

## THE GREAT AMERICAN DILEMMA: LAW AND THE INTRANSIGENCE OF RACISM\*

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At the start of the twentieth century, W.E.B. Du Bois noted that, “the problem of the Twentieth Century is the problem of the color-line.”<sup>1</sup> Over a century later, Du Bois’s words remain prescient. In the twenty-first century, the problem of the color line persists. This should come as no surprise. The subordination and marginalization of people of color is embedded into the very fabric of America’s political and social arrangements.<sup>2</sup> Indeed, even American citizenship<sup>3</sup> is color-coded, inextricably tied to whiteness. This was the case initially as a matter of law.<sup>4</sup> It is now the case as a

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\* This article is one of six written for CUNY Law Review’s inaugural cross-textual dialogue. The author was invited to write a short piece in response to the following quotation: “When you say racism, they say: it could have been something else. Sometimes you just know when it is racism. It is as tangible as hitting a wall, that the problem is you; that part of you that makes you the person they do not want or expect, the part of you than makes you stand out from the sea of whiteness. Sometimes you are not sure. And you begin to feel paranoid. That is what racism does: it makes you question everything, the whole world, the world to which you exist in relation. Heterosexism and sexism are like that too: are they looking at me like that because of that? Is that why they are passing us over, two women at the table? You are not sure.” Sara Ahmed, *Evidence*, FEMINISTKILLJOYS (July 12, 2016, 2:00 PM), <https://feministkilljoys.com/2016/07/12/evidence/> [https://perma.cc/T39A-28S3].

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<sup>1</sup> W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* vii (1903).

<sup>2</sup> The law has historically been used to enslave people of color and deny them access to meaningful and substantive rights. *See, e.g.*, *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857) (“[A]t the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted . . . [Blacks were] so far inferior, that they had no rights which the white man was bound to respect . . .”); *People v. Hall*, 4 Cal. 399, 404 (1854) (barring the testimony of Chinese witnesses to a murder committed by a white man because “[t]he same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls”).

<sup>3</sup> I use the term citizenship to encompass both the formal rights that come along with citizenship such as the right to vote and the informal benefits of citizenship such as membership and inclusion as part of a community with shared interests.

<sup>4</sup> For much of this country’s history, whiteness was a specified legal prerequisite to becoming a naturalized citizen of the United States. The Naturalization Act of 1790, the first official codification of naturalization requirements, identified whiteness as a prerequisite for citizenship and explicitly stated that only whites could become citizens of the United States. *See* Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1952) (stating, in pertinent part, that “any alien, being a free *white person*, who shall

matter of praxis.<sup>5</sup>

While whiteness is no longer a legal prerequisite to formal American citizenship,<sup>6</sup> the racial nativism that undergirded America's initial conceptions of citizenship remain. For non-whites in America, whether native born or naturalized citizens, questions persist about the extent to which they can truly lay claim to America being "their" country, despite changing demographics which suggest that by 2055 America will have no clear racial majority.<sup>7</sup> Even the election of an African-American president has not altered this reality. The election of President Barack Obama at best revealed racial cleavages that have long existed, and at worst, increased rather than ameliorated racial discord.<sup>8</sup> The recent election of Donald J. Trump with his promise to "make America great again," along with the cacophonous battle cry of his followers to "take back our country," demonstrates this point.<sup>9</sup> Arguably, Donald J. Trump was elected President of the United States not in spite of his naked appeal to white racial nativism, but because of it.<sup>10</sup>

Trump's election has made clear what some people of color in

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have resided within the limits and under the jurisdiction of the United States for the term of two years" is eligible for naturalized citizenship (emphasis added)).

<sup>5</sup> Indeed, even after the grant of formal citizenship rights for non-whites, it is debatable whether they enjoy the full parameters of citizenship as "there is often a gap between possession of [formal] citizenship status and the enjoyment or performance of citizenship in substantive terms." LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 31 (2006).

<sup>6</sup> John Tehranian, Note, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 *YALE L.J.* 817, 841 (2000) ("With the McCarran-Walter (Immigration and Nationality) Act of 1952, Congress finally abandoned the race-based system of naturalization in existence since 1790.").

<sup>7</sup> See D'Vera Cohn & Andrea Caumont, *10 Demographic Trends That Are Shaping the U.S. and the World*, PEW RES. CTR. (Mar. 31, 2016), <http://www.pewresearch.org/fact-tank/2016/03/31/10-demographic-trends-that-are-shaping-the-u-s-and-the-world/> [<https://perma.cc/8T3T-C3FV>] (describing the demographic shifts and noting the estimated shift to a majority minority country by the year 2055).

<sup>8</sup> See, e.g., Jamelle Bouie, *Racial Discontent is Rising, But That's Not Obama's Fault*, SLATE (July 15, 2016, 5:00 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/07/racism\\_discontent\\_is\\_rising\\_but\\_that\\_s\\_not\\_obama\\_s\\_fault.html](http://www.slate.com/articles/news_and_politics/politics/2016/07/racism_discontent_is_rising_but_that_s_not_obama_s_fault.html) [<https://perma.cc/V9KG-DXL2>] (describing the ways in which Barack Obama's presidency impacted race relations in America).

<sup>9</sup> See Ronald Brownstein, *Trump's Rhetoric of White Nostalgia*, ATLANTIC (June 2, 2016), <http://www.theatlantic.com/politics/archive/2016/06/trumps-rhetoric-of-white-nostalgia/485192/> [<https://perma.cc/C6GE-L5VV>] ("In the Trump vocabulary, the word 'back' ranks closely behind 'again.' Trump is forever promising to 'bring back' things that have been lost. Manufacturing jobs, steel and coal production, waterboarding of terrorists, 'law and order' in the cities—all of these Trump says he will 'bring back' to reverse what he portrays as years of American decline.").

<sup>10</sup> See, e.g., Nicholas Confessore & Nate Cohn, *Donald Trump's Victory Was Built on Unique Coalition of White Voters*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/10/us/politics/donald-trump-voters.html> [<https://perma.cc/EVU9-25NK>].

America have long suspected: as a person of color in America, “the flag to which you have pledged allegiance, along with everybody else, has not pledged allegiance to you.”<sup>11</sup> That a majority of white American citizens would vote for a man who openly disparaged Mexicans,<sup>12</sup> was found liable for discriminating against African-Americans in housing,<sup>13</sup> and is overwhelmingly supported by white nationalist groups<sup>14</sup> underscores this suspicion. The election of Donald J. Trump was the proverbial smoking gun for those who have come to believe that race always has and always will matter in America.<sup>15</sup>

Yet critics of the continued salience of racism contest such a proposition. They suggest that racism is an ancillary matter that had little to do with Trump’s election, as some not insubstantial number of whites who voted for Trump this time around previously voted for President Obama.<sup>16</sup> They further suggest that Trump’s election had more to do with economics, most notably that the working class—white working class—felt marginalized and excluded.<sup>17</sup> They also point to the flaws of the Democratic candi-

<sup>11</sup> James Baldwin, Debate with William F. Buckley at the Cambridge Union Society of Cambridge University: The American Dream and the American Negro (Feb. 18, 1965), in N.Y. TIMES, Mar. 7, 1965, at SM32.

<sup>12</sup> See Janell Ross, *From Mexican Rapists to Bad Hombres, The Trump Campaign in Two Moments*, WASH. POST: THE FIX (Oct. 20, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/10/20/from-mexican-rapists-to-bad-hombres-the-trump-campaign-in-two-moments/> [<https://perma.cc/2TJ4-T2TA>].

<sup>13</sup> See Jonathan Mahler & Steve Eder, ‘No Vacancies’ for Blacks: How Donald Trump Got His Start, and Was First Accused of Bias, N.Y. TIMES (Aug. 27, 2016), <http://www.nytimes.com/2016/08/28/us/politics/donald-trump-housing-race.html> [<https://perma.cc/V3F6-DH2N>].

<sup>14</sup> See J.M. Berger, *How White Nationalists Learned to Love Donald Trump*, POLITICO MAG. (Oct. 25, 2016), <http://www.politico.com/magazine/story/2016/10/donald-trump-2016-white-nationalists-alt-right-214388> [<https://perma.cc/2YXZ-3XST>].

<sup>15</sup> See, e.g., Roxane Gay, *The Audacity of Hopelessness*, N.Y. TIMES (Nov. 9, 2016, 2:01 AM), <http://www.nytimes.com/interactive/projects/cp/opinion/election-night-2016/the-audacity-of-hopelessness> [<https://perma.cc/W2RJ-QY26>] (describing the fear, hurt, and disillusionment that many people of color felt after Trump’s election); Charles M. Blow, Opinion, *America Elects a Bigot*, N.Y. TIMES (Nov. 10, 2016), <http://www.nytimes.com/2016/11/10/opinion/america-elects-a-bigot.html> [<https://perma.cc/5D2A-5FLE>] (chronicling the ways in which Trump’s election sends an unwelcoming message to citizens of color).

<sup>16</sup> See, e.g., Eric Levitz, *Trump Won a Lot of White Working-Class Voters Who Backed Obama*, N.Y. MAG.: DAILY INTELLIGENCER (Nov. 9, 2016, 4:10 AM), <http://nymag.com/daily/intelligencer/2016/11/trump-won-a-lot-of-white-working-class-obama-voters.html> [<https://perma.cc/9SNW-T6BW>] (contending that Trump’s election was not primarily about race or racism as evidenced by the number of Trump supporters who previously voted for President Obama).

<sup>17</sup> See, e.g., Nate Cohn, *Why Trump Won: Working-Class Whites*, N.Y. TIMES: THE UPSHOT (Nov. 9, 2016), <http://www.nytimes.com/2016/11/10/upshot/why-trump-won-working-class-whites.html> [<https://perma.cc/AS2A-74JK>].

date and suggest that her flaws were the reason for Trump's victory, not racism.<sup>18</sup> Thus, despite Trump's not so subtle appeal to white nativism, doubts remain as to the salience of racism as a factor in his being elected president. As noted by Professor Sara Ahmed, in this instance, "[w]hen [people] say racism, [critics] say: it could have been something else."<sup>19</sup>

The tendency to look for an explanation other than race or racism is a fairly standard response to dealing with race and racism in America,<sup>20</sup> particularly when an egregious or overt act of racial animus is not readily identifiable.<sup>21</sup> For the most part, within the public discourse, racism is narrowly conceptualized to mean disliking or having malintent towards a person because of their race or ethnicity.<sup>22</sup> Thus, for many people, "racism is equivalent to colour-consciousness and consequently non-racism must be a lack of colour-consciousness."<sup>23</sup> This is why calls to "get beyond race" or to "not see color" are commonly framed as the solution to eradicating racism.

This essay suggests that the law plays a pivotal role in the way in which both race and racism are viewed in the mainstream discourse. To be sure, the law has been a valuable instrument in transforming America from a place of overt bigotry and racial exclusion to one where overt bigotry and racial exclusion are considered unacceptable. Court cases such as *Brown v. Board of Education*<sup>24</sup> and laws like the 1964 Civil Rights Act,<sup>25</sup> in particular, profoundly shaped the way that Americans view race and racism. In the eyes of the public, these two iconic pieces of law have come to define what racism is—denying access or differential treatment because of race—and how to best eradicate it—enacting laws that prohibit dif-

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<sup>18</sup> See, e.g., Mike Abrams, Opinion, *Hillary and Co. Are the Only Ones to Blame for Her Loss*, MIAMI HERALD (Nov. 14, 2016, 8:35 PM), <http://www.miamiherald.com/opinion/op-ed/article114792013.html> [<https://perma.cc/N9YN-PRFA>].

<sup>19</sup> Sara Ahmed, *Evidence*, FEMINISTKILLJOYS (July 12, 2016, 2:00 PM), <https://feministkilljoys.com/2016/07/12/evidence/> [<https://perma.cc/6YQG-L7UY>].

<sup>20</sup> I use the term racism here to mean policies, practices, or procedures that "create[ ] or reproduce[ ] a racially unequal social structure, based on essentialized racial categories . . ." Howard Winant, *Racism Today: Continuity and Change in the Post-Civil Rights Era*, 21 ETHNIC & RACIAL STUD. 755, 760-61 (1998).

<sup>21</sup> See *id.* at 758.

<sup>22</sup> See *id.* at 757-58.

<sup>23</sup> *Id.* at 760.

<sup>24</sup> 347 U.S. 483 (1954) (finding the segregation of public schools unconstitutional).

<sup>25</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

ferential treatment because of race.<sup>26</sup> In this sense the law has helped to usher in undeniable positive gains in terms of racial inclusion and public attitudes towards racism.<sup>27</sup>

At the same time, however, the law also perpetuates a static and harmful understanding of what racism is and how to best alleviate it. Nowhere is this more evident than in how the law deals with claims of racial discrimination. Justice Roberts's proclamation in *Parents Involved in Community Schools v. Seattle School District No. 1* that the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race"<sup>28</sup> exemplifies this point. The law sends the not so subtle message that: (i) racism consists of a demonstrable injury suffered by one individual at the hands of another individual, rather than group or systemic harm caused by institutions rather than people;<sup>29</sup> (ii) the only kind of racism worth addressing is the kind in which there was invidious discrimination or malintent;<sup>30</sup> (iii) we should eschew color-consciousness in favor of color-blindness in order to remedy racism;<sup>31</sup> (iv) we should look first for some (or any) race-neutral reason to explain away a policy that has a disparate impact on people of color, and if one exists, that can absolve a party or institution from liability for racial discrimination;<sup>32</sup> and (v) the effects of centuries of racism will be

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<sup>26</sup> Cf. Joe R. Feagin & Bernice McNair Barnett, *Success and Failure: How Systemic Racism Trumped the Brown v. Board of Education Decision*, 2004 U. ILL. L. REV. 1099, 1106-07 (2004).

<sup>27</sup> See Valerie Strauss, *How, After 60 Years, Brown v. Board of Education Succeeded—and Didn't*, WASH. POST: ANSWER SHEET (Apr. 24, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/04/24/how-after-60-years-brown-v-board-of-education-succeeded-and-didnt/> [https://perma.cc/PJX8-VYEH].

<sup>28</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

<sup>29</sup> See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 279, 319-20 (1978) (rejecting the idea that a race-conscious affirmative action program could be implemented for the purpose of ameliorating general societal discrimination and noting that only specific and demonstrable findings of discrimination would justify a race-conscious affirmative action program).

<sup>30</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229, 240-42 (1976) (requiring a finding of invidious discriminatory intent in order to successfully establish a violation of the Fourteenth Amendment Equal Protection Clause).

<sup>31</sup> See, e.g., *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638-39 (2014) (Roberts, C.J., concurring) ("[I]t is not 'out of touch with reality' to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely [minority self-doubt], and — if so — that the preferences do more harm than good.").

<sup>32</sup> See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986) (setting forth the test for striking a juror because of their race as follows: (1) the defendant must establish a prima facie case that the strike was racially motivated, (2) the burden then shifts to the prosecutor to come forward with a race-neutral reason for the strike, and (3) the

ameliorated by time alone.<sup>33</sup> Further, the law often takes an ahistorical view of racism, all too often rebuffing color-conscious legislation that attempts to remedy the present and persistent residue of historical state-sponsored discrimination against people of color that lingers today.<sup>34</sup>

The rule of law is a powerful force in structuring behavior. To the extent that the law adopts a myopic definition of what constitutes an actionable form of racism, the broader cultural understanding of what constitutes racism is likely to suffer from similar myopia. This leads to what I call the Great American Dilemma: racism is now arguably an intransigent problem, nearly intractable. Following the model set by the very laws ostensibly meant to root out racism, we all too often demand exacting evidence of racism before we will acknowledge that it is real. For example, when Black men, women, and children are disproportionately killed or brutalized by the police,<sup>35</sup> race-neutral reasons are vigorously sought to explain the phenomenon;<sup>36</sup> the history of state over-policing and brutalization of Black bodies dating back to slavery and Reconstruction is rarely acknowledged.<sup>37</sup> Even when there is clear, videotaped evidence of excessive force or an unlawful police killing of a Black person, doubt festers about the unlawfulness of the officer's action<sup>38</sup> and whether the officer would have reacted in the same

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trial judge must assess the credibility of the explanation and determine whether purposeful discrimination has been established).

<sup>33</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary.”).

<sup>34</sup> See, e.g., *Schuetz*, 134 S. Ct. at 1676 (Sotomayor, J., dissenting) (criticizing the majority for failing to engage in a more contextualized and complete examination of the effect of a piece of legislation in light of the history of discrimination faced by people of color in America and noting that “[a]s members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society”).

<sup>35</sup> See Wesley Lowery, *Study Finds Police Fatally Shoot Unarmed Black Men at Disproportionate Rates*, WASH. POST (Apr. 7, 2016), [https://www.washingtonpost.com/national/study-finds-police-fatally-shoot-unarmed-black-men-at-disproportionate-rates/2016/04/06/e494563e-fa74-11e5-80e4-c381214de1a3\\_story.html](https://www.washingtonpost.com/national/study-finds-police-fatally-shoot-unarmed-black-men-at-disproportionate-rates/2016/04/06/e494563e-fa74-11e5-80e4-c381214de1a3_story.html) [<https://perma.cc/26ED-7K4C>].

<sup>36</sup> See, e.g., Carl Bialik, *Why Are So Many Black Americans Killed by Police?*, FIVETHIRTYEIGHT (July 21, 2016, 1:24 PM), <https://fivethirtyeight.com/features/why-are-so-many-black-americans-killed-by-police/> [<https://perma.cc/QM7G-5TGS>].

<sup>37</sup> See generally GEORGE YANCY, *BLACK BODIES, WHITE GAZES: THE CONTINUING SIGNIFICANCE OF RACE* (2008) (discussing the ways in which the Black body has been literally and metaphorically criminalized); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (discussing the link between slavery and modern-day forms of incarceration).

<sup>38</sup> See, e.g., Joseph Goldstein, *Is a Police Shooting a Crime? It Depends on the Officer's Point of View*, N.Y. TIMES (July 28, 2016), <https://www.nytimes.com/2016/07/29/nyre>

way to a white citizen.<sup>39</sup> Further, we eschew race-based affirmative action and instead prefer class-based affirmative action, because poverty is perceived as non-controversial and our history of slavery and racial segregation are too attenuated to warrant reparatory assistance to people of color.<sup>40</sup>

Finally, unlike other countries with a robust history of racial or ethnic discrimination,<sup>41</sup> the United States routinely shies away from convening a truth and reconciliation process acknowledging its past.<sup>42</sup> While there have been some isolated attempts at establishing truth and reconciliation, in individual localities like the City of Greensboro, North Carolina, for example,<sup>43</sup> there has not been a country-wide comprehensive attempt at Truth and Reconciliation around America's history of slavery and discrimination. The United States does not ensure that its citizens understand or remember that past. Consequently, as the election of Donald J. Trump to the presidency revealed, racism remains the Great American Dilemma. In the words of Justice Sotomayor, "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."<sup>44</sup> Until both the law and the broader culture recognize this truth, we as a country will continue to struggle with racism.

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gion/is-a-police-shooting-a-crime-it-depends-on-the-officers-point-of-view.html [https://perma.cc/Y6BS-5XG5].

<sup>39</sup> See, e.g., Lowery, *supra* note 35.

<sup>40</sup> See Lauren Camera, *Poverty Preference Admissions: The New Affirmative Action?*, U.S. NEWS & WORLD REP. (Jan. 12, 2016, 6:06 PM), <http://www.usnews.com/news/articles/2016/01/12/poverty-preference-admissions-the-new-affirmative-action> [https://perma.cc/7XMH-W6GL].

<sup>41</sup> See, e.g., SOUTH AFRICAN TRUTH & RECONCILIATION COMMISSION, <http://www.justice.gov.za/Trc/> [https://perma.cc/Y8BS-CLXS].

<sup>42</sup> See Anand Giridharadas, *Turning the Call for Racial reckonings Back on the U.S.*, N.Y. TIMES (July 18, 2016), <https://www.nytimes.com/2016/07/19/us/truth-reconciliation-commission-slavery.html> [https://perma.cc/4RS2-QLEQ].

<sup>43</sup> See GREENSBORO TRUTH & RECONCILIATION COMM'N, GREENSBORO TRUTH AND RECONCILIATION COMMISSION REPORT: EXECUTIVE SUMMARY (2006), [http://www.greensborotrc.org/exec\\_summary.pdf](http://www.greensborotrc.org/exec_summary.pdf) [https://perma.cc/CUN9-6KA7].

<sup>44</sup> *Schutte v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).