprofile.com/>

University of Mississippi would play the University of Alabama in a basketball game that would start ten black players.⁶³ Four, a black Miss America or Miss USA would become so commonplace that when another one claimed the crown it would not be a major news story.⁶⁴ Five, a self-made black female would become one of the wealthiest Americans.⁶⁵ And six, a black person could become President.

Even though we could imagine a black person becoming President, we did not imagine that such a feat would occur as the result of a popular election. I believe our most plausible scenario was depicted in the 1972 movie entitled *The Man*, with the screen play written by Rod Serling (of *Twilight Zone* fame).⁶⁶ In this movie,

fortune-500-ceos. For a list of additional black corporate leaders, see *Ebony Power 150: Business*, EBONY MAG., Dec. 2009, at 92–93.

63. On February 12, 2011, the University of Alabama basketball team beat the University of Mississippi 74 to 64. For the official basketball box score of Mississippi v. Alabama, see *Mississippi vs. Alabama (02/12/11 at Tuscaloosa, Ala. (Coleman Coliseum))*, ROLLTIDE.COM, <http://www.rolltide.com/sports/m-baskbl/stats/2010-2011/ua021211.html>. The starting five players for the University of Alabama were JaMychal Green, Chris Hines, Trevor Releford, Andrew Steele, and Charvez Davis. The University of Mississippi started Terrance Henry, Reginald Buckner, Chris Warren, Nick Williams, and Zach Graham. *Id.* For pictures of the University of Mississippi basketball players, see *2010-11 Rebels*, CBSSPORTS, http://grfx.cstv.com/photos/schools/ole/sports/m-baskbl/auto_pdf/2010mg-sec4.pdf.

64. There have been eight black Miss Americas. The last one, Caressa Cameron, was crowned in January 2010. See Joanne Fowler, *Caressa Cameron of Virginia Crowned Miss America*, PEOPLE (Jan. 31, 2010), <http://www.people.com/people/article/0,,20340574,00.htm>. The other seven were Vanessa Williams, 1984; Suzette Charles, 1984; Debbye Turner, 1990; Marjorie Vincent, 1991; Kimberly Aiken, 1994; Erika Harold, 2003; and Erica Dunlap, 2004. ELWOOD WATSON & DARCY MARTIN, *THERE SHE IS, MISS AMERICA: THE POLITICS OF SEX, BEAUTY, AND RACE IN AMERICA'S MOST FAMOUS PAGEANT* 107 (2004); see also Elwood Watson, *Miss America's Racial Milestones*, DIVERSE ISSUES IN HIGHER EDUCATION (Jan. 14, 2009), <http://diverseeducation.wordpress.com/2009/01/14/miss-americas-racial-milestones/>. Cf. Carol Brennan, *Erika Harold Biography*, BRIEF BIOGRAPHIES, <http://biography.jrank.org/pages/2852/Harold-Erika.html#ixzz0JfEloz8x&D> (explaining that Harold, the winner of the 2003 crown, was born to a white father and a mother who was part African American and part Native American). There have also been five black Miss USA winners: Kenya Moore, 1993; Chelsi Smith (who has a black father and white mother), 1995; Shauntay Hinton, 2002; Rachel Smith (half black, half white), 2007; and Crystle Stewart, 2008. *Crystle Stewart Crowned Miss USA*, THE DAILY VOICE (Apr. 12, 2008, 8:15 AM), <http://thedailyvoice.com/voice/2008/04/crystle-stewart-crowned-miss-u-000448.php>.

65. According to Forbes Magazine, Oprah Winfrey was #141 on its list of 400 richest Americans in 2009 with a net worth of \$2.3 billion. *The Richest People in America*, FORBES, (Matthew Miller & Duncan Greenberg eds., Sept. 30, 2009), http://www.forbes.com/2009/09/30/forbes-400-gates-buffett-wealth-rich-list-09_land.html. According to Forbes's inaugural list of the wealthiest black Americans, after Oprah Winfrey comes Tiger Woods with a net worth of approximately \$600 million, Robert Johnson worth \$550 million, Michael Jordan worth \$525 million, Magic Johnson worth \$500 million, and \$Bill Cosby worth 450 million. Matthew Miller, *The Wealthiest Black Americans*, FORBES (May 6, 2009), <http://www.forbes.com/2009/05/06/richest-black-americans-busienss-billionaires-richest-black-americans.html>.

66. See *The Man (1972): Plot Summary and Details*, MOVIEFONE, <http://www.moviefone.com/movie/the-man/1067098/synopsis>.

Douglass Dilman, played by James Earl Jones, becomes President.⁶⁷ Dilman, a black U.S. Senator, becomes the Senate President Pro Tempore as a means of calming racial unrest in the country.⁶⁸ However, a building collapse kills both the President and Speaker of the House.⁶⁹ The Vice President declines to assume the Presidency due to his age and ill health.⁷⁰ As a result, the office falls to Dilman.⁷¹ So, we believed that a black man could become President. However, our sixth impossible thing would come about only as a result of a great tragedy befalling the elected President.⁷²

If Byron had reformulated his question that day in words closer to those used by Onwuachi-Willig and Barnes to describe Obama and asked, “Could a biracial, black-white person, running on a platform that tried to deemphasize his black ancestry be elected President?” I am certain that our response would have been the same. I agree that today people under the age of twenty-five with Obama’s mixed-race background could refer to themselves as biracial, instead of black.⁷³ However,

67. For a discussion of the plot, see Arya Ponto, *Watch Out!: The Man* (1972), JUSTPRESSPLAY (Jan. 2009), <http://www.justpressplay.net/movies/movie-news/4669-watch-out-the-man-1972.html>.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. In our most optimistic moments, we imagined that a black person could get placed on the Democratic ticket as the vice presidential candidate. The ticket could win because of the strength at the top. A tragedy would befall the elected President and the United States would have its first black President. In the days of Ronald Reagan’s Presidency, we did not think it likely a black Republican could become President. There was a joke told about the Republican Party that summed up our belief: A Young Republican was campaigning for office in the Deep South. The Young Republican was having a fundraiser. He approached an elderly white man and cordially said to him, “Excuse me sir, but I am running for office and would like your support.” The elderly white man looked at the young candidate’s campaign button that marked him as a Republican, scowled, and said, “Republican! That’s the Party of Lincoln. That is the party that freed the slaves. Why would I ever vote for a damn Republican?” The young man thought for a moment, because he knew he needed to answer this question if he ever expected to prevail in the elections. Then he quipped back to the elderly white man, “I understand that we are the Party of Lincoln. And I understand your gut reaction to us. But, remember Lyndon Baines Johnson. Remember the Civil Rights Act of 1964. Remember the Voting Rights Act of 1965. Remember, the Fair Housing Act of 1968. Remember seeing Martin Luther King, Jr. at the right hand of President Johnson.” And the elderly white man nodded his affirmative remembrance. Then the Young Republican went in for the kill: “Well, kindly sir, the reason that you should vote for me as a Republican is because we are the party most likely to get your slaves back!”

73. See generally Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229 (2008) (raising concern about the overrepresentation of black multiracials and black immigrants attending selective higher education programs). Cf. Sam Roberts & Peter Baker, *Asked to Declare His Race, Obama Checks “Black”*, N.Y. TIMES, Apr. 2, 2010, at A9, <http://www.nytimes.com/2010/04/03/us/politics/03census.html?scp=1&sq=%22asked%20to%20declare%20his%20race,%20Obama%22&st=cse> (explaining how President Obama selected only the “Black, African Am., or

in 1982, when Obama was twenty-one years old, Americans determined who was black through the rigid application of the “one-drop” rule.⁷⁴ In the words of Thomas F. Dixon, Jr., the author of the *Clansman*, the book that D.W. Griffith made into his legendary film, *Birth of a Nation*,⁷⁵ “One drop of Negro blood . . . kinks the hair, flattens the nose, thickens the lip, puts out the light of intellect, and lights the fires of brutal passions.”⁷⁶ Thus, our black Yale Law School roundtable would not have distinguished between a black whose mixed-race heritage stemmed from slavery or from the voluntary choices of their parents. We would not have recognized the reformulated question as different from the original. In other words, I never thought in my lifetime that I would live to see a black (biracial black-white) man elected President of America, especially one who was so popular among blacks that he received 96% of the black vote.⁷⁷

There are two different ways in which reductions of discrimination against black employees in the workplace during the Obama Administration could occur. One way is that fellow employees and management make fewer negative judgments or engage in fewer negative practices due to a black person’s race. The other way is that black employees perceive less discrimination than they did before Obama’s inauguration. Thus, the reduction in discrimination could occur as a result of either the intentions of fellow employees and management or the perceptions of black employees. When I think about the impact of Obama’s election on racial discrimination in the workplace, I believe that factors should be considered beyond Obama’s identity performance during his campaign, studies regarding the psychology of whites who supported Obama, and studies concerning implicit bias. The factors that Onwuachi-Willig and Barnes cite are shaded primarily to the aspect of the racial victimization of blacks. For example, the identity performance of Obama may actually be interpreted very differently by people of color, particularly blacks, than by whites. Part of my story was to suggest that many of us did not expect the election of a black man, regardless of how Obama attempted to present himself to the American electorate. No identity performance by him obscured the reality to African Americans that he was black. African Americans are sophisticated enough to understand that those blacks viewed as “too black”—like Shirley Chisholm, Carol Mosely Braun, and Jesse Jackson—could not win a

Negro” category on the 2010 census to identify his race). Question nine of the 2010 census asks, “What is [the] person’s race? Mark one or more boxes.” U.S. CENSUS BUREAU, UNITED STATES CENSUS 2010, available at http://www.census.gov/schools/pdf/2010form_info.pdf. Several options are presented, including “White”; “Black, African Am., or Negro”; and “Some other race.” *Id.* Thus, while Obama could have also checked white or “some other race,” by only checking the black box, he asserted a racial identity of “black,” not biracial.

74. See generally Brown & Bell, *supra* note 73 (explaining the one-drop rule and its influence over black racial identity). Question 9 of the 2010 Census asks, “What is [the] Person’s race? Mark one or more boxes.” U.S. CENSUS BUREAU, UNITED STATES CENSUS 2010, available at http://www.census.gov/schools/pdf/2010form_info.pdf.

75. THOMAS DIXON, JR., *THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN* (Gregg Press, Inc. 1967) (1905). *The Clansman* was the basis for the 1915 silent movie, *Birth of a Nation*. See generally *THE BIRTH OF A NATION* (Epoch Film Co. 1915).

76. THOMAS DIXON, JR., *THE LEOPARD’S SPOTS: A ROMANCE OF THE WHITE MAN’S BURDEN: 1865–1900*, at 244 (1905).

77. David Paul Kuhn, *Exit Polls: How Obama Won*, POLITICO (Nov. 5, 2008, 12:27 AM), <http://www.politico.com/news/stories/1108/15297.html>.

popular election for the Presidency. As a result, Onwuachi-Willig and Barnes focus on the perception of whites of Obama's identity performance is just half the picture because it systematically underappreciates how blacks experience racism and use the election of Obama in ways that attenuate the perception and the amount of racial discrimination in the workplace. Admittedly, many of the factors beyond those mentioned by Onwuachi-Willig and Barnes that I would consider are not ones that are easy to objectively quantify. However, the difficulty in measuring them does not eliminate their relevance or importance.

The factors that Onwuachi-Willig and Barnes leave out are the factors that discuss how black people feel about the workplace as a result of Obama's election. What is the impact on a black person walking into the lunchroom or the employee lounge at work, and seeing on CNN Wolf Blitzer, Candy Crowley, or John King reporting on the position of the Obama Administration regarding a particular international event? Does this make this black person feel more at ease and comfortable during the workday? Do they hear a coworker tell a joke about Obama and think it is amazing that there is a black President to joke about in the first place? Do they look at Obama and realize that if he can stand up under pressure, they can as well and thereby redouble their efforts to prove themselves on the job? Does the election of Obama fill them with a sense of pride that makes them less concerned about minor insults and more willing to laugh at a racial joke as opposed to being offended by it? What is the impact of the election of Obama on the psyche, and thus the academic achievement, of young black students when one of their teachers, mentors, friends, or relatives says, "If Obama can be elected President, surely you can work hard enough to earn an 'A' in Geometry?"⁷⁸ Does this make them work harder at their schoolwork, thereby improving their academic performance, which eventually increases their academic credentials and makes them more marketable in the work force? What about the impact on the psyche of black parents or guardians who in an effort to urge their children to set their standards in life high, say to their child, "you could be President one day"? How do these black parents and guardians feel after saying this as they head out the door on their way to work knowing that when they urge their child to achieve more with this statement they are no longer bold-faced liars? What impact does growing up and seeing Obama as President for four (hopefully eight) years, have on the attitudes of young white, Asian, Hispanic/Latino, or Native Americans about the intelligence, diligence and hardworking black people they encounter? How will it affect the attitudes of these young people about the abilities of blacks as they mature, move into the workforce and eventually progress into management positions where they make decisions about hiring, retaining or promoting black people?

In conclusion, I understand and share the concerns raised by Onwuachi-Willig and Barnes that America has reached the post-racial society where legitimate claims about the harmful effects of racism have no place, especially given

78. See Sam Dillon, *Study Sees an Obama Effect as Lifting Black Test-Takers*, N.Y. TIMES, Jan. 22, 2009, at A15 (reporting that researchers documented a reduction in test score gaps between white and black test takers that existed before Obama's election and after his acceptance speech), <http://www.nytimes.com/2009/01/23/education/23gap.html>.

persistent racial gaps in the important social economic measures. I also understand that Obama downplayed his race during his campaign and his presidency. I understand that there are some whites who will use their vote for Obama as a permission to let their true feelings of racism emerge. I also understand that some individuals will use stereotyped imagery to attack Obama. However, these seem small and *inevitable* prices to pay for the enormous benefit to African Americans for having a black president.

I never thought that a person with Obama's racial background could get elected President of the United States in my lifetime. Obama comes out of the tradition of struggle against racial oppression that so many blacks have experienced. His syllabus from his Spring 1994 University of Chicago Law School course on "Current Issues in Race and Law" was placed on the internet by the *New York Times*.⁷⁹ I have taught a course on race, American society, and the law for over two decades. Many of the writings that Obama used in his course are ones that I have used over the years in mine. So there can be little doubt that he has a black scholar's understanding about race in America. Having lived through the presidencies of Richard Nixon, Gerald Ford, Jimmy Carter, Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush, I am not prepared to denigrate the current President due to a concern about the arguments that this is a post-racial society. As Obama has reminded us on numerous occasions, we should not make the "best" the enemy of "good."⁸⁰ I recognize that this is the "Ebony Age," and I am prepared to enjoy some of it, because I don't know if it will ever come again. For those who doubt that this is such a time to be optimistic and hopeful about future change, I would simply ask, "If not now, when?"

79. Barack Obama, *Reading Packet #1: Current Issues in Racism and the Law*, N.Y. TIMES, available at http://www.nytimes.com/packages/pdf/politics/2008OBAMA_LAW/Obama_CoursePk.pdf.

80. For example, Obama gave an interview discussing why the United States resisted European pressure to further reduce greenhouse gas emissions. During the interview, he commented on the fact that German Chancellor Angela Merkel and the leaders of many European and other nations wanted more from the United States. In response, Obama is quoted as saying, "My argument to her and to the Europeans is we don't want to make the best the enemy of the good." John M. Broder & James Kanter, *Despite Shift on Climate by U.S., Europe Is Wary*, N.Y. TIMES, July 7, 2009, at A9, <http://www.nytimes.com/2009/07/08/science/earth/08climate.html>.