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## Turning Stones of Hope into Boulders of Resistance: The First and Last Task of Social Justice Curriculum, Scholarship, and Practice

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# TURNING STONES OF HOPE INTO BOULDERS OF RESISTANCE: THE FIRST AND LAST TASK OF SOCIAL JUSTICE CURRICULUM, SCHOLARSHIP, AND PRACTICE\*

DEREK W. BLACK\*\*

*The most important and intangible aspect of teaching and practicing social justice law is retaining the hope that our efforts can translate into progressive results. At times, professors' approaches to the subject of social justice tend toward pessimism that can have unintended negative effects on students. Thus, this Article calls on social justice professors to explicitly teach hope and, moreover, to produce practical scholarship on pressing legal issues that will help students keep hope once they leave school. This Article begins by exploring the theme of hope in John O. Calmore's scholarship and how it interrelates with his project of producing social justice lawyers. It then delves into his teaching methodology and describes the specific competencies he tried to create in his social justice students, particularly in their writing and their approach to building relationships with clients. Next, the Article addresses how those lessons carry beyond law school, including both those instances where they help and those instances where practitioners are left wanting and needing more. From that point, the Article proceeds to describe how our teaching and scholarship can meet that need, and ultimately inspire hope. The Article ends with concrete examples from the legacy of Brown v. Board of Education that show how we can find, teach, and keep hope.*

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\*\* Assistant Professor of Law, Howard University School of Law. I would like to thank Howard University School of Law for its support, particularly Dean Kurt L. Schmoke for a research stipend and research assistant, and Marissa Gunn, who helped me complete this piece sooner rather than later. Foremost, I would like to thank Professor John O. Calmore. He has made this piece possible in more ways than are appropriate to mention here. I would, however, like to thank him for starting me on the road of social justice lawyering before I knew what the phrase meant and then holding my hand, so to speak, along the way. To the extent I have achieved any success as a social justice lawyer or professor, much of it has grown from the insights and skills I took from his courses.

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"It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity . . . it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us."<sup>1</sup>

## INTRODUCTION

The inspirational seed that sparked this piece and my most vivid memory of John Calmore comes from his recurring attestation of his conviction that some day hope and history will rhyme.<sup>2</sup> He draws the thought from a quote in Seamus Heaney's *The Cure at Troy*,<sup>3</sup> but when he utters or writes it, I am never left with the impression that he is simply recounting someone else's faith.<sup>4</sup> The first time I heard him

1. CHARLES DICKENS, *A TALE OF TWO CITIES* 7 (Toby Press 2003) (1859).

2. See, e.g., John O. Calmore, Remarks at UNC Conference: Reconciling Hope and History: The Question of Reparations (Feb. 16, 2002).

3. SEAMUS HEANEY, *THE CURE AT TROY: A VERSION OF SOPHOCLES' PHILOCTETES* (1991).

4. John O. Calmore, *Airing Dirty Laundry: Disputes Among Privileged Blacks—From Clarence Thomas to "The Law School Five,"* 46 HOW. L.J. 175, 224 (2003) ("I have often included in my public talks a quoted passage from Seamus Heaney's *The Cure of Troy* [sic]: 'History says, Don't hope/On this side of the grave/But then, once in a lifetime/The longed for tidal wave/of justice can rise up/and hope and history rhyme.' For many people in our country, Justice Thomas represents the command of history not to

reference this thought, his tone of voice and gracefully transparent expressions bore witness that the hope that resided in him was special and that the “tidal wave of justice” would in fact some day “rise up” to meet him.

What was far less clear, however, was from whence and for how long that hope had sprung. Such a strong and abiding hope is remarkable in contrast to the colleagues, students, and communities about whom he writes and who are so frequently disposed of hope.<sup>5</sup> In fact, Calmore is particularly attuned to the bleakness that grabs others and surrounds him. For instance, he developed a course called Social Justice Lawyering in which he integrates issues of racial injustice with various other forms of discrimination, inequity, and disadvantage, and explores the lawyering obstacles that are common to all of them.<sup>6</sup> At the outset, he warns his students that his course “will focus on some harsh realities of oppression, subordination, injustice, and inequalities in the law and that this could . . . depress and enervate students.”<sup>7</sup> Although he asserts these realities “need

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hope on this side of the grave. If for no other reason, I could not delight in his visit to our law school. I could not share in his dream and vision of America. I need a dream and vision with a deeper, more connected human touch, so I am working for a better reconciliation of hope and history. In short, I want to live out a better rhyme.”).

5. See, e.g., DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 184 (1993) (identifying a hopelessness among isolated inner-city communities); John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927, 1938 (1999) [hereinafter Calmore, *Call to Context*] (discussing clients who experienced a world that was without options); John O. Calmore, “*Chasing the Wind*”: *Pursuing Social Justice, Overcoming Legal Mis-education, and Engaging in Professional Re-socialization*, 37 *LOY. L.A. L. REV.* 1167, 1187 (2004) [hereinafter Calmore, *Chasing the Wind*] (observing a lot of frustration among critical, progressive scholars and those with whom they collaborate). One of my students wrote in a reflection piece, with much dismay, that she did “not believe social justice is feasible in this country as long as capitalism remains intact.” Journal Entry, Social Justice Lawyering Student, Howard University School of Law, at \*1 (Aug. 28, 2006) (unpublished manuscript, on file with North Carolina Law Review).

6. The introduction to the textbook for the course indicates that social justice means “‘eliminati[ng] . . . institutionalized discrimination,’” “[p]romoting individual and collective well-being, enhancing human dignity, and correcting imbalances of power and wealth.” MARTHA R. MAHONEY, JOHN O. CALMORE & STEPHANIE M. WILDMAN, *SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW* 1 (2003) (quoting ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 3 (1994)). “Social justice lawyering seeks to give material meaning to these ideals in the daily lives of individuals and communities that are marginalized, subordinated, and underrepresented.” *Id.*

7. John O. Calmore, *Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations*, 31 *U.S.F. L. REV.* 903, 912 (1997) [hereinafter Calmore, *Close Encounters*].

not” depress students,<sup>8</sup> as students come to more fully understand the complexity and depth of oppression in our society, some still wonder how they could do anything other than despair. Many of Calmore’s colleagues may reflect similar sentiments.<sup>9</sup> Without fail, however, he implores us to find hope and keep it. Unfortunately, we have no roadmap as to how to do so. In some respects, hope may be just natural to him, but for those with shallower wells of faith upon which to draw, a roadmap would certainly be of benefit.

My task in this piece then is to capture the nature of Calmore’s hope and explore how it has animated his teaching, scholarship, advocacy, and intellectual evolution. Likewise, I will examine his hope in context and examine how it reverberates through those he has most directly touched: his students, colleagues, and those institutions with which he has been affiliated. In doing so, we will find that his hope has found wings and managed to rhyme with history in more ways than even he might have supposed. Because of his dedication to hope, future social justice lawyers are leaving law school far more prepared and sophisticated. They are engaging client communities with a new humility and a profound respect that prompts these lawyers to respond to, rather than direct, the community. Yet, as an academy, we must still do more to prepare students.

For some students, telling them that they need not despair is equivalent to telling a cancer patient that he need not worry about his illness. Even placing the problems of social justice practice aside, law students are one of the most unhappy and stressed groups of individuals imaginable. By their third year of law school, a full forty percent of law students are depressed.<sup>10</sup> I would like to think that our social justice students become less susceptible to unhappiness and depression by pursuing careers in which they find meaning. Yet, I fear that we, as social justice-oriented professors, might just as easily be inadvertently fostering other counterproductive emotions or steering them away from social justice careers, as we tend to spend so

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8. *Id.*

9. For instance, the opening sentence of Derrick Bell’s casebook on race and the law states that “[r]acism remains a permanent facet of American civilization.” DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* 1 (5th ed. 2004).

10. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 875 (1999); see also Pamela Daley & Arla Lisa McMillan, *Is There Life After (and During) Law School?*, 94 ILL. B.J. 256, 256 (2006) (noting the opinion of psychotherapists that “too many law students and lawyers are depressed and discontented and that law schools do too little to help them cope with the demands of legal education and practice”).

much of our scholarship and teaching describing society and the law's illnesses. A select group devotes at least some time toward practical cures for those ills,<sup>11</sup> but even fewer devote substantive efforts toward affirming students' belief that those cures are possible.

Given the practice they will soon face, our social justice students need more from their professors than sophisticated analysis; they need inspiration. While ready and able to deliver the analysis, we are less attuned to the need—or less confident in our ability—to deliver the inspiration. Moreover, it can be difficult to prevent our critical evaluation from spilling over into a seeming negativity that can undermine our purposes. More so than in other courses, social justice professors must be cognizant of both the spoken and unspoken messages they send their students, and hope must be explicitly included in those messages. If our students leave with nothing else, they must leave with hope. Without it, they will not leave law school moving in the direction that we intend for them.

To further the lesson of hope in our teaching and scholarship, I begin Part I of this piece by identifying the theme of hope in Calmore's scholarship and how it interrelates with his project of producing social justice lawyers. I delve into his teaching methodology and describe the specific competencies he tried to create in his social justice students, particularly in their writing and their approach to building relationships with clients. In Part II, relying on personal experience, I address how those lessons carry beyond law school, including both those instances where they help and those instances where practitioners are left wanting more. I challenge us to do more through our scholarship to assist students and practitioners. In addition to identifying injustice, we must assist our students in formulating new and compelling legal claims for justice. By doing so, we can not only inspire hope, we can deliver it. In Part III, I demonstrate how we can explicitly teach hope and help students identify it in the most difficult of circumstances. I briefly explore an often overlooked legacy of *Brown v. Board of Education*<sup>12</sup> that portends hope. Although *Brown*'s legacy has not been a story of fully integrated schools, and schools are actually resegregating,<sup>13</sup> *Brown*

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11. Professor Harold McDougall, in particular, builds his course in Civil Rights Planning around problem identification and problem solving. Harold A. McDougall, *For Critical Race Practitioners: Race, Racism and American Law* (4th ed.) by Derrick A. Bell, Jr., 46 HOW. L.J. 1, 6–7 (2002) (book review).

12. 347 U.S. 483 (1954).

13. See GARY ORFIELD & CHUNGMEI LEE, *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?* app. (2004), available at <http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf>.

taught our society some valuable lessons that continue to reverberate. Fifty years after *Brown*, its lessons are prompting schools to fight for, rather than against, integration.<sup>14</sup> *Brown*'s lessons are similarly prompting many states to afford a higher, rather than minimal, level of education.<sup>15</sup> By articulating such stories with the appropriate perspective, social justice-oriented professors can create an equilibrium between the harsh realities of injustice and the slow, yet attainable, substantiation of justice. We can, likewise, reinforce those emotions that brought many justice-oriented students to law school in the first instance.

## I. PREPARING SOCIAL JUSTICE LAWYERS: JOHN CALMORE'S LIFE'S LABOR

### A. *A Scholarship of Hope*

The impulse to begin preparing and expanding the ranks of social justice lawyers can only come from the belief that the world suffers from injustice. Recognizing injustice is not in itself a remarkable or unusual sentiment, but a more profound root of the impulse to expand the ranks of social justice lawyers is the firm conviction that lawyers can and must make a difference in the way our society operates. Some attorneys enter "public interest" jobs with no intent to fundamentally alter structures or policies, but merely to provide a public service and technical skill, or to mitigate inevitable suffering that, from their perspective, is not necessarily unjust.<sup>16</sup> Thus, these attorneys need not effect change to find or make their efforts meaningful. In contrast, social justice lawyers' fundamental purpose is to effect substantive and lasting change.<sup>17</sup> Such an ambitious

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14. See *infra* notes 210–13 and accompanying text.

15. See *infra* notes 240–86 and accompanying text.

16. AUSTIN SARAT & STUART SCHEINGOLD, CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3 (1998) (distinguishing cause lawyering from the mere provision of technical skills to clients). Calmore distinguishes public interest lawyering from social justice lawyering, finding the former has become too inclusive and now even includes reactionary elements that are hostile to social justice. Calmore, *Chasing the Wind*, *supra* note 5, at 1169–70; see also Lisa Anderson, *Falwell Saw Law School as Tool To Alter Society*, CHI. TRIB., May 21, 2007, § 1, at 1 (reporting on the recent phenomenon of religiously conservative law schools whose purpose is to change society and confront secular culture on issues of abortion and same-sex marriage).

17. See, e.g., Calmore, *Chasing the Wind*, *supra* note 5, at 1171 (articulating "social justice lawyering as a movement that can reverse the phenomenon of preservation-through-transformation by engaging in 'third-dimension lawyering' and by filing 'thick complaints' in federal court"); John O. Calmore, *The Law and Culture-Shift: Race and the Warren Court Legacy*, 59 WASH. & LEE L. REV. 1095, 1100 (2002) [hereinafter Calmore, *Warren Court Legacy*] (pointing to the need for "continuous enforcement of the change").

purpose is imbued with a vision of the future that is different than the current circumstances and an abiding hope that someday their vision of the future will come to fruition.<sup>18</sup> It is that very hope from which John Calmore's scholarship, teaching, and perseverance comes. Even before he formalized a course in social justice lawyering, his scholarship began building a basis for it. Although not as explicit as other lessons, the first and hardest lesson of social justice lawyering that Calmore ever taught was a subtle one of hope.

From his earliest oppositional work to his later more aspirational work, the most consistent theme that rings through Calmore's scholarship is hope. For instance, in one of his early seminal pieces on critical race theory, he challenges "the universality of white experience/judgment as the authoritative standard that binds people of color and normatively measures, directs, controls, and regulates the terms of proper thought, expression, presentment, and behavior."<sup>19</sup> The challenge, however, is predominantly in principle rather than practice, as his primary claim is merely to the right to speak as "a matter of existential voice."<sup>20</sup> He exhausts himself even in that, writing that he could find "no satisfying way" to "end the article" other than to just "stop writing."<sup>21</sup> Yet, at the end of the article, just as he seems to brace the reader for a concession of the inevitability of continued racial oppression, he forces himself to find hope. He writes:

When all is said and done, this writing is probably for my children, 10-year-old Jonathan and 6-year-old Canai, and for their rainbow of little friends, associates, and peers, who at this time cannot really appreciate what I have struggled to write here. Perhaps the slim hope, however, does indeed lie in "cohort replacement."<sup>22</sup>

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18. See generally MAHONEY, CALMORE & WILDMAN, *supra* note 6, at 34–60 (organizing a chapter on "Envisioning Social Justice Lawyering"); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 469 (1984) (discussing a vision of lawyering that "appeals to an ideal of practice as an activity that constitutes and transforms the actors and the system in which they act and that thus implies . . . political commitment").

19. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992) [hereinafter Calmore, *Critical Race*].

20. *Id.* at 2171.

21. *Id.* at 2229.

22. *Id.* (quoting Glen Firebaugh & Kenneth E. Davis, *Trends in Antiracist Prejudice, 1972–1984: Region and Cohort Effects*, 94 AM. J. SOC. 251, 251 (1988)). Firebaugh and Davis define "cohort replacement" as "the replacement of older, more prejudiced birth cohorts with younger, less prejudiced ones." Glen Firebaugh & Kenneth E. Davis, *Trends*



Over time, this ever-so-small hope slowly perpetuates itself. Calmore becomes less ambiguous, rejecting the claim that there will never be a time when whites and blacks treat each other equally.<sup>23</sup> His writing eventually begins to exemplify a steady and consistent hope that refuses to concede the inevitability of the staggering problems it addresses. At the same time, however, he intersperses his articles with particular quotes that leave his audience to wonder whether his hope is grounded in anything more than survivalist necessity. Discussing the black/white racial divide, he concedes that one has no choice other than to respond to it with opposition or simply suffer from its debilitating effects.<sup>24</sup> Thus, internal fortitude and the need to persevere, rather than a realistic expectation of progress, seem to animate his hope at times. His choice to quote Václav Havel, the formerly imprisoned President of Czechoslovakia, reinforces as much:

Either we have hope within us or we don't: it is a dimension of the soul. . . . Hope in this deep and powerful sense is . . . an ability to work for something because it is good, not just because it stands a chance to succeed. . . . It is also this hope, above all, which gives us the strength to live and continually to try things, even in conditions that seem as hopeless as ours do here and now.<sup>25</sup>

In another article, Calmore reiterates this sentiment when he identifies his wellspring of hope with that of Dr. Martin Luther King, who was never an optimist, but remained hopeful simply because he had no other choice.<sup>26</sup>

Although identifying with this perseverance through hope and never embracing full optimism, Calmore's hope gradually diverges from fatalism and grows much more concrete over the years. His hope eventually asserts itself in a manner that challenges the status

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in *Antiblack Prejudice, 1972-1984: Region and Cohort Effects*, 94 AM. J. SOC. 251, 251 (1988).

23. Calmore, *Close Encounters*, *supra* note 7, at 916. He does, however, acknowledge that overcoming the black/white divide will require more effort than he currently sees occurring. *Id.*

24. *Id.*

25. John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233, 1273 (1995) [hereinafter Calmore, *Racialized Space*] (quoting MARIAN W. EDELMAN, *THE MEASURE OF OUR SUCCESS: A LETTER TO MY CHILDREN AND YOURS* 33-34 (1992)).

26. John O. Calmore, *Social Justice Advocacy in the Third Dimension: Addressing the Problem of "Preservation-Through-Transformation,"* 16 FLA. J. INT'L L. 615, 638 (2004) [hereinafter Calmore, *Social Justice Advocacy*] (referencing Cornel West's characterization of Dr. King as a "prisoner of hope").

quo. In 2004, he is resolute when he writes: "As a social justice worker, I sense I am not alone and that our time is coming."<sup>27</sup> Then, discussing trends in the legal academy and practice, he declares, "the concern for social justice is real and it is growing and spreading."<sup>28</sup> Thus, in his "social justice lawyering" articles, he regularly implores that we must "keep hope alive."<sup>29</sup> In this respect, his writing bucks the trend of those who lose faith in the better wills of men and women and who effectively resign themselves to the injustice they see.

He finds this hopeful and optimistic center through an increasing focus on humanity. Rather than seeing human nature solely as a source of conflict and injustice, he identifies it as a source of change and possibility. All of his scholarship situates the struggle for justice as occurring within the context of structural oppression, but his later scholarship also incorporates the power and relevance of human agency. For instance, Peggy McIntosh conceptualizes "whiteness" as being an "invisible knapsack" of privileges that whites use to navigate the world so often and easily that they do not even recognize the privilege.<sup>30</sup> Other scholars rely on this concept to explain domination and oppression.<sup>31</sup> Calmore himself relies on the concept of "whiteness" to describe the norms by which non-whites are evaluated and how non-whites are forced "to re-invent themselves [and] perform within a framework of whiteness as audition."<sup>32</sup> But he refuses to concede the continuation of its dominance. In fact, he believes whites can contribute to the unraveling of white dominance because they share in the "humanity that connects us all."<sup>33</sup> Calling

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27. Calmore, *Chasing the Wind*, *supra* note 5, at 1174.

28. *Id.* In typical Calmore fashion, he writes of teaching the challenging seminar on critical race theory: "I see a similar openness to critical race theory. Its percussive quality is freedom drumming and its energy is enough for the long haul." John O. Calmore, *Random Notes of an Integration Warrior—Part 2: A Critical Response to the Hegemonic "Truth" of Daniel Farber and Suzanna Sherry*, 83 MINN. L. REV. 1589, 1615–16 (1999).

29. See, e.g., Calmore, *Warren Court Legacy*, *supra* note 17, at 1133; Calmore, *Social Justice Advocacy*, *supra* note 26, at 636.

30. Peggy McIntosh famously coined whiteness or white privilege as being "like an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks." Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming To See Correspondences Through Work in Women's Studies*, in POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 22, 23 (Leslie Bender & Daan Braveman eds., 1995).

31. See, e.g., John A. Powell, *Whites Will Be Whites: The Failure To Interrogate White Privilege*, 34 U.S.F. L. REV. 419, 435 (2000); Stephanie M. Wildman, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881, 893 (1995).

32. John O. Calmore, *Whiteness as Audition and Blackness as Performance: Status Protest from the Margin*, 18 WASH. U. J.L. & POL'Y 99, 103 (2005) [hereinafter Calmore, *Whiteness as Audition*].

33. *Id.* at 128.

on whites to incorporate, rather than merely assimilate, non-whites, he envisions a future of national norms that are far broader than the current single, narrow identity.<sup>34</sup> Such norms would create space for and include multiple identities.<sup>35</sup> In short, he sets himself apart from others, first, by finding hope in the future and, second, by looking to the humanity in each of us to find hope.

Sentiments connecting justice with our better human senses carry throughout Calmore's scholarship from the second half of his career.<sup>36</sup> Faith in our humanity ultimately surfaces as the greatest hope we might have, as humanity calls or redeems us to a more just society. He expresses this notion most clearly in his 2002 evaluation of the Warren Court's successes and failures.<sup>37</sup> Introducing the subject, he writes: "I think we are all so tired and beat down from the travail of racism . . . that most of us really yearn for comity, for the more humane community."<sup>38</sup> Then, for the first time in any of his scholarship, Calmore's hope, or yearning itself, prompts him to de-emphasize the weight of society's flaws and see promise in humanity by suggesting that history, context, and structures may not entirely bind us to perpetuate our past failures. He suggests we can "put indifference and fear aside [and] . . . forget all that we think we know about each other and start over again."<sup>39</sup> If we can do that, we can "reimagine, reinvent, and reestablish America as a place of racial comity."<sup>40</sup> Sounding far from the law professor and critical scholar and more in tune with Dr. King's exhortation that blacks should bring whites back into the "beloved community,"<sup>41</sup> Calmore implores us to

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34. *Id.* at 127 ("Those of us who press for incorporation should not accept the mere extension of dominant values and protections that may accrue to us as individualized, integrated tokens.").

35. *Id.*

36. See, e.g., Calmore, *Chasing the Wind*, *supra* note 5, at 1173, 1175, 1180 (calling on advocates to connect with marginalized groups on a human level and predicating social justice lawyering upon a respect for human dignity); Calmore, *Close Encounters*, *supra* note 7, at 906-07 (using "strong democratic talk" in his classroom discussion "to forge a viable link between human relations and social justice").

37. Calmore, *Warren Court Legacy*, *supra* note 17.

38. *Id.* at 1134.

39. *Id.*

40. *Id.*

41. See, e.g., Martin Luther King, Jr., *The Birth of a New Nation*, Sermon Delivered at Dexter Avenue Baptist Church in Montgomery, Alabama (Apr. 7, 1957), in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 13, 32 (Clayborne Carson & Kris Shepard eds., 2001) ("The aftermath of nonviolence is the creation of the beloved community. The aftermath of nonviolence is redemption. The aftermath of nonviolence is reconciliation. The aftermath of violence is emptiness and bitterness."); Martin Luther King, Jr., *Facing the Challenge of a New Age*, Address Before the First Annual Institute on Non-Violence and Social Change, Montgomery,

“be tolerant of one another’s ignorance and awkward questions, remain extremely patient with each other, not overstate or understate incidents of racism, and, perhaps most of all, handle the difficult moments with grace.”<sup>42</sup>

Reinforcing his point, he also finds that it was actually our disconnect from the human element that caused us to lose the momentum and promise of the civil rights movement.<sup>43</sup> The Warren Court’s progressive precedents in cases such as *Brown, Loving v. Virginia*,<sup>44</sup> and *Jones v. Alfred H. Mayer Co.*,<sup>45</sup> provided the hope for significant social change until later decisions such as *Milliken v. Bradley*,<sup>46</sup> *City of Memphis v. Greene*,<sup>47</sup> and others eroded those precedents. Responding to that erosion, advocates devolved into a battle over legalisms and, in the process, lost their commitment to the humanizing aspects that brought the civil rights movement its progress in the first instance.<sup>48</sup>

Connection to human dignity, not legal principle, provided the synergy for progressive change during the Warren Court era. Calmore argues that we must recapture that connection because “in seeking a just society we must open our hearts as well as our minds.”<sup>49</sup> And it is here, in focusing on the humanity that still resides in us all,

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Alabama (Dec. 3, 1956), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 135, 140 (James Melvin Washington ed., 1986) (“But the end is reconciliation; the end is redemption; the end is the creation of the beloved community.”).

42. Calmore, *Warren Court Legacy*, *supra* note 17, at 1136.

43. *Id.* at 1134 (“The true tragedy of the civil rights movement is that it was too quickly disconnected from the humanizing aspects of the struggle that marked its origins and animated it. . . . Once severed from the larger community, law was easily cabined, justice easily delayed, and racist resistance easily enabled.”).

44. 388 U.S. 1 (1966) (holding restrictions by race on the right to marry unconstitutional).

45. 392 U.S. 409 (1968) (prohibiting private discrimination in housing even though no governmental action was involved).

46. 418 U.S. 717 (1974) (limiting a school desegregation plan to an intradistrict remedy absent proof of intentional interdistrict segregation). Consequently, this decision eliminated the possibility of effective integration in Detroit and school districts similar to it.

47. 451 U.S. 100 (1981) (permitting a street closing that eliminated traffic to and from a black neighborhood through a white one).

48. Calmore, *Warren Court Legacy*, *supra* note 17, at 1134. Calmore critiques *Memphis*, not necessarily for its legal analysis, but for its dehumanization of blacks in a way that permitted the Court to characterize blacks as unwanted traffic and to perpetuate the indignity upon blacks that tells them they simply are not welcome in the white neighborhood. *Id.* at 1112–20. Although the Court in *Memphis* overturned no important legal principles, in this dehumanizing respect it returned to a sensibility that existed prior to *Brown*.

49. Calmore, *Close Encounters*, *supra* note 7, at 905.

that Calmore finds hope. That hope eventually breeds and is incorporated into his push for a new social justice lawyering movement.

*B. A New Curriculum*

Calmore's growing hope and faith in humanity coincided with a subtle shift in the subject matter of his scholarship and teaching. His work in the second half of his professorial career came to reflect a more practical purpose. Unlike others, his scholarship became less of a discussion with his colleagues and more of a source of inspiration and guidance for his students. In particular, his course and textbook in social justice lawyering exemplify a larger concern with students and practice than theory.<sup>50</sup>

Although the phrase "social justice" may be common parlance now, when Calmore was shifting his scholarship and teaching in this direction, it was more enigmatic. In fact, I often struggled to succinctly explain to fellow students—and even now colleagues—what a course in social justice lawyering "is." My simple answer is that the course is professional responsibility for social justice attorneys. As designed by its authors, it does not purport to teach any doctrine, reveal any grand theories, or even focus on any particular area of the law. Instead, it alerts social justice students to the world they will soon inhabit, including the struggles they will face and the ineptitudes they may carry with them if they are not attuned to the unique and multifaceted role of a social justice attorney.<sup>51</sup>

Calmore himself sees the course as radically different from traditional legal education. Traditional legal education presents itself as a neutral process that merely teaches students the analyses, rules, and procedures with which society governs itself, but Calmore rejects the notion that any education, much less law school, is neutral.<sup>52</sup> In fact, legal education may be one of the least neutral educational

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50. See, e.g., MAHONEY, CALMORE & WILDMAN, *supra* note 6, at 7 ("Encouraging reflection and reevaluation of values and roles, this text examines issues of professional responsibility in many selected social justice contexts that face lawyers and law students.").

51. In those respects, the course prepared me more for the practice of social justice law than any other single course in law school.

52. See Calmore, *Close Encounters*, *supra* note 7, at 908 (noting that Calmore follows a pedagogy that "assumes that the educational process is neither neutral nor conflict-free"). Some argue that Calmore's and others' theory of education takes a nihilist approach toward law by emphasizing that the law is value laden and nonneutral. *Id.* at 908–09 (citing comments by Dean Paul Carrington). Calmore rebuts these charges by asserting that his theory of education does not teach that legal principle is irrelevant, but rather that students can "resolve conflicts between personal values and [the] professional role" as attorneys only when they understand that law is not value free. *Id.* at 909.

processes through which students go. Calmore concurs with Duncan Kennedy's characterization of legal education as "training for hierarchy," meaning that law students acquiesce in and learn to reproduce the systems that stratify opportunities and resources.<sup>53</sup>

In contrast, Calmore's social justice lawyering course directly challenges the biases in legal education, warning of legal education's potential to mask bias for neutrality and to present this neutrality as a normative means to achieve justice. Calmore further argues that social justice lawyering should not stand alone in exposing bias; rather, all professors should address the law's and legal education's biases in their courses.<sup>54</sup> Eventually, using his scholarship and teaching to offer students this type of counter-hegemonic education became Calmore's primary goal: "I am hopeful [my few students] will learn and spread what Charles Lawrence calls 'the Word.' I am hopeful that the handful has been given inspiration and direction . . . toward a more just society. This is why I teach and learn."<sup>55</sup>

Because of its enigmatic nature, however, teaching social justice lawyering carries with it an unusually heavy burden. In fact, Calmore operates from the premise that most students need to be re-socialized.<sup>56</sup> Although students may enter law school with personal values that are consistent with social justice, legal education instills a different set of professional values and norms that often act to reinforce inequity and the status quo.<sup>57</sup> Unfortunately, students uncritically adopt these new values and norms.<sup>58</sup> In this respect, Calmore concludes that "[t]raditional law study, both in terms of course offerings and teaching methodology, may detract from learning the lessons of social justice."<sup>59</sup> The "better" a student becomes at the study of law, the more difficult pursuing social justice may become. In fact, the "most fully socialized individuals, those who uncritically accept their professional roles . . . tend to be the highest

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53. Calmore, *Chasing the Wind*, *supra* note 5, at 1205 (citing DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM, at i-ii (1983)).

54. *Id.* at 1205.

55. Calmore, *Close Encounters*, *supra* note 7, at 926 (footnote omitted).

56. Calmore, *Chasing the Wind*, *supra* note 5, at 1177 ("[D]eveloping a commitment to social justice requires a re-socialization.").

57. See, e.g., DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM, at i-ii (1983) (describing legal education as training for hierarchy). Relying on Duncan Kennedy's characterization of legal education as training for hierarchy, Calmore posits social justice lawyering as the antithesis. Calmore, *Chasing the Wind*, *supra* note 5, at 1205-06.

58. Calmore, *Close Encounters*, *supra* note 7, at 925.

59. Calmore, *Chasing the Wind*, *supra* note 5, at 1177.

achieving students.”<sup>60</sup> Ultimately, law school compels students to embrace the notion that lawyers are simply amoral agents that operate within these structures, regardless of whether these structures are oppressive.<sup>61</sup>

In response, social justice lawyering must push students “to question, if not challenge, the dominant understandings that drive their professional socialization.”<sup>62</sup> Students can then gain the ability to “reject the option of conforming to the ‘logic of the present system’ and, instead, ‘deal critically and creatively’ in helping to advance the concerns of social justice.”<sup>63</sup> Once students recognize the system’s biases, they feel free to counter them with their own personal values. By integrating their values into their concept of lawyering, they can create a holistic, rather than fractured, identity.<sup>64</sup> These students no longer find the notion of attorneys as “amoral technicians,”<sup>65</sup> who represent causes at odds with their own, as an appealing prospect. However, without re-socialization, many students will later face rude awakenings in practice when their naiveté finally fades and they are asked to bring their skills to bear on the lives of others.<sup>66</sup>

Once students’ approach to the law and legal profession changes, they see the law’s “underlying assumptions and unspoken norms” as targets at which to lodge justice claims, rather than neutral concepts that require their acquiescence.<sup>67</sup> The law is revealed as a tool that can either inflict or remedy injustice.<sup>68</sup> Too often it does the former,<sup>69</sup> and a social justice attorney’s job is to use it for the latter. By illuminating the injustice in those underlying assumptions and norms, social justice lawyering urges students to adopt a position of

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60. *Id.* at 1183.

61. *See id.* at 1182 (noting that “[i]t is convenient for . . . law students to inhabit a simplified moral world that cultivates professionals who are at best amoral technicians”).

62. *Id.* at 1177.

63. Calmore, *Close Encounters*, *supra* note 7, at 908 (quoting Richard Shaull, *Introduction to PAULO FREIRE, PEDAGOGY OF THE OPPRESSED* 15 (1992)).

64. ELIZABETH DVORKIN, JACK HIMMELSTEIN & HOWARD LESNICK, *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* 1-3 (1981), *reprinted in* MAHONEY, CALMORE & WILDMAN, *supra* note 6, at 209-11.

65. Calmore, *Chasing the Wind*, *supra* note 5, at 1182.

66. *Id.* at 1183 (“Those most rudely awakened after law school are those who were fully socialized while attending law school.”).

67. Calmore, *Close Encounters*, *supra* note 7, at 912 (quoting POWER, PRIVILEGE AND LAW, *supra* note 30, at 616).

68. *Id.* at 910 (citing POWER, PRIVILEGE AND LAW, *supra* note 30, at 11).

69. Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601-09 (1986) (arguing that “[l]egal interpretation takes place in a field of pain and death” and is used to justify and inflict “violence”).

opposition and engage in efforts to disrupt patterns of unequal power and domination.<sup>70</sup> In short, social justice lawyering students learn to unmask the law's values, assess the consistency of those values with their personal visions of justice, and then challenge, where appropriate, the adoption of the law's values as normative.

### C. *The Bridge from Real Communities to Their Future Advocates*

Re-socializing students and broadening their perspectives alone will not fully prepare them for the real work of social justice. One can easily be Pollyannaish and simply misunderstand the practical aspects of social justice lawyering. The picture of Thurgood Marshall, James Nabrit Jr., and George Hayes smiling on the steps of the Supreme Court when it decided *Brown* is so familiar and symbolic that it can be misleading. It is not balanced by a picture of Oliver Hill Sr.'s modest meetings in South Carolina's un-air conditioned, packed churches late in the evenings or with stories of his running from one single-room plank home to another, trying to sign up clients.<sup>71</sup> In fact, visual documentation of most social justice lawyering is unavailable because the cameras some might imagine hoarding around the attorneys simply are not there.<sup>72</sup> Likewise, prototypical clients like Rosa Parks are few and far between.<sup>73</sup> The communities in which social justice lawyers will work are populated by individuals who are just as reluctant to speak to a lawyer—social justice or not—as they are to speak with the numerous other outsiders who inevitably end up making decisions about community members' lives, often compounding the oppression they already experience.

Calmore's work attempts to impress upon students that social justice lawyering is not a theoretical or legally intuitive exercise, nor is it glamorous. Rather, the work is grounded in communities that are largely foreign to attorneys, but into which attorneys must immerse themselves to gain understanding, competency, and the community's

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70. Calmore, *Close Encounters*, *supra* note 7, at 912.

71. For a recounting of Oliver Hill's exploits in *Brown*, see OLIVER W. HILL, *THE BIG BANG: BROWN VS BOARD OF EDUCATION, AND BEYOND: THE AUTOBIOGRAPHY OF OLIVER W. HILL, SR.* 148–88 (Jonathan K. Stubbs ed., 2000).

72. The absence of such pictures in Oliver Hill's autobiography is telling enough. The only community-oriented picture in his autobiography during the period leading up to and immediately following *Brown* is one from his election headquarters in 1948, on the night he won a seat on the Richmond City Council. *Id.* at 227.

73. During a time of violence and de jure segregation, many were simply wary to stand up. Rosa Parks's stance against injustice was not happenstance, but rather a result of participation in prior training and organizing. See Highlander Research and Education Center, A Tribute to Rosa Parks, <http://www.highlandercenter.org/n-rosa-parks.asp> (last visited Jan. 26, 2008).



trust. In one article, Calmore uses his own example of past naiveté to serve as a wake-up call to students and colleagues. He admits to previously believing in the “Horatio Alger Myth”<sup>74</sup> and failing to see the level of oppression the inner-city poor experience.<sup>75</sup> Although no text can deliver or substitute for experiential lessons,<sup>76</sup> Calmore’s social justice lawyering textbook alerts individuals to their own shortcomings and highlights those issues to which they should be attuned.<sup>77</sup>

One of the first tasks is to help students understand who their most marginalized clients are, which includes understanding clients in context beyond what their legal claims might look like. Throughout his work, Calmore issues what he refers to as a “call to context” that directs our attention to the inner-city poor,<sup>78</sup> who “are nakedly oppressed [and] at risk of living out their lives as ‘static, limited, and expendable.’”<sup>79</sup> The lives of the inner-city poor are inapposite to the Horatio Alger Myth and the ethos of individualism and opportunity. “[T]hey experience poverty not simply as individuals, but as members

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74. Horatio Alger wrote numerous stories about characters who, through hard work, elevated themselves from poverty. The characterization of these stories as myth is meant to challenge the notion that the American Dream, or at least a middle-class lifestyle, is available to all who put in the effort. See generally CAROL NACKENOFF, *THE FICTIONAL REPUBLIC: HORATIO ALGER AND AMERICAN POLITICAL DISCOURSE* (1994).

75. Calmore, *Call to Context*, *supra* note 5, at 1943.

76. Calmore, *Chasing the Wind*, *supra* note 5, at 1169. Calmore writes:

I think that students who aspire to engage in social justice advocacy cannot learn all they need to know within the classroom, because “[s]ocial justice lawyering envisions the practice of law both on behalf of and alongside of subordinated peoples, with the efforts and achievements of members of the community [as] a crucial aspect of the work.”

*Id.* (quoting MAHONEY, CALMORE & WILDMAN, *supra* note 6, at 5). My social justice lawyering students’ reflection pieces have revealed the same. One student admitted that after reading the materials for the first part of the class she thought she “got it” and that the readings became redundant. Journal Entry, Social Justice Lawyering Student, Howard University School of Law, at \*1 (Nov. 22, 2006) (unpublished manuscript, on file with the North Carolina Law Review). However, she wrote that she only later became disabused of this notion when I assigned the class to work on a pro bono project. *Id.* When she was forced to confront real clients, she finally realized the importance of the nuances we had covered regarding client-centered advocacy versus traditional advocacy. *Id.*

77. The textbook addresses several complex issues, including the ideals that students hold about the practice of law and justice, the obstacles that will confront them in practice, the difficulty for the oppressed to obtain counsel, the unique attorney-client relationship that social justice lawyers maintain, the communal context in which they will work, the ability to identify injustice, and professional responsibility challenges. See generally MAHONEY, CALMORE & WILDMAN, *supra* note 6.

78. Calmore, *Call to Context*, *supra* note 5, at 1927.

79. Calmore, *Chasing the Wind*, *supra* note 5, at 1176 (quoting IRA GOLDENBERG, *OPPRESSION AND SOCIAL INTERVENTION* 2 (1978)).

of a poor community.”<sup>80</sup> In some respects, the communities in which today’s poor live are also dissimilar from those of past generations. Past generations suffered poverty as a result of deprivation, lost opportunity, and exploitation, but they experienced oppression *within* the national economic and social system.<sup>81</sup> Insofar as their experience occurred within this system, they had at least some potential for escaping poverty and climbing into a higher rung of society. Conversely, today’s inner-city poor do not experience inequality within the national economic system; rather, they are entirely removed from it and are treated as simply superfluous to economic and societal organization.<sup>82</sup>

In addition, the intersection of race and geography with poverty exacerbates the inner-city poor’s economic oppression. First, the forces of suburbanization geographically isolate them from opportunities, resources, and infrastructures.<sup>83</sup> Moreover, as members of racial minority groups, they are citizens from whom members of larger society have traditionally intentionally distanced themselves spatially. After distancing themselves, those members of larger society can more easily conceptualize inequality as the minority group’s own problem and one that broader society need not address.<sup>84</sup> Calmore argues that this has led toward political systems seeing the inner-city poor themselves as being the problem, rather than the societal forces that operate upon them and cause inequality.<sup>85</sup>

Current discourse attempts to obscure these underlying currents, but Calmore argues they still shape practice and policy. The label “underclass,” for instance, is more than just a reference to the inner-city poor, but rather a judgment that the inner-city poor lead lives contrary to society’s “norms of behavior.”<sup>86</sup> Thus, they, rather than society, must change.<sup>87</sup> Calmore, however, finds the label “underclass” is an anesthetized way of referencing that they deserve

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80. Calmore, *Call to Context*, *supra* note 5, at 1943.

81. *Id.* at 1943–46 (discussing what Michael Harrington calls “new poverty” (citing MICHAEL HARRINGTON, *THE NEW AMERICAN POVERTY* 9 (1984))).

82. *Id.* at 1943.

83. See generally MASSEY & DENTON, *supra* note 5 (discussing the law of opportunity and resources in inner-city minority communities); Raymond A. Mohl, *Planned Destruction: The Interstates and Central Housing*, in MAHONEY, CALMORE & WILDMAN, *supra* note 6, at 859 (detailing how the interstate system destroyed many African American neighborhoods and allowed whites to flee to the suburbs).

84. MASSEY & DENTON, *supra* note 5, at 84–93 (describing geographic isolation between blacks and whites).

85. Calmore, *Racialized Space*, *supra* note 25, at 1244–45.

86. Calmore, *Call to Context*, *supra* note 5, at 1951.

87. *Id.*

to be poor and are unworthy of our help.<sup>88</sup> In essence, the term represents a covert form of racial prejudice.<sup>89</sup> This anesthetized perspective, nevertheless, is a basis upon which society justifies abandoning any commitment to assisting these communities.<sup>90</sup>

Calmore does not take for granted that students and lawyers are also susceptible to these messages and might inadvertently act in counterproductive ways toward the poor. He attempts to lay a foundation for substantive bridges between lawyers and the inner-city poor and avoid the traditional practices of lawyers who at times have swept into the communities as invaders only to later leave as quickly as they arrived.<sup>91</sup> In this respect, his work again relies heavily on a faith in humanity.<sup>92</sup> When stripped to its core, Calmore's belief that lawyers can act contrary to their training and privilege is founded on the humanity that lawyers and community members share. Speaking of the struggles his students will face in practice, he writes that "the most basic theme deals with their social distance from marginalized, subordinated, and underrepresented clients and communities."<sup>93</sup> Only by relying on their common humanity can they come together.<sup>94</sup>

He does not suggest that lawyers can approach their representation of the inner-city poor in a humanistic vacuum that ignores or attempts to "separate [the inner-city poor] from their racial, geographical, and class identities."<sup>95</sup> But providing effective legal representation for those affected by systemic oppression requires approaching clients on the level of humanity because it may be one of the few means through which lawyers and clients can find commonality. Calmore pushes future and current lawyers toward this commonality by demanding that they engage clients as equals and co-

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88. *Id.* at 1952 (citing HERBERT GANS, *THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTI-POVERTY POLICY* 59 (1995)).

89. *Id.* at 1952 (noting that "because the term underclass is racialized, it is a convenient way for masking anti-black or anti-Latino sentiments").

90. Calmore, *Racialized Space*, *supra* note 25, at 1245. Integration is purportedly the only option that can change their situation. *Id.* at 1246.

91. Calmore, *Call to Context*, *supra* note 5, at 1950 (specifically distinguishing attorneys who live "outside of the intersection of race, space, and poverty" from the clients who live at the intersection and emphasizing that the attorneys cannot come to these communities "with canned claims and prayers for relief").

92. *Id.* at 1955 (noting that it is the "professional responsibility" of the social justice lawyer to "respect[] the client community's voice, vision, and humanity").

93. Calmore, *Chasing the Wind*, *supra* note 5, at 1204.

94. Calmore, *Call to Context*, *supra* note 5, at 1955 (finding it is only by "respecting the client community's voice, vision, and humanity" that attorneys "do good").

95. *Id.* at 1940. The inner-city poor are not merely disadvantaged by poverty or subject to racial bias as individual forces; they are "trapped at the intersection of race, space, and poverty." *Id.* at 1931.

collaborators.<sup>96</sup> With this foundation, clients and lawyers can build bridges between themselves that allow them to identify collective strategies to resist oppression. Moreover, by collaborating with the community, rather than simply executing a legal strategy, attorneys gain a greater appreciation for the community. Attorneys can come to understand the community's "‘marginality as a position and place of resistance,’"<sup>97</sup> which explains "how they are not overwhelmed by their pain and deprivation."<sup>98</sup> Thus, the attorney can respect, rather than pity or patronize, the client community.

Attorneys who have a learned respect for their client communities practice law in a manner methodologically different than traditional practice. Calmore notes a significant distinction between "regnant" lawyering—which "tend[s] to maintain a disassociated power over . . . clients, embracing the traditional lawyer-client paradigm"<sup>99</sup>—and progressive, rebellious, or social justice lawyering—which is responsive to and respectful of the needs and autonomy of marginalized groups.<sup>100</sup> The latter involves "collaborative work with the client community," "dialogue and mutual education . . . [and] strategic work,"<sup>101</sup> and helping communities "learn how to interpret moments of domination as opportunities for resistance."<sup>102</sup> In fact, Calmore suggests that

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96. See, e.g., Calmore, *Chasing the Wind*, *supra* note 5, at 1199 (urging attorneys to engage in "collaborative work with the client community"); Calmore, *Warren Court Legacy*, *supra* note 17, at 1100 (noting that public engagement is a vital factor if social justice lawyering is to create social change (citing Nan Hunter, *Lawyering for Social Justice*, 72 N.Y.U. L. REV. 1009, 1019 (1997))); Calmore, *Social Justice Advocacy*, *supra* note 26, at 623 (same).

97. Calmore, *Call to Context*, *supra* note 5, at 1950 (quoting BELL HOOKS, *YEARNING: RACE, GENDER AND CULTURAL POLITICS* 150 (1990)).

98. *Id.* at 1950.

99. *Id.* at 1933–34. Gerald Lopez first introduced the concept of regnant lawyering in contrast to rebellious lawyering in GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 11–82 (1992). Lopez identifies the characteristics of regnant lawyers as seeing individual "service" work and "impact" work as dichotomous categories, litigating more than anything else, devaluing community organizing and community input in "legal" work, resisting meaningful or substantive connections to the institutions or groups they represent, not grasping how large societal structures relate to the status quo, blaming the client for many of the problems clients encounter, conceptualizing the battle as one fought by attorneys who merely need clients to bring claims, and ignoring how formal changes will affect the lives of subordinated people. *Id.* at 24.

100. See Calmore, *Call to Context*, *supra* note 5, at 1934. For further sources drawing this distinction, see MAHONEY, CALMORE & WILDMAN, *supra* note 6, at 47; Calmore, *Chasing the Wind*, *supra* note 5, at 1201; and Calmore, *Social Justice Advocacy*, *supra* note 26, at 625.

101. Calmore, *Social Justice Advocacy*, *supra* note 26, at 623.

102. Calmore, *Chasing the Wind*, *supra* note 5, at 1199.

responsible social justice lawyering requires an attorney to relinquish her power, leadership, and hierarchical position over clients:

[W]e cannot come into the picture with canned claims and prayers for relief. We must be open to being used by the client community in ways that they deem appropriate. We can provide technical assistance and advocacy perspective; we can enhance their stories; and we can help them leverage their positions. . . . [W]e can join the political project by occupying the real-and-imagined worlds on the margin and helping the community to reclaim these spaces as places of radical openness and possibility.<sup>103</sup>

Calmore elaborates further:

We must . . . adopt a progressively activist, yet patiently open, collaboration with the client community. . . . We must come with a faith in the ability of those in these communities to hold fast to their struggles and their potential to, with support, transform life within these communities. . . . [W]e must have faith that our client base can reconstitute its communities as viable homeplaces.<sup>104</sup>

And as always, bridging the attorney-client gap and formulating a new relationship is grounded in “respecting the client community’s . . . humanity.”<sup>105</sup> Like re-socialization, Calmore sees these humanistic relationships as essential to the practice of social justice law.

#### *D. Social Justice Writing*

Once an attorney learns to build this type of relationship with clients, I suspect it becomes a lesson she never forgets. The emphasis on community dignity, respect, humanity, and collaboration fundamentally altered how I approached relationships with clients and remained at the forefront of my mind after I left law school. The more difficult part, at which I cannot claim to have been as successful, was consistently extending those lessons into the courtrooms, trial briefs, appellate briefs, and other documents.

One of Calmore’s major exercises in his social justice lawyering course requires students to draft a “social justice complaint” based on

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103. Calmore, *Call to Context*, *supra* note 5, at 1950.

104. *Id.* at 1956.

105. *Id.* at 1955.

Herbert Eastman's theory of "thick pleading."<sup>106</sup> The purpose is to draft the complaint in a tone, language, and story that does not reduce the clients to mere names on the pleading, nor their claim of injustice to a narrow legal cause of action.<sup>107</sup> Instead, a social justice complaint illuminates who the clients are and the nature of the injustice from which they suffer.<sup>108</sup> Eastman points out that the complaint is the first document courts see, and it shapes their view of the entire case.<sup>109</sup> Thus, the complaint is a lawyer's best chance to educate, inform, and persuade courts that are not predisposed to identify with or understand the oppression that constricts marginalized clients' lives.<sup>110</sup>

As writing is an attorney's primary mode of advocacy, drafting a social justice complaint appears, at first glance, easier than building bridges with communities dissimilar or distant from an attorney's own. Although requiring a different tone and approach, a social justice complaint is but another written legal document, which can lead skilled attorneys to believe the task is easy enough to master. Social justice lawyering *with* communities requires attorneys to succumb to re-socialization and act in ways that may not be natural or consistent with prearranged norms of lawyering. In contrast, drafting a social justice complaint merely requires that attorneys approach complaint drafting with an additional purpose. Nevertheless, drafting a social justice complaint can prove to be the more difficult and counterintuitive, particularly because the choice to use this method of pleading signifies an attorney's personal stand and philosophy.<sup>111</sup> In that respect, it challenges an attorney in ways that bridge-building with clients does not.

First, a social justice complaint might be the most personal and direct challenge that an attorney lodges against the legal system and

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106. See Calmore, *Social Justice Advocacy*, *supra* note 26, at 625–35 (discussing the nature of the assignment and its purposes); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 836–49 (1995) (explaining "thick pleading").

107. Calmore, *Social Justice Advocacy*, *supra* note 26, at 626–27.

108. *Id.* at 626–27, 629.

109. Eastman, *supra* note 106, at 769–72.

110. *Id.* at 771 (finding that judges are unable to recognize injustice because they come from extremely privileged backgrounds that "restrict [their] view" and prevent them from "understand[ing] the problems sufficiently").

111. See Calmore, *Social Justice Advocacy*, *supra* note 26, at 635 (describing the fears attorneys might experience in filing these types of pleadings); *id.* at 631 (listing "dominant expectations associated with professional role and socialization[,] . . . convention and tradition associated with being a lawyer[,] . . . professional standards of practice[, and] self-preservation" among the constraints of practicing social justice lawyering).

his role in it. A social justice complaint simply defies the unstated norms regarding what a complaint should look like. Consequently, the complaint publicly opens the attorney up to criticism and disdain from his peers and superiors, not as to *who* he represents, but *how* he represents clients.<sup>112</sup> The Federal Rules of Civil Procedure state that a complaint “shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief,”<sup>113</sup> but the entire point of a social justice complaint is to avoid a short and plain statement of the claim and instead include the client’s story or narrative.<sup>114</sup> Opposing counsel is sure to object to various statements in a social justice complaint as being: (1) statements of fact that she can neither admit nor deny, (2) statements that warrant sanctions under Rule 11 because they are not based in fact,<sup>115</sup> or (3) statements that the court should strike under Rule 12(f) because they fall under the category of “impertinent, or scandalous matter.”<sup>116</sup> Lest anyone doubt that opposing counsel would object, I still recall how vehemently two students, fresh from their first year of law school, argued against the appropriateness of thick pleading in Calmore’s Social Justice Lawyering class. Their response ironically embodies the professional difficulty social justice attorneys will have with filing this type of complaint.

Second, even if these procedural objections are not warranted—and Eastman demonstrates they are not<sup>117</sup>—social justice attorneys may still find this type of pleading intellectually and personally difficult: “Lawyers, schooled in legal reasoning, see a limited world in which problems between people are discrete and legally defined,” but a social justice complaint requires that they abandon this approach and conceptualize the dispute as being “social[ly] and politically defined.”<sup>118</sup> Moreover, by telling the client’s story in its social and political context, an attorney lends power to the client’s voice at the

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112. *Id.* at 635 (noting that lawyers filing thick pleadings “fear the backlash from the Establishment”).

113. FED. R. CIV. P. 8(a).

114. See Eastman, *supra* note 106, at 813 (“It is the dynamic role of the narrative within a legal argument—rather than the narrative standing alone, perhaps unheard—that gives it persuasive force.”).

115. FED. R. CIV. P. 11(b)(3).

116. FED. R. CIV. P. 12(f).

117. Eastman, *supra* note 106, at 790–805 (explaining how a thick complaint is acceptable according to the Federal Rules of Civil Procedure and other constraints of the legal community).

118. *Id.* at 798 (citing Peter Gabel, *Reification in Legal Reasoning*, in CRITICAL LEGAL STUDIES 17, 25 (James Boyle ed., 1992)).

expense of legal vocabulary and hierarchy.<sup>119</sup> Thus, the social justice complaint, again, inherently challenges lawyers' "own status and power over clients,"<sup>120</sup> but this time in full view of others. In short, the social justice lawyer "is asked to risk sanction and ostracism for clients she may not even understand or know. When one's cause may be perceived as radical, one may wisely appear conservative and mainstream—to 'pass.'"<sup>121</sup>

This same problem also arises in the way we attempt to sculpt our clients' testimony in court, the very place where one would think clients' stories are most relevant. Attorneys often distort clients' stories with the premise that they are presenting the stories in a way judges can understand, but the attorneys then lament for the courts not seeing their clients properly or "hearing their stories correctly."<sup>122</sup> The problem starts, however, with the fact that:

We need to begin educating the courts about our clients' lives and stories . . . . We need to help the bench and bar recognize that the indigent clients we serve are not just rich clients dressed in cheaper clothes, but are people who have problems uniquely their own, problems which until now the legal system has refused to acknowledge.<sup>123</sup>

Even among those young re-socialized attorneys who remain "radical" enough to file social justice complaints or allow clients to tell *their* stories in court, supervising attorneys are likely to express skepticism over these tactics and encourage, if not require, a different approach. The rest, regardless of supervision, will likely find the standard "lawyerly" tasks of drafting and oral advocacy to be the

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119. See *id.* (explaining how legal characterization of client stories and disputes reinforces the legal system's dominance over clients). Anthony Alfieri, upon whom Eastman relies, writes:

Client narratives are tolerated only to the extent they do not rupture the ordered system of meanings and relationships defined by lawyer narratives. When rupture is threatened by client resistance, the lawyer engages in a series of interpretive moves to restore hierarchy by characterizing client story in the vocabulary of dependence.

Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2126 (1991) (citations omitted).

120. Eastman, *supra* note 106, at 798.

121. *Id.* at 804.

122. Calmore, *Social Justice Advocacy*, *supra* note 26, at 630 (quoting Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 402 (1997)).

123. *Id.* (citations omitted).



most difficult to incorporate into their practice as social justice lawyers.

### *E. The Battle To Keep Hope Alive*

Finally, students need not assume that their task is easy or that failure only befalls those who are faint of spirit; far too many good committed attorneys have already suffered from exhaustion and defeat for that to be the case. The plain truth, as Calmore regularly hears, is “this work . . . ain’t easy.”<sup>124</sup> For instance, “in a racist culture, it is very hard to litigate, negotiate, and maintain antiracist legal remedies, let alone employ them to shift culture.”<sup>125</sup> Likewise, attorneys bring their own set of incompetencies, privileges, and preconceptions, over which they are apt to trip to the detriment of their clients. Thus, students must disabuse themselves of the notion of the dramatic or charismatic attorney who can simply rely on will and skill to undermine injustice.

Professors, however, must be similarly careful not to discourage students while responsibly apprising them of the realities and adversity they will encounter. The result that follows from students’ discouragement may be worse than leaving them to their naiveté. Too often students and practitioners become exhausted or intimidated by the structural forces of oppression that social justice lawyering reveals. Thus, the task of social justice professors must be more than simply to expose and socialize students, but also to steel them. Otherwise, we threaten to saddle them with a psychology of failure and what Calmore calls an “excessive identification with Don Quixote and/or Sisyphus.”<sup>126</sup> If they are to become practicing social justice lawyers,<sup>127</sup> he writes “we must solidify [rather than undermine] the commitment of progressive students. We must move liberal students as far to the left as they can go . . . [and] develop a critical consciousness among those in the center.”<sup>128</sup>

The best way to solidify our students—but the one in which we may too often fail due to our own pessimism—is to inspire them and broaden their sense of what is possible. For those of us who practiced

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124. Calmore, *Chasing the Wind*, *supra* note 5, at 1173.

125. Calmore, *Warren Court Legacy*, *supra* note 17, at 1098.

126. Calmore, *Social Justice Advocacy*, *supra* note 26, at 631.

127. Calmore’s textbook invokes Jane Aiken’s call for students to become “provocateurs for justice,” meaning that they become “justice ready” and are prepared to recognize injustice for what it is and then initiate action and inspire others to oppose it. MAHONEY, CALMORE & WILDMAN, *supra* note 6, at 214–15 (citing Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 290–91 (2001)).

128. Calmore, *Chasing the Wind*, *supra* note 5, at 1193.

or grew up after the height of the civil rights movement, we ourselves can stand in the way of our students. We may be too apt to project our own disappointments and frustrations in class and, likewise, fall victim to a constricting notion of what is possible. If we cannot overcome this, surely our students will follow our outward, even if unintended, expressions to their logical ends. Mindful of the course materials' effect on students, Calmore specifically structures the readings in his class to manage students' reactions. He devotes the first weeks of class to visions of justice, leaving cases and specific issues of injustice for later, "because so many of the cases tend to depress students who hope to practice on behalf of subordinated people."<sup>129</sup> Thus, the course largely begins, not with how the world *is*, but with how it *should* be.

When students later reach the depth and reality of injustice, the course is careful to emphasize that existing norms and systems "do not exhaust the range of possibilities."<sup>130</sup> In essence, norms are neither inherent nor obvious. If students can see beyond existing norms and systems, they can begin to see the course, not as an intense course in the reality and inevitability of oppression, but as an exercise in "the practice of freedom."<sup>131</sup> This practice in freedom also allows them to "more readily embrace and commit to the earlier described visions of justice."<sup>132</sup> The best students then may find more possibility and promise in the world than their teachers do.

In Calmore's experience, inspired students traverse the hard realities of oppression and injustice, yet leave the course wanting "to bring voting rights cases to empower and enhance the political influence of people of color; bring housing and employment discrimination cases, not defend them; they want to press affirmative action to *reverse* racism."<sup>133</sup> Moreover, those students stand in stark contrast to others who take doctrinal courses in antidiscrimination or constitutional law and can see nothing more than the constriction of legal rights.<sup>134</sup> In short, courses in social justice are balancing acts between realization and inspiration. They must include a strong dose

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129. Calmore, *Close Encounters*, *supra* note 7, at 912.

130. Calmore, *Warren Court Legacy*, *supra* note 17, at 1109 (quoting CRAIG CALHOUN, *CRITICAL SOCIAL THEORY: CULTURE, HISTORY, AND THE CHALLENGE OF DIFFERENCE*, at xviii (1995)).

131. Calmore, *Close Encounters*, *supra* note 7, at 913.

132. *Id.*

133. *Id.*

134. *Id.* (noting that a "broader cross-section of the student body," both politically and ideologically, in those doctrinal courses can lead to polarized discussions that discourage open-mindedness).

of the latter for students to understand the task before them, yet willingly choose to pursue it.<sup>135</sup>

## II. LESSONS LEARNED, LESSONS RE-LEARNED, AND REFLECTIONS ON SOCIAL JUSTICE LAWYERING

### A. *Practical Lessons*

In the first years of practice, I tried to carry with me all the lessons of social justice lawyering that I could. In fact, I felt that the course, as Calmore promised, had put me “ahead of the curve.”<sup>136</sup> Unfortunately, the opportunity to educate the court and tell clients’ stories through a complaint was not immediately available, but when drafting other documents before the courts, such as findings of fact, trial briefs, or appellate briefs, I struggled to find the clients’ messages.<sup>137</sup> I would regularly focus on my language choice and try,

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135. The experience of one of my social justice students demonstrates the depth of students’ realizations and the absolute necessity that hope accompany it. The student admitted that she found many of the early readings “redundant . . . because I believed that I ‘got it’ after reading just a few articles. . . . I now realize how foolish and naïve my assumptions were.” Journal Entry, Social Justice Lawyering Student, *supra* note 76, at \*1. Her final journal entry for the class, however, revealed a profound evolution during a single semester. She began it by writing that she would characterize the course with the single word “unexpected. . . . because I leave the course with lessons and impressions that I never foresaw nor expected.” *Id.* She then proceeds to discuss the theme of hope, which ironically I had not stressed in that semester, but which emphasizes hope’s importance to social justice lawyering. Speaking of a pro bono project to assist victims of Hurricane Katrina that students undertook through the class, she reflected:

I learned the related lesson that hope is oftentimes the collateral damage that accompanies social justice violations. . . . I felt helpless when [the victims] expressed their lack of hope in the legal system to provide any remedies to their hardship. In retrospect, I think I too felt helpless because I agreed with their outlook. . . .

I wouldn’t say that the people with whom I spoke have no hope for themselves, but the amount that they do have has been injured [and] has taken on loftier dimensions. The hope expressed to me was more apocalyptic; they talked about faith that the righteous would be uplifted and the hurricane profiteers will be laid low in some later space and time. Hope for immediate retribution seemed almost non-existent. Yet hope, or the lack thereof, is very powerful. I have to believe that there is still a chance, albeit small, for justice to emerge from this horrendous situation. And given the stakes of human lives that are involved, this small chance is worth fighting for.

*Id.* at \*2–3.

136. Calmore, *Chasing the Wind*, *supra* note 5, at 1174.

137. Even now in writing this piece, the lessons I have learned from social justice lawyering cause me to struggle with the appropriate manner in which to reflect on my experiences, in particular the way in which I now reveal and describe clients’ stories. For fear of disclosing too much, violating confidences, or telling the story in a way that clients

for instance, to make strategic use of passive versus active voice verbs. The passive seemed to present clients' oppression as existing, if at all, as some vague, unidentifiable force. The active voice located the source of that oppression with the individual decisionmakers who had names, motivations, and stories of their own. Although more forceful, the active voice would also require a court to pass judgment on the values and decisions of a community, which at the trial level might be very similar to or the same as the court's own, while the passive voice—if the court could recognize the oppression as real—might allow the court to pass judgment on the oppression rather than the people. In the end, I tried to balance the two in light of my appraisal of what courts were willing to hear. Social justice lawyering had developed my sensibilities enough to recognize the conundrum, but I often felt it provided me no answers.

In appellate courts, I likewise learned that for an appeal to have any chance of success, the briefs had to center on the clients' stories. Today's appellate courts are simply too far removed from and too disinterested in most civil rights cases to give them serious treatment if the briefs present them with nothing but bare facts and legal arguments.<sup>138</sup> Thus, I had to provide stories that explained what had happened and was continuing to happen to the marginalized communities. Although the cases in which I was involved achieved mixed success, I continue to believe that it was only our clients' stories that garnered the attention of appellate courts and created a willingness to even entertain relief.

On more than one occasion, however, I came to the rude awakening that my legal teams' shortcomings in telling clients' full stories from the outset diminished the power of their cases. Because the initial complaint frames the entire case and gains momentum once it is filed, it simply becomes too difficult to change a case or a legal team's course and tone later. Looking back now, I know that the legal teams often waited too long to begin that process. By the time a case reached trial, I was always uneasy about the way a court might interpret a witness's testimony. Moreover, I hypothesized that

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can no longer participate or collaborate, I have anesthetized and generalized my experiences. For a further exploration of these concerns, see Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 *GEO. J. LEGAL ETHICS* 1, 40–45 (2000) (discussing the ethical issues involved in telling such stories).

138. Even basic first-year legal writing texts attempt to alert law students to this principle, although in a less complicated way. See RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* 305–06, 310–11 (5th ed. 2005) (discussing the need to make clients come alive in the trial court and the need to make a claim of injustice, beyond just legal arguments, in the appellate courts).

although witnesses were telling stories, a cultural or linguistic gap often may have prevented courts from understanding them.<sup>139</sup> The stories of marginalized clients or witnesses carry with them a meaning deeper and broader than the mere words that a court reporter can catch.<sup>140</sup> The deeper meaning can only be captured by one who understands the context from which these stories were conveyed.

In those moments of uneasiness, I recalled the ever-resounding retort from critical race theory classmates who demand to know how they could use any of "this" in practice.<sup>141</sup> Unfortunately, even the best professors do not always have a good response.<sup>142</sup> Yet based on

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139. See, e.g., Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459, 2470-73 (1989) (revealing the extent of the linguistic gap between clients and attorneys or judges, and the resulting relationship between the gap and the perception of which issues are important); Kim A. Taylor, *Invisible Woman: Reflections on the Clarence Thomas Confirmation Hearing*, 45 STAN. L. REV. 443, 449-50 (1993) (arguing that whites in general, and Senator Specter in particular, simply did not understand the complexity of Anita Hill's story of sexual harassment and the intersection of race and gender oppression). Gilkerson writes:

Contextualization is fundamental to legal storytelling; the storyteller must be able to provide enough information about herself and her situation to transfer to the story receiver—through meanings and images—her perspective, beliefs, and values. The storytelling dilemma in law arises when authoritative discourse and knowledge impede the transfer of the storyteller's meanings and images. Hence the receiver's interpretive understanding of the story often is at odds with the message intended by the teller.

Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 866 (1992).

140. See Cunningham, *supra* note 139, at 2479-82 (exploring the deeper meanings behind simple words that we interpret or fail to interpret, depending on the amount of linguistic resources we share with the speaker).

141. See generally McDougall, *supra* note 11, at 4-6 (admitting his own skepticism of the subject matter's use and then later his students' need for practicality).

142. See Calmore, *Chasing the Wind*, *supra* note 5, at 1187 (acknowledging that it is difficult to translate critical race theory into practice). Calmore further points to Peggy Davis's comments that making scholarship useful for client communities is "daunting" because critical race theorists are often "trying to solidify an optimism about limited transformation." *Id.* (quoting Peggy Davis, Comments at the Panel Discussion on the Application of Critical Race Theory to Progressive Practice, Critical Race Theory Workshop, Phila., Pa. (June 1995)). Calmore, at times, implicitly concedes that critical race theory is difficult for the professor, much less the student or practitioner, to grasp and apply:

This scholarship is now quite broad-based. As it has evolved, it has attracted a motley crew, and its body of scholarship is actually improvisationally incoherent, diffuse, and stunningly eclectic in both method and message. Critical race theory primarily investigates how the law contributes to and diminishes racial subordination. Beyond that, it is harder to identify and, like rain, its fallout varies in impact.

lessons learned, I surmised that our clients' cases would be far more difficult to ignore if they included testimony from a critical race theorist, sociologist, or anthropologist who could provide the court with the sociological and structurally oppressive context from which a client's story came.<sup>143</sup> Such experts' perspectives could help narrow the cultural and linguistic gaps between courts and clients, as well as those that surely exist between lawyer and client. Likewise, a critical perspective could unearth the underlying assumptions that everyone in the courtroom might have about a client's story and deprive the listener of the opportunity to interpret and later write the client's story as he or she saw fit.<sup>144</sup>

That such critical perspective was necessary became painfully obvious during lunch with a witness one day. The witness was

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Calmore, *Social Justice Advocacy*, *supra* note 26, at 1592. At its core, critical race theory represents an oppositional stance. *Id.* at 1593. However, that stance is existentially determined by the people who take it, and how they then apply it is unbounded by any rules or canon of scholarship.

143. See, e.g., Tanya Katerí Hernández, *Latino Inter-Ethnic Employment Discrimination and the "Diversity" Defense*, 42 HARV. C.R.-C.L. L. REV. 259, 304 (2007) (suggesting the use of experts to help judges understand the nature of discrimination in a specific workplace). Interestingly, studies in federal courts reveal that a significant proportion of women and minority attorneys believe that they are disadvantaged in relation to their male or white counterparts, but these attorneys nonetheless say it does not affect how they present their cases. Carroll Seron, *A Report of the Perceptions and Experiences of Lawyers, Judges, and Court Employees Concerning Gender, Racial and Ethnic Fairness in the Federal Courts of the Second Circuit of the United States*, 1997 ANN. SURV. AM. L. 415, 437-38; see also *Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 84 GEO. L.J. 1657, 1708 (1996) (noting that female attorneys report inequality of treatment that "may undermine their effectiveness as counsel"); *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 64 GEO. WASH. L. REV. 189, 226-30 (1996) (presenting research findings on the effects of minority status on the attorney's experience within the professional legal community); *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745, 809-35 (1994) (analyzing the "complex picture of the ways in which gender does—and does not—affect professional interactions within the Ninth Circuit").

144. Gary Blasi remarks that scholars have voluminously revealed the nature of unconscious biases and how they are put to use in the law, but that with only minor exceptions:

scholars have had much less to say to practicing lawyers and other advocates about what to make of their insights, particularly in situations in which race is below the surface. . . . Scholars and teachers of advocacy have also had little to say about how advocates should deal with stereotyping or race. With one notable exception, the leading law school textbooks on trial advocacy completely ignore the issues of race and stereotyping, except in the context of cross-examining a witness to reveal hidden bias.

Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1244-45 (2002) (footnote omitted).

concerned with how the television had specifically referenced the names of every client that had testified the day before. I had watched the broadcast but had paid no attention to this fact and still was unclear as to its ultimate significance. The witness said that other witnesses would be less apt to testify or speak freely if they were subject to being prominently identified and negatively characterized. I am not sure that such witnesses ever expect a warm reception in their local media, but this witness revealed that specific references to witnesses' names meant that those who had to apply for a loan at the bank, a job at the filling station, or an apartment at a local complex next Monday were being told by the mere mention of their name that their chances of obtaining those opportunities were reduced. At that moment, I became more aware of my privilege than ever before, more aware of the gap between client and lawyer, and able to recognize that a client's story is far more complex than attorneys imagine and is in need of full illumination in complaints, briefs, and testimony. Unfortunately, it also brought on those Sisyphean feelings,<sup>145</sup> as I marveled at how hard "provocateurs of justice"<sup>146</sup> must work to achieve so little and to tell such familiar American stories.<sup>147</sup>

### B. Legal Lessons

The most disappointing lessons that were reified in practice were the jurisprudential flaws in antidiscrimination law, particularly in regard to the intentional discrimination standard.<sup>148</sup> In practice, I

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145. See *supra* note 126 and accompanying text.

146. See *supra* note 127.

147. Derrick Bell has written of how his work as a civil rights attorney was no more leisurely than that of an associate grinding away toward partnership at a major law firm. DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* 112 (2002). He also admits that the demands of the work resulted in personal sacrifices along the way. *Id.* I had already learned that lesson far too well and was still willing to make that sacrifice. My marvel, however, was with the substantive difficulty of our work. Eastman writes that judges may be the least able of any to recognize injustice, because most come from privileged backgrounds that "restrict [their] view" and require poor black plaintiffs to paint "more vivid and complete pictures [in order for judges] to understand the problems sufficiently." Eastman, *supra* note 106, at 771.

148. The intentional discrimination standard effectively requires proof of the defendant's subjective motivation but, as several courts and commentators have noted, proving subjective motivation is extremely difficult and unreliable. See, e.g., *United States v. Bd. of Sch. Comm'rs*, 573 F.2d 400, 413 (7th Cir. 1978) (noting that "[a]s a subjective test would be impossible to apply . . . the courts are driven to adopt an objective criterion" to determine intent); *NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042, 1047-48 (6th Cir. 1977) (noting that "it would be difficult, and nigh impossible, for a district court to find" intentional discrimination unless it is free to draw the inference based on objective evidence). In fact, for that reason, several lower courts resisted the Supreme Court's efforts to evolve the standard toward a subjective one. See Derek W. Black, *The*

grew too accustomed to disappointing communities who suffered from discrimination and inequality with my appraisal that they did not have a legal claim because we would not be able to demonstrate “intentional discrimination,” as currently applied.<sup>149</sup> Not satisfied with conveying that disappointment, or with the real-world effects of the standard itself, I began attempting to formulate new claims for the same old injustices. Unfortunately, as a practitioner with several live cases and issues, I never had quite enough time to develop satisfying solutions for systemic problems. However, as an academic, I have spent a great deal of time and scholarship attempting to whittle away at the intent doctrine.<sup>150</sup> Moreover, I believe that it is in similar endeavors that we as professors can and must do more to assist communities and practitioners.

As social justice professors, we implore our students that this work is not just theoretical. They must be ready to spot injustice, committed to collaborating and strategizing with the community, and creative in integrating a legal claim within that strategy. The creativity has two levels: integrating a legal claim within the

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*Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 565–66 (2006) (describing how “courts continued to find that ‘intent’ could be shown with evidence short of animus of specific racial purpose”). Currently, absent “smoking gun” evidence, most plaintiffs cannot meet the standard. See, e.g., Hart v. Cmty. Sch. Bd. of Educ., 512 F.2d 37, 50 (2d Cir. 1975) (noting that it is “almost impossible” to prove subjective intent, except in the case of admissions); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 112–26 (2003) (discussing cases that required smoking gun evidence).

149. For further discussion of the types of claims that lack viability and an analysis of the current intentional discrimination standard, see Black, *supra* note 148, at 534–38.

150. See generally Black, *supra* note 148 (demonstrating the intentional discrimination standard’s inability to produce results consistent with equal protection’s original meaning and proposing a new standard in its place); Derek W. Black, *A Framework for the Next Civil Rights Act: What Tort Concepts Reveal About Goals, Results, and Standards*, 60 RUTGERS L. REV. (forthcoming 2008) (using tort principles to demonstrate that the choice-of-liability standards in antidiscrimination law is not limited to a dichotomy between disparate impact and intentional discrimination, and that the conversation must include a focus on public policy rather than moralistic notions of fault); Derek W. Black, *The Mysteriously Reappearing Cause of Action: The Court’s Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs*, 67 MD. L. REV. (forthcoming 2007) [hereinafter Black, *Mysteriously Reappearing Cause of Action*] (identifying the implicit principles and bases upon which the Supreme Court has recently recognized statutory claims of discrimination and demonstrating that those principles and bases would support broader causes of action under antidiscrimination statutes than the traditional notion of intentional discrimination); Derek Black, *Picking up the Pieces After Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356 (2002) (suggesting three ways in which plaintiffs can circumvent the Supreme Court’s holding that Section 602 of the Civil Rights Act of 1964 implies no private right of action for intentional discrimination).



communities' larger agenda and formulating a viable claim. By the time students leave our constitutional law, antidiscrimination, and social justice courses, they are all too aware that oppressed communities' legal claims are limited and growing narrower.<sup>151</sup> Moreover, scholars have adeptly demonstrated how the narrowing of these claims represents bias, decontextualization, a lack of understanding, and maintenance of structural inequality.<sup>152</sup> The academy, however, has not been as adept at using its scholarship to provide the missing pieces of the puzzle that students and practitioners often need to formulate new claims and theories. We consistently take oppositional stances with our students, but do not consistently help them throw oppositional legal blows. Yet if ever there were means by which to inspire our students, it is here. Moreover, insofar as judges find not only our scholarship, but scholarship in general, useless,<sup>153</sup> we can make the theoretical practical and the useless useful.

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151. See, e.g., *Barnes v. Gorman*, 536 U.S. 181 (2002) (holding that punitive damages are unavailable in disability discrimination suits); *Buckhannon Bd. & Care Home v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598 (2001) (limiting the availability of attorneys' fees in civil rights cases); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (eliminating disparate impact claims under Title VI of the Civil Rights Act of 1964); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (permitting employers to compel employees to enter into agreements submitting all civil rights claims against an employer to arbitration).

152. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978) (arguing that current antidiscrimination law reinforces structural inequality because it focuses on the motive of the perpetrators rather than on conditions that many defendants' conduct creates); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 2-3 (1991) ("A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (contending that racial attitudes are engrained in the collective unconscious of American citizens, and that therefore requiring intent as a prerequisite to any discrimination claim means there is no legal remedy available for the vast majority of discriminatory acts).

153. Adam Liptak writes:

In a cheerfully dismissive presentation, Judge Jacobs and six of his colleagues on the United States Court of Appeals for the Second Circuit said in a lecture hall jammed with law professors at the Benjamin N. Cardozo School of Law this month that their scholarship no longer had any impact on the courts. The assembled professors mostly agreed, though they differed about the reasons and about whether the trend was also a problem. Some suggested, gently, that judges might not have the intellectual curiosity to appreciate modern legal scholarship. Articles in law reviews have certainly become more obscure in recent decades. Many law professors seem to think they are under no obligation to say anything useful or to say anything well. They take pride in the theoretical and in working in disciplines

One of Calmore's most significant contributions has been revealing the injustice and normative flaws in the law and policy regarding housing and life opportunities for the inner-city poor. As discussed above, the inner-city poor are trapped at the intersection of race, space, and poverty where they often lead a life devoid of options or hope.<sup>154</sup> Larger society is content to simply leave the inner-city poor behind and cordon them off as irrelevant to the economy, policy, and progress. Calmore identifies racism in general and white indifference toward inner-city poverty in particular as the causes of this social neglect. When "looking at the racial and ethnic data regarding neighborhood poverty, [he is] struck by two things. First, it is not really a significant problem for whites . . . . Second, for this reason, racism may continue to cultivate broad societal neglect and block efforts at grand-scale redress."<sup>155</sup> The unfortunate reality is that "so many whites are indifferent to blacks."<sup>156</sup> Some argue that indifference is distinct from racism,<sup>157</sup> but Calmore asserts that the indifference is "driven by bias, prejudice, and stereotype—by cultural and institutional racisms."<sup>158</sup>

His scholarship, however, does not respond directly to this indifference. In other contexts, Calmore argues that the government's affirmative historical acts of housing discrimination warrant spatial reparations for African American communities,<sup>159</sup> but as to the larger problem of white indifference, he seems to lack confidence in the law. In fact, the following quote suggests that the law is in some respects irrelevant:

As long as race makes no obvious demands on whites in these terms, ironically, their everyday racism will continue to

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other than their own. They seem to think the analysis of actual statutes and court decisions—which is to say the practice of law—is beneath them.

Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8.

154. Calmore, *Call to Context*, *supra* note 5, at 1929–30.

155. *Id.* at 1942.

156. Calmore, *Warren Court Legacy*, *supra* note 17, at 1129.

157. See, e.g., PAUL L. WACHTEL, RACE IN THE MIND OF AMERICA: BREAKING THE VICIOUS CIRCLE BETWEEN BLACKS AND WHITES 35 (1999) (arguing there is a distinction between indifference and racism).

158. Calmore, *Warren Court Legacy*, *supra* note 17, at 1129.

159. John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1492 (1993) [hereinafter Calmore, *Spatial Equality*] (supporting "a claim that territorial reparations would be a proper result"); see also MAHONEY, CALMORE & WILDMAN, *supra* note 6, at 857–84 (discussing and including articles that detail the federal government's involvement in creating racial inequity in home ownership and neighborhood resources).

manifest itself in interpersonal relations, institutional arrangements, and cultural expression. Certainly, we have no chance to effectuate a real cultural-shift through lawmaking. Nor is there an advancement of an anti-racist moral ideal or standard. Perhaps most disconcerting, a stasis in current cultural attitudes and patterns exists that hampers progress towards the goal of overarching justice for all peoples.<sup>160</sup>

It is here that Calmore comes closest to expressing a lack of hope and creates the crack through which despair can creep, particularly for our students. The most he offers in response to his own prognosis is that others "argue that [his] narrative of progress understates the racial improvement that marks the nation's cultural-shift on matters of race and racism."<sup>161</sup>

The above is not a critique of Calmore, as I concur in the problem of indifference and the difficulty of legal solutions. My comments, however, are meant to emphasize the problems he and others pose to us and the work they leave for us to complete. In his course, for instance, he requires students to draft complaints against the United States, premised on a theory of spatial reparations.<sup>162</sup> I similarly ask students to formulate creative legal theories to sustain claims on behalf of marginalized clients who otherwise have no recognized remedy. Yet neither students, practitioners, nor their professors have fully resolved the legal hurdles to various and recurring social justice claims that they need to make. Of course, the teacher cannot provide legal solutions for every problem, but I believe we must do more to support students in their effort.

For instance, insofar as societal indifference is born from racism, and Calmore and John Payne are correct that "[o]ur society simply would not tolerate the amount of poverty found in black and other minority communities if whites were proportionally as poor as these less-favored groups,"<sup>163</sup> we cannot accede that equal protection and antidiscrimination law sanction this indifference. Even if current precedent holds otherwise, we cannot simply tell our students, colleagues, and communities that we voice opposition to the proposition, but can offer them no assistance; we must advocate, educate, and create through scholarship and other means until the

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160. Calmore, *Warren Court Legacy*, *supra* note 17, at 1102.

161. *Id.* at 1102 n.68 (referencing STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE* 499 (1997)).

162. Calmore, *Chasing the Wind*, *supra* note 5, at 1201 n.120.

163. John M. Payne, *Title VIII and Mount Laurel: Is Affordable Housing Fair Housing?*, 6 YALE L. & POL'Y REV. 361, 370 (1988).

courts also recognize that the law does not, and must not, sanction this racially unequal indifference.

To use a favorite adage of civil rights attorneys from earlier generations, when *Brown* was decided, not only were whites indifferent, they were entrenched in a culture that was explicitly racist and a legal system that had for over half a century held that “enforced separation of the races . . . neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment.”<sup>164</sup> In comparison, our outlook today should be bright.

In all fairness, the basis for relative optimism does not necessarily portend significant successes, but as the earlier quote from President Havel indicates, the promise of success cannot be the barometer of our effort and commitment.<sup>165</sup> We must push new legal claims because they are right, not because they will win.<sup>166</sup> I cannot claim it to have been my original purpose, but two of my recent articles on the intent standard purport to shed some light on the white indifference towards which Calmore looks with pessimism.<sup>167</sup> In proposing re-articulations of the intent standard and new claims, those articles do not suggest that new claims are easily established. They do, however, argue that social justice lawyers and the communities they represent do not stand alone in opposition to indifference and neglect, but that the law stands with them.

For instance, one article argues that equal protection’s original and evolved meaning demonstrates a single fundamental concept:

[A]ll are equally entitled to the consideration and protection of the law. Consequently, the interests of none [can be] denied value or afforded a differential value when the government weighs competing interests or ends, particularly in regard to race. Even the infamous decision in *Roberts v. City of Boston*, which later served as a basis for the Court’s holding in *Plessy*, recognized . . . that equality before the law required “that the rights of all . . . are equally entitled to *the paternal consideration*

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164. *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896).

165. See *supra* note 25 and accompanying text.

166. Calmore, *Racialized Space*, *supra* note 25, at 1273.

167. See Black, *supra* note 148, at 575–85 (advocating that a modified deliberate indifference standard would better reflect the meaning and purpose of equal protection); Black, *Mysteriously Reappearing Cause of Action*, *supra* note 150 (demonstrating that some more subtle forms of indifference by recipients of federal funds, even if not racially or gender-motivated, may amount to violations of statutes such as Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments).

*and protection* of the law, for their maintenance and security." It is the failure of equal consideration that strikes at the heart of equal protection. This failure can be obvious when it is motivated by animus or far more subtle when it lacks motivation and is a result of "racially selective sympathy and indifference" or unconscious feelings of differential worth between racial groups. On their face, decisions may appear legitimate when they are actually the result of "the unconscious failure to extend to a minority . . . the same sympathy and care, given as a matter of course to one's own group." Although selective sympathy or indifference and differential appraisals of worth are difficult to identify, they are no less pernicious to the Fourteenth Amendment's guarantee of "equal concern and respect in the design and administration of the political institutions that govern them."<sup>168</sup>

Thus, insofar as the intent standard fails to provide this type of equal protection, it must be expanded or abandoned.<sup>169</sup> In its place or incorporated within it, the article proposes a deliberate indifference standard (similar in name to current deliberate indifference standards but significantly dissimilar in application) as being appropriate.<sup>170</sup>

Equally important, laws and standards consistent with those proposed above have the capacity to work the cultural shifts that Calmore associates with the Warren Court and finds necessary for significant and sustainable progress.<sup>171</sup> For instance, a deliberate indifference standard that queries whether the government is cognizant of the harm it causes, whether it has available options to avoid that harm, and whether it would have avoided the harm had the affected group been white, is a standard that reflects the way decisions are actually made. The current intent standard only requires that we not be openly racist; it does not demand that government treat its citizens equally. In contrast, by requiring government to be cognizant of the harms it causes, a deliberate indifference standard combats less explicit forms of bias or racism

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168. Black, *supra* note 148, at 562 (footnotes omitted) (quoting, respectively, *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206 (1849); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976); *Id.* at 7-8; JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 82 (1980)).

169. *Id.* at 564-77; see also Lawrence, *supra* note 152, at 319-23 (critiquing the intent standard and arguing for a standard that addresses unconscious racism in its place).

170. Black, *supra* note 148, at 575-86.

171. See Calmore, *Warren Court Legacy*, *supra* note 17, at 1098-103 (explaining that cultural shifts, in addition to legal shifts, must occur for meaningful progress to be sustainable).

that are the predominant causes of unequal treatment.<sup>172</sup> Moreover, calling those considerations to the forefront provides the potential for cultural change.

We lament the intent doctrine's exclusive focus on racial animus because such animus is no longer the predominant form of discrimination,<sup>173</sup> but we likewise recognize that racial animus's diminished prevalence is, in part, a result of the consensus and precedent that deemed it both socially and legally unacceptable.<sup>174</sup> Thus, it follows that if the structure of the law can call us to account for our indifference to one another, it can minimize the continued prevalence of that indifference. Insofar as we share Calmore's hope and faith in humanity, we must believe that our government and individual decisionmakers would react to such laws by changing the way they approach decisions. They can resist the urge to be indifferent to the needs of some and explore alternative courses of action that do not cause avoidable racial harms. This alone will not eliminate racism, oppression, or the problems of the inner-city poor, but it will move us forward; it can prevent us from carelessly writing off others. This is but one example of how we should put our scholarship to rectifying, in addition to identifying, injustice.

### III. SUSTAINING SOCIAL JUSTICE LAWYERS: TO TEACH A NEW LESSON OF HOPE

My experience teaching and working with social justice students affirms the need for Calmore's attentiveness to the emotional responses that students have to the readings and issues we address in social justice lawyering. Predominantly confined to law school buildings and long reading assignments, students do not instinctively find hope in humanity, grass-roots collaboration, or simple necessity. These things often remain but words in a book. Most students have

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172. See Blasi, *supra* note 144, at 1246–66 (discussing psychological studies and scholarship on stereotypes and bias); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (discussing the flaws in disparate treatment theory and questioning traditional conceptions of discrimination as a manifestation of intent or motive). See generally Lawrence, *supra* note 152 (focusing on the prevalence of unconscious racism).

173. See Green, *supra* note 148, at 95–97 (discussing the shift in the nature of discrimination from conscious animus to unconscious bias); Krieger, *supra* note 172, at 1164–65 (stating that “deliberate discrimination [was] prevalent in an earlier age” but “subtle forms of bias . . . represent today’s most prevalent type of discrimination” and, thus, the old legal standards are insufficient).

174. Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1376–82 (1988).

not yet had those experiences and revelations that reify or build hope in those pillars. Since students live within law books and are, after all, lawyers in training, they often ask for at least a sliver of hope in the law books themselves. I believe we can and must answer them.

Our response cannot be to paint false pictures or understate the conservative trends in the law, but likewise we cannot allow our students to succumb to notions of futility or career changes.<sup>175</sup> I believe there is at least as much reason for them to hope as to despair, if we can just reveal it. The state of today's law—and some might argue the general state for some time—is akin to Charles Dickens' description from *A Tale of Two Cities* that it was both the “best of times” and the “worst of times.”<sup>176</sup> Today's law is in perpetual evolution and still provides principles that should inspire and invigorate both us and our students. Calmore, for instance, directs us toward grassroots coalitions in Los Angeles,<sup>177</sup> multicultural projects,<sup>178</sup> the creative exploits of students in individual cases,<sup>179</sup> and simply the increasing number of lawyers doing this work,<sup>180</sup> but I would also answer our students' pleas for hope in the law by directing them toward the decisions of our highest courts, the positions of our most visible institutions, and the cultural shifts that are both following and leading the law.

Hope *can* be found in the law. Although an unfortunate truth exists in Calmore's conclusion that the Warren Court's “law-making legacy faces premature death” and that “much of the promise of *Brown* has now disappeared,”<sup>181</sup> those statements do not express a finality or absoluteness. Most important, another less recognized and heralded legacy persists from *Brown* and the Warren Court. To grasp it, we must first understand from whence we came and tell the story from a perspective grounded in history.

#### A. *The Successful Lesson of Brown v. Board of Education*

The University of Michigan at Ann Arbor, like many other educational institutions, did not joyfully renounce or abandon its history of segregation and discrimination. Although founded in 1817, the University did not admit its first African American students until

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175. See Calmore, *Close Encounters*, *supra* note 7, at 912 (discussing despair among students).

176. See DICKENS, *supra* note 1, at 7.

177. Calmore, *Racialized Space*, *supra* note 25, at 1254–70.

178. *Id.*

179. Calmore, *Social Justice Advocacy*, *supra* note 26, at 636–38.

180. Calmore, *Chasing the Wind*, *supra* note 5, at 1174–75.

181. Calmore, *Warren Court Legacy*, *supra* note 17, at 1111.

after the Civil War, well over half a century later.<sup>182</sup> Even then, the University segregated its students in housing and sanctioned the exclusion of African Americans from fraternity and sorority life.<sup>183</sup> Over the objection of internal committees, students, coalitions, and organizations in Michigan, the University continued its discriminatory practices for another century and into the 1960s.<sup>184</sup> Finally, in 1963, the University made a minor gesture toward African Americans by expressing its intent to recruit and admit what it called “socially disadvantaged” students, though this label suggested the University was still uncomfortable with altering its racial mission.<sup>185</sup>

Despite the University’s unwelcoming gestures and exclusion of minorities from campus activities and programs, minority enrollment modestly increased.<sup>186</sup> Consequently, the Governor and Senate Committee on Student Affairs recommended changes to financial aid to further increase minority enrollment, but the University rejected the recommendation.<sup>187</sup> Under pressure from a student strike, the University finally agreed to limited changes.<sup>188</sup> Yet, the University abandoned its commitment to change in 1973.<sup>189</sup> All the while, discriminatory and racially hostile practices persisted on campus, and the University refused to intervene.<sup>190</sup>

Thirty years later, however, the University demonstrated a drastically different approach to educating students. By 2003, the University had not only adopted, but fought for, principles antithetical to those it previously held for over a century and a half. Before the Supreme Court in *Grutter v. Bollinger*<sup>191</sup> and *Gratz v. Bollinger*,<sup>192</sup> the University argued that a racially diverse student body is “an integral component of its mission” because diversity “increase[s] the intellectual vitality of [its] education, scholarship,

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182. Brief for the Patterson Respondents at 9–10, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 367216.

183. *Id.* at 10.

184. *Id.*

185. *Id.*

186. *Id.* at 10–11. “In 1954, there were fewer than 200 African Americans attending the University. By 1966, 400 Black students were enrolled, still representing only 1.2 per cent of the total student population of about 32,000. At the same time, nearly 55 per cent of Detroit’s 300,000 elementary and secondary school students were African American.” *Id.* at 11 n.13.

187. *Id.* at 11.

188. *Id.*

189. *Id.*

190. *Id.* at 12.

191. 539 U.S. 306 (2003).

192. 539 U.S. 244 (2003).



service, and communal life.”<sup>193</sup> The University further argued that without the presence of meaningful numbers of minority students on campus, the appropriate interracial and diversity interactions—and the educational benefits they foster—cannot take place.<sup>194</sup> Thus, the University asked the Supreme Court to allow it to enroll more, not fewer, African American and minority students. In addition, not only did the University of Michigan take this newfound position, but universities across the nation followed its lead.<sup>195</sup> Fortune 500 companies, military generals, and numerous constituencies also joined them.<sup>196</sup>

In juxtaposing *Grutter* with *Brown*, the irony could be no greater. *Brown* was a battle by disempowered African American communities and the then-small NAACP Legal Defense Fund against entrenched and empowered white institutions across the nation.<sup>197</sup> In the lead-up to *Brown*, the University of Texas, for instance, so earnestly wanted to keep blacks out of its flagship law school that it was willing to build a new law school at great cost and inefficiency, and to defend its discriminatory practices in litigation all the way to the Supreme Court.<sup>198</sup> Thus, *Grutter* and *Gratz* signal that we have gone from a nation educated by institutions that used race to exclude to one of institutions that want to use race to include.<sup>199</sup> Moreover, this

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193. Brief for Respondents at 2, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 402237 (quoting Appendix to Petition for Writ of Certiorari at 4a, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516)).

194. *Grutter*, 539 U.S. at 315–16.

195. See, e.g., Brief for American Law Deans Association as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 316 (2003) (No. 02-241), 2003 WL 399070; see also *Grutter*, 539 U.S. at 323 (“Public and private universities across the Nation have modeled their own admissions programs on Justice Powell’s views on permissible race-conscious policies.”).

196. See, e.g., Brief for the American Sociological Ass’n et al. as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (02-241), 2003 WL 398313; Brief for Ass’n of American Medical Colleges et al. as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (02-241), 2003 WL 398338; Brief for Members & Former Members of Pennsylvania General Assembly and Pennsylvania Civic Leaders as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (02-241), 2003 WL 402090; Consolidated Brief for Lieutenant General Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (02-241), 2003 WL 1787554; Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (02-241), 2003 WL 399056.

197. For a full discussion of the struggle towards *Brown*, see generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (2004).

198. See generally *Sweatt v. Painter*, 339 U.S. 629 (1950).

199. Justice Breyer relies on this shift as a basis for finding strict scrutiny should not apply to voluntary desegregation efforts in elementary and secondary schools that rely on

inclination is not born of ambivalence. Rather, *Grutter* and *Gratz* involved a predominantly and historically white institution placing its reputation, resources, and time on the line to defend the belief that the inclusion of racial minorities in higher education is crucial to the future of our nation.<sup>200</sup> Although many were quietly pessimistic and some nearly ready to concede defeat,<sup>201</sup> the Supreme Court was swayed by the University and agreed that indeed the University “has a compelling interest in attaining a diverse student body.”<sup>202</sup> We may lament the fact that the cases were subject to close votes or that such cases are even brought at all, but we cannot view the reversal of perspectives—and the Court’s endorsement of that reversal—as anything other than a sign of hope in the law. And, this hope rings true, not merely because of the good natures of men and institutions, but because of the cultural shift that undoubtedly has arisen as a result of *Brown* and the Warren Court.<sup>203</sup>

The same sentiment and lessons resonate from the Court’s decision this past term in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>204</sup> Two school systems had formerly segregated their students.<sup>205</sup> Jefferson County, Kentucky imposed

race to achieve their goal. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. \_\_\_, \_\_\_, 127 S. Ct. 2738, 2818–20 (2007).

200. The University of Michigan’s effort in defending its program was Herculean in some respects. The University hired legal counsel from the nation’s top law firms, undertook extensive research to substantiate its position regarding diversity, and publicly defended its program without excuse or fail. See *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 811 (E.D. Mich. 2000) (recognizing the extensive expert testimony provided by the University and listing John A. Payton, John H. Pickering, and Jane Sherburne from the major law firm Wilmer, Cutler in Washington, D.C., as counsel for the University). The best illustration of the University’s strong effort to defend itself may be the Expert Witness Report of Patricia Y. Gurin. See generally Expert Report of Patricia Gurin, *Gratz*, 122 F. Supp. 2d 811 (No. 97-75321), 1998 WL 35140040, reprinted in 5 MICH. J. RACE & L. 363 (1999) (showing positive correlations between increased cross-racial student interactions and several learning, democracy, and living and working outcomes).

201. But see Adam Cohen, *Why Justice O’Connor Could Be Affirmative Action’s Unlikely Savior*, N.Y. TIMES, Apr. 6, 2003, § 4, at 12.

202. *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003).

203. See Derek Black, *Beyond Brown: Its Impact upon American Education and Culture*, NAT’L BAR ASS’N MAG., Mar.–Apr. 2004, at 14.

204. 551 U.S. \_\_\_, 127 S. Ct. 2738 (2007).

205. See *id.* at \_\_\_, 127 S. Ct. at 2747, 2749. The Seattle school district was never segregated by law, but the segregation there was de jure nonetheless. In Seattle,

[a]lthough black students made up about 3% of the total Seattle population in the mid-1950’s, nearly all black children attended schools where a majority of the population was minority. . . .

. . . In 1956, a memo for the Seattle School Board reported that school segregation reflected not only segregated housing patterns but also school board policies that permitted white students to transfer out of black schools while

school segregation by law, only halting its explicit segregation and discrimination in response to a court order in 1972.<sup>206</sup> A court order remained in place until 2000.<sup>207</sup> Likewise, Seattle did not express the slightest willingness to desegregate until plaintiffs brought a federal lawsuit in 1969 alleging that the Seattle school district intentionally segregated its students.<sup>208</sup> It took another legal complaint in 1977 before the district engaged in any meaningful efforts to desegregate.<sup>209</sup>

Yet during their period of desegregation, both school districts learned the lesson of *Brown*. By 2000, neither was under any legal obligation to desegregate their schools, but both had come to believe that racial integration was good for all their students and communities.<sup>210</sup> Consequently, the school districts took action to voluntarily desegregate. Shortly thereafter, they found themselves in court, not because the schools objected to desegregation efforts, but because they refused to accede to those private individuals who would undermine their efforts to desegregate.

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restricting the transfer of black students into white schools. In 1958, black parents whose children attended Harrison Elementary School (with a black student population of over 75%) wrote the Seattle board, complaining that the “‘boundaries for the Harrison Elementary School were not set in accordance with the long-established standards of the School District . . . but were arbitrarily set with an end to excluding colored children from McGilvra School, which is adjacent to the Harrison school district.’”

*Id.* at \_\_\_, 127 S. Ct. at 2803 (Breyer, J., dissenting). In 1963, the NAACP forced the school board to adopt a new race-based transfer policy to attempt to ameliorate the segregation, but the effect was minimal. *Id.* at \_\_\_, 127 S. Ct. at 2803. Finally, in 1969 the board agreed to “a plan that required race-based transfers and mandatory busing,” *id.* at \_\_\_, 127 S. Ct. at 2803, in response to a federal lawsuit against the school board claiming that the school board had created a segregated system by

“mak[ing] and enforc[ing]” certain “rules and regulations,” in part by “drawing . . . boundary lines” and “executing school attendance policies” that would create and maintain “predominantly Negro or non-white schools,” and in part by building schools “in such a manner as to restrict the Negro plaintiffs and the class they represent to predominantly Negro or non-white schools.”

*Id.* at \_\_\_, 127 S. Ct. at 2803 (alteration in original) (quoting a 1969 complaint filed by the NAACP against the Seattle School Board).

206. *Id.* at \_\_\_, 127 S. Ct. at 2806–10.

207. *Id.* at \_\_\_, 127 S. Ct. at 2806–10.

208. *Id.* at \_\_\_, 127 S. Ct. at 2803.

209. *Id.* at \_\_\_, 127 S. Ct. at 2804.

210. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224, 1232 (W.D. Wash. 2001) (quoting the school district’s diversity rationale); *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004) (discussing the district’s compelling interest in integrating its schools).

Had the country and courts committed more fully to desegregation in the years immediately following *Brown*, Seattle and Jefferson County may not have even been segregated school districts as late as 2000. In fact, because of waning commitments, many schools are as segregated today as they were in 1970,<sup>211</sup> and in that respect, the promise of *Brown* has unquestionably fallen short. Yet the promise of *Brown* may have exceeded our expectations in other respects, namely that Seattle and Jefferson County are not alone in their newfound commitment to desegregation. Several other school districts have followed their lead<sup>212</sup> and, thus, inspiration and hope persist. Moreover, although such exceptions do not create their own rule, these cases respectfully challenge the general and continued applicability of Calmore's conclusion that for whites, white space is not a problem and black space is somewhere else and irrelevant.<sup>213</sup>

We can also find hope, not only in the litigants' stances, but also in the Supreme Court's decision in *Parents Involved*. Justice Kennedy's opinion, which forms the controlling opinion in the case, admittedly gives rise to several practical and jurisprudential problems.<sup>214</sup> At the same time, however, it includes some profound

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211. See ORFIELD & LEE, *supra* note 13, at app.

212. See, e.g., *Comfort v. Lynn Sch. Cmty.*, 418 F.3d 1 (1st Cir. 2005) (adjudicating a public school's voluntary desegregation program); Brief for the Council for the Great City Schools et al. as Amici Curiae Supporting Respondents, *Parents Involved*, 551 U.S. \_\_\_, 127 S. Ct. 2738 (Nos. 05-908, 05-915), 2006 WL 2882698 (identifying amici as being additional school districts that operate or support voluntary desegregation plans); LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION, A MANUAL FOR PARENTS, EDUCATORS, AND ADVOCATES 20-25 (2005), available at <http://www.civilrightsproject.ucla.edu/resources/manual/manual.pdf> (describing the move to voluntary desegregation and programs schools have embraced).

213. Calmore, *Racialized Space*, *supra* note 25, at 1234. Calmore's insight was largely directed toward housing segregation, but interestingly, the Jefferson County school board in *Parents Involved* indicated that, as a result of their racially inclusive school assignment policies, they had witnessed a stabilization of housing segregation and actually a slight reversal of it. See Transcript of Oral Argument at 49, *Meredith v. Jefferson County Bd. of Educ.*, decided *sub nom. Parents Involved*, 551 U.S. \_\_\_, 127 S. Ct. 2738 (No. 05-915), 2006 WL 3486966. Thus, at least in some small respect, *Parents Involved* demonstrates that the school did not want to protect white space or ignore black space in the schools, and the effect was a slightly less prized value on white space in housing.

214. Several law review articles are sure to follow and address these problems, but it suffices to say that the desegregative measures Kennedy proposes are not necessarily new and may prove more difficult to implement and less effective than the measures the schools were already employing. *Parents Involved*, 551 U.S. at \_\_\_, 127 S. Ct. at 2828 (Breyer, J., dissenting). Second, as I will address in a separate article, Justice Kennedy's analysis is flawed insofar as he interprets the school districts' assignment policies as discriminating against individuals on the basis of race. Rather, the decisions are group-based, race-conscious decisions, which he says would otherwise not even be subject to strict scrutiny. *Id.* at \_\_\_, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

statements that none could have expected. As background to Kennedy's opinion, Calmore's analysis of the disappearance of *Brown's* promise and the death of the Warren Court's legacy concludes that a judicial retrenchment has occurred and includes: (1) "an adoption of race neutrality, or colorblindness, as a paramount principle" and (2) "a rejection of societal discrimination as a wrong to be redressed."<sup>215</sup> Likewise, scholars from across the ideological spectrum would have generally concurred in believing that a majority of the Court, even before the addition of Justices Roberts and Alito, accepted colorblindness as the guiding principle of equal protection law.<sup>216</sup> The rejection of remedying societal discrimination seemed even stronger, as the Court had stated in various decisions that "alleviat[ing] the effects of societal discrimination is not a compelling interest."<sup>217</sup>

As to these and other principles, however, Kennedy's opinion turns the world upside down.<sup>218</sup> He writes: "The enduring hope is that race should not matter; the reality is that too often it does. . . . The plurality's postulate that '[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race' is not sufficient to decide these cases."<sup>219</sup> He follows by applauding Justice Harlan's statement in dissent in *Plessy v. Ferguson*<sup>220</sup> that "[o]ur

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215. Calmore, *Warren Court Legacy*, *supra* note 17, at 1111.

216. See generally Gotanda, *supra* note 152 (critiquing the dominance of the paradigm of colorblindness in Supreme Court jurisprudence); Conference, *Race Law and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U. L. REV. 567, 568-645 (1996) (providing a transcript of various law professors discussing the Court's colorblindness jurisprudence).

217. *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-99 (1989) (holding that past societal discrimination alone was not enough to justify the use of race in contracting programs); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy"); *id.* at 288 (O'Connor, J., concurring in part and concurring in the judgment) ("[A] governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster.").

218. In response to the claim at a recent conference that the sky is not falling, I emphasized to the audience that the conservative plurality would have certainly had the sky fall. The plurality's discussion of what interests justify race-conscious remedies and what those remedies might be, although not directly overruling *Grutter*, suggest that the plurality, if joined by Kennedy on the rules of law, would have effectively overturned *Grutter*. Derek W. Black, Remarks at the Southeastern Association of Law Schools Annual Meeting (July 29, 2007) (outline of comments on file with the North Carolina Law Review).

219. *Parents Involved*, 551 U.S. at \_\_\_, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *id.* at 2768 (plurality opinion)).

220. 163 U.S. 537 (1896).

Constitution is color-blind,”<sup>221</sup> but then concludes that “[i]n the real world, it is regrettable to say, [colorblindness] cannot be a universal constitutional principle.”<sup>222</sup> Thus, Kennedy repudiates the conservative plurality’s colorblind approach and dramatically shifts the Court’s rhetoric in a new direction. For this reason, Kennedy’s statements are likely to reverberate through progressive briefs and scholarship across the country, as well as the Supreme Court’s own opinions that side with social justice.

Kennedy, although not stating it explicitly, also undermines as a universal principle the notion that government cannot act to remedy societal discrimination.<sup>223</sup> The conservative plurality argues that these school districts cannot use race to voluntarily desegregate because they have already discharged their duty to remedy their past intentional segregation; thus, their current actions are no more than racial balancing in an attempt to “remedy[] past societal discrimination.”<sup>224</sup> Kennedy’s opinion breaks from the traditional practice of deferring to and respecting school districts’ discretion in effectuating desegregation,<sup>225</sup> but his opinion nonetheless eschews the plurality’s rigidity that would hamstring those school districts. He concludes:

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221. See *Parents Involved*, 551 U.S. at \_\_\_, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and dissenting in the judgment) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

222. *Id.* at \_\_\_, 127 S. Ct. at 2791–92.

223. Interestingly, Kennedy draws a distinction between de jure segregation and de facto segregation, which he views as being caused by societal discrimination and thus beyond the power of courts to remedy. *Id.* at \_\_\_, 127 S. Ct. at 2795. However, as demonstrated below, he nonetheless holds that schools can use race to remedy de facto segregation. *Id.* at \_\_\_, 127 S. Ct. at 2791.

224. *Id.* at \_\_\_, 127 S. Ct. at 2758 (plurality opinion). The plurality argues: “Jefferson County phrases its interest as ‘racial integration,’ but integration certainly does not require the sort of racial proportionality reflected in its plan. Even in the context of mandatory desegregation, we have stressed that racial proportionality is not required and here Jefferson County has already been found to have eliminated the vestiges of its prior segregated school system.” *Id.* at \_\_\_, 127 S. Ct. at 2759 (citations omitted) (internal quotation marks omitted).

225. During court-ordered desegregation, the Supreme Court always stressed that the decision as to *how* to desegregate resided with schools and that courts must defer to them and return autonomy to them expeditiously. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) (expressing concern over depriving schools of local control); *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (“School authorities are traditionally charged with broad power to formulate and implement educational policy.”); *Green v. New Kent Co.*, 391 U.S. 430, 437–38 (1968) (placing the duty of desegregation on school boards); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 299 (1955) (noting that “primary responsibility for elucidating, assessing, and solving th[e] problems” of desegregation rests with “school authorities”).

School districts can seek to reach *Brown's* objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.<sup>226</sup>

Some Supreme Court Justices, several scholars, and most civil rights advocates argue that the distinction between *de jure* and *de facto* school segregation is illusory.<sup>227</sup> Nevertheless, the Court has attempted to proffer a distinction: *de jure* segregation is attributable to state action and, consequently, warrants judicial remedy, while *de facto* segregation is attributable to demographic factors (e.g., societal discrimination) and is beyond the reach of the judiciary.<sup>228</sup> Thus, Kennedy's conclusion that remedying the effects of *de facto* segregation is a compelling government interest that justifies schools' use of race-conscious measures, paired with his above-quoted statement, represents a concession permitting school districts to remedy societal discrimination in some instances.<sup>229</sup> Consequently, he

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226. *Parents Involved*, 551 U.S. at \_\_\_, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

227. See, e.g., *Milliken*, 418 U.S. at 762–80 (White, J., dissenting) (refusing to limit a desegregation remedy to the *de jure* segregated school district and arguing that the surrounding school districts were also subject to desegregation orders as agencies of the state); *Keyes v. Sch. Dist.*, 413 U.S. 189, 227, 228 n.12 (1973) (Powell, J., concurring in part and dissenting in part) (“[A]ll racial segregation . . . has at some time been supported or maintained by government action.”); Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 435–37 (1972) (contending that *de jure* and *de facto* segregation share many of the same negative qualities); Nathaniel R. Jones, *The Judicial Betrayal of Blacks—Again: The Supreme Court's Destruction of the Hopes Raised by Brown v. Board of Education*, 32 FORDHAM URB. L.J. 109, 117 (2004) (“[T]he distinction between ‘*de facto*’ and ‘*de jure*’ segregation was illusory.”); Donald E. Lively, *Desegregation and the Supreme Court: The Fatal Attraction of Brown*, 20 HASTINGS CONST. L.Q. 649, 658–59 (1993) (“Of particular long-term significance was the Court’s illusory distinction between *de jure* and *de facto* segregation.”); Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1330 (1991) (“Differentiation between *de jure* and *de facto* segregation . . . is largely illusory.”).

228. *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (attributing racial imbalances in the schools to demographic shifts and, thus, beyond the responsibility of the school district); *Milliken*, 418 U.S. at 744–45 (holding that a district court could not order a remedy that included the surrounding school districts because the litigants failed to prove that the intentional acts of the school district caused the resulting segregation in those other surrounding school districts).

229. *Parents Involved*, 551 U.S. at \_\_\_, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment). This concession is more apparent when one further compares Kennedy's opinion in *Parents Involved* to his opinion in *Grutter*, where he

pushes beyond the conventional wisdom regarding the Court's judicial retrenchment.

Were that not enough to inspire hope, Kennedy reaches one final surprising conclusion. The plurality concludes that all race-conscious policies and remedies warrant review under strict scrutiny.<sup>230</sup> In fact, this very principle has been the central battleground in affirmative action cases for nearly two decades,<sup>231</sup> with the Court in every instance applying strict scrutiny.<sup>232</sup> Justice Kennedy, however, writes that school districts "are free to devise race-conscious measures to address the problem [of de facto segregation] in a general way" and, if their measures do not classify individual students by race, "it is unlikely [they] would demand strict scrutiny."<sup>233</sup> Thus, for the first time in nearly two decades, five Justices sit on the Court who openly agree to exclude certain uses of race from strict scrutiny. The last time the Supreme Court even came close to suggesting as much was in *Metro Broadcasting v. F.C.C.*,<sup>234</sup> which was decided before the Court had first established that strict scrutiny applies even to the government's purportedly benign uses of race.<sup>235</sup>

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accepted Justice Powell's opinion in *Bakke* merely as precedent that controlled the compelling interest question and where the compelling interest was unrelated to societal discrimination. See *Grutter v. Bollinger*, 539 U.S. 306, 387–95 (2003) (Kennedy, J., dissenting). In *Grutter*, he was antagonistic toward the University and questioned the Court's deference toward it. *id.* at 388, whereas in *Parents Involved*, he was willing to defer to the school in several respects, *Parents Involved*, 551 U.S. at \_\_\_, 127 S. Ct. at 2792 (noting a number of means through which school boards may pursue the goal of diversity).

230. *Parents Involved*, 551 U.S. at \_\_\_, 127 S. Ct. at 2764.

231. *Compare* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 234–35 (1995) (focusing on the neutrality of equal protection and rejecting the notion that affirmative action permitted more leeway), *and* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–95 (1989) (holding that strict scrutiny is applied to any racially based classification regardless of who benefits), *with id.* at 536–39 (Marshall, J., dissenting) (articulating the need to provide the government leeway in remedying past discrimination and inequality).

232. See, e.g., *Grutter*, 539 U.S. at 326; *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Shaw v. Hunt*, 517 U.S. 899, 906–07 (1996); *Adarand*, 515 U.S. at 222; *Croson*, 488 U.S. at 493.

233. *Parents Involved*, 551 U.S. at \_\_\_, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

234. 497 U.S. 547 (1990).

235. In *Metro Broadcasting*, the Court only applied intermediate scrutiny, reasoning from precedent that

when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, we are "bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States and to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."



The significance of Kennedy's statement is further demonstrated by the conservative plurality's precise use of language and glaring refusal to address his statement. First, rather than address Kennedy's opinion, the plurality spoke to Justice Breyer's dissent, writing:

"all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny." . . . Justice Breyer nonetheless relies on the good intentions and motives of the school districts, stating that he has found "no case that . . . repudiated this constitutional asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races." We have found many. Our cases clearly reject the argument that motives affect the strict scrutiny analysis.<sup>236</sup>

Yet, Kennedy's indication that he would not apply strict scrutiny in some instances is far more revelatory than Breyer's opinion. Kennedy is the fifth vote holding together the plurality's future holdings, while Breyer is merely reiterating a principle that continues to command only a minority on the Court.

Second, the plurality is careful to use the precise language of "racial classifications" and to avoid using the term "race-conscious remedy" throughout its opinion, thereby further disengaging from Kennedy's point regarding the permissibility of certain race-conscious remedies.<sup>237</sup> In regard to when the use of race is inappropriate, Kennedy's opinion reaches common ground with the plurality only so long as one reads the plurality's references to racial classifications as equivalent to Kennedy's references to *individual* racial classifications. His opinion, however, diverges from the plurality if the question is one regarding race-conscious measures, either individual or general. Kennedy's opinion distinguishes between using "individual racial classifications" as a remedial measure and general "race-conscious measures."<sup>238</sup> The plurality ignores the latter so as to appear facially consistent with the former. Regardless, Kennedy iterated yet another profound and unexpected principle regarding race-conscious remedies that was unnecessary to reach his holding. Moreover, that he was boisterous throughout, and surprisingly unwilling to go as far

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*Id.* at 563 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980)). In *Adarand*, however, the Court overruled this application of intermediate scrutiny. 515 U.S. at 227.

236. *Parents Involved*, 551 U.S. at \_\_\_, 127 S. Ct. at 2764 (first, second, and fourth alterations in the original) (citations omitted).

237. See, e.g., *id.* at \_\_\_, 127 S. Ct. at 2747, 2751–55, 2758–60 (using the phrase "racial classification").

238. See, e.g., *id.* at \_\_\_, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment) (noting that race-conscious measures that do not rely on differential treatment based on individual classifications pose fewer problems).

in creating roadblocks to racial integration as other members of the Court seemed ready to go, gives me hope.<sup>239</sup>

### B. *An Educational Right Beyond and Bigger Than Brown*

Last, hope arises in other unlikely places: state courts and constitutions. Since the Civil War, victims of inequality and injustice have sought refuge in the federal courts.<sup>240</sup> They found few if any protections under state law and feared unwelcoming juries and judges in state courts, even when those state courts were applying federal law.<sup>241</sup> Now, however, these courts are recognizing that children have a state constitutional right to a quality education<sup>242</sup>—which the federal

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239. Without question, Kennedy himself creates roadblocks. He struck down the particular plans in Seattle and Louisville and indicated that henceforth districts could only use race to make individual decisions if they followed procedures analogous to those in *Grutter*. *Id.* at \_\_\_, 127 S. Ct. at 2792–93. Moreover, the general uses of race in drawing attendance zones, for instance, will not prove effective in desegregating these schools. *Id.* at \_\_\_, 127 S. Ct. at 2827–28 (Breyer, J., dissenting). Nonetheless, in keeping with this piece's focus on hope, I need not go into this critique of Kennedy's opinion, but rather merely acknowledge and point to it.

240. *Zwicker v. Koota*, 389 U.S. 241, 245–49 (1967) (detailing the history and purpose of civil rights litigation in federal courts), *rev'd sub nom. Golden v. Zwicker*, 394 U.S. 103 (1969).

241. *See, e.g.,* Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction To Abort State Court Trial*, 113 U. PA. L. REV. 793, 800–05 (1965) (arguing that civil rights claims, even in criminal cases, must be removed to the federal courts because the litigants were subject to extreme bias in the state courts); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 511 (1995) (“General federal question jurisdiction was created in 1875 because of fears about state court hostility to federal claims.”).

242. *See, e.g.,* *Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973) (finding education to be a fundamental right under the state constitution); *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1976) (holding that education is a fundamental interest), *modified*, 569 P.2d 1303 (Cal. 1977); *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977) (holding that education is a fundamental right); *Lewis E. v. Spagnolo*, 679 N.E.2d 831, 835 (Ill. App. Ct. 1997) (finding the Illinois constitution provides for at least a minimally adequate education); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) (finding the right to an adequate education is fundamental); *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) (holding that education is a fundamental right); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997) (holding that a constitutionally adequate public education is a fundamental right); *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997) (finding the right to an education is guaranteed by the state constitution); *Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247, 256 (N.D. 1994) (finding education a fundamental right); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 151 (Tenn. 1993) (finding the state constitution guarantees the right to free public education); *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994) (holding that education is a fundamental right); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 92 (Wash. 1978) (en banc) (finding a right to be provided an education); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (holding education is a fundamental constitutional right); *Buse v. Smith*, 247 N.W.2d 141, 155 (Wis. 1976) (establishing that “the right to equal opportunity for education is a fundamental right”); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 333

courts and U.S. Constitution have denied them.<sup>243</sup> Prior to *Brown*, and even in the years that followed *Brown*, the courts and our national culture did not fully accept a duty to deliver a substantive education to our children, nor did they conceptualize education as a public good that one could demand.<sup>244</sup> In fact, placing substance aside, states did not even enforce the basic requirement that children of all ages attend school on a regular basis until well into the twentieth century.<sup>245</sup>

Operating within this tradition, the Court wrote in *Brown* that "the opportunity of an education . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms."<sup>246</sup> This statement was not mere historical semantics, but rather a carefully crafted recognition that the state need not offer children an education if it did not wish to. Thus, it was only upon gratuitously offering an education that equal protection was implicated. In fact, some members of the Warren Court had considered reaching a decision in favor of desegregating schools, not on equal protection grounds, but by recognizing a fundamental interest in education. Their brethren, however, urged them to refrain.<sup>247</sup> The Justices apparently concluded that such a holding

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(Wyo. 1980) (finding education is a matter of fundamental interest); see also Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 270 (1999) (finding that fifteen states had found that education was a fundamental right under their state constitution); Avidan Y. Cover, Note, *Is "Adequacy" a More "Political Question" Than "Equality?"*: The Effect of Standards-Based Education on Judicial Standards for Education Finance, 11 CORNELL J.L. & PUB. POL'Y 403, 409 (2000) (stating every state constitution has an education clause allowing for the argument that education is a fundamental right).

243. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (holding that no fundamental right to education exists in the Fourteenth Amendment and that the unequal opportunities to obtain education resulting from wealth inequalities between school districts does not violate equal protection).

244. See EDUCATIONAL POLICY AND THE LAW 1-3 (Mark G. Yudof et al. eds., 4th ed. 2002) (discussing the evolution of Americans' attitudes toward public schooling).

245. See *id.* at 13 ("[C]ompulsory education, although legally required, did not immediately become social fact.").

246. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

247. Hans J. Hacker, *The Neutrality Principle: The Hidden Yet Powerful Legal Axiom at Work in Brown Versus Board of Education*, 8 BERKELEY J. AFR.-AM. L. & POL'Y 5, 46-47 (2006) (discussing the negotiations regarding varying opinion drafts in *Brown* and *Bolling v. Sharpe*, 347 U.S. 497 (1954)); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 34-50 (1979) (same); see also WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 56-59 (Jack M. Balkin ed., 2001) (detailing consideration of education as a fundamental right in *Brown* and *Bolling*).

would push the law and culture too far.<sup>248</sup> Although the Court avoided the issue in *Brown*, it resurfaced two decades later in *San Antonio Independent School District v. Rodriguez*.<sup>249</sup> In *Rodriguez*, the Court squarely held that education was not a fundamental right and that inequalities in education based on wealth do not violate equal protection.<sup>250</sup> With that decision, the Court effectively eliminated any education equalization litigation in the federal courts<sup>251</sup> and implicitly sanctioned gross inequalities in education.

Yet, on the same exact questions of law, those advocates who met their darkest hours in federal court eventually found their brightest hours in state courts. When the progress of *Brown* began to slow in the federal courts in the 1970s,<sup>252</sup> remedies for educational inequities began to abound in state courts.<sup>253</sup> Most notably, Derrick Bell worked on desegregation cases in the 1960s, but during the 1970s began work on *Serrano v. Priest*,<sup>254</sup> one of the earliest state finance equity cases and a forerunner of later litigation directed at substantively improving school quality and adequacy.<sup>255</sup> Using

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248. See Hutchinson, *supra* note 247, at 47–50 (speculating as to which Justices discouraged Chief Justice Warren from basing the opinion in *Brown* and *Bolling* on a fundamental rights analysis); G. Edward White, *Earl Warren as Jurist*, 67 VA. L. REV. 461, 474 (1981) (noting general uncertainty as to why Chief Justice Warren excised a discussion of education as a fundamental right from his draft of *Bolling*, and suggesting it was to placate Justices Black and Frankfurter).

249. 411 U.S. 1 (1973).

250. *Id.* at 18.

251. See Gregory C. Malhoit & Derek W. Black, *The Power of Small Schools: Achieving Equal Educational Opportunity Through Academic Success and Democratic Citizenship*, 82 NEB. L. REV. 50, 59–60 (2003) (noting that *Rodriguez* “closed the door” to litigation focused on obtaining equal resources for each child in different school districts).

252. See, e.g., *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434–38 (1976) (overturning a district court desegregation order); *Milliken v. Bradley*, 418 U.S. 717, 741–43 (1974) (refusing to extend remedies to entire metropolitan areas because of school district lines), *aff’d*, 433 U.S. 269 (1977); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 200 (1973) (distinguishing between de facto and de jure segregation).

253. See, e.g., *Serrano v. Priest II*, 557 P.2d 929, 957–58 (Cal. 1976) (holding the state’s school financing scheme violated the state’s equal protection clause); *Horton v. Meskill*, 376 A.2d 359, 374–75 (Conn. 1977) (concluding education was a fundamental right under the state constitution and that the state’s school financing scheme violated that right); *Robinson v. Cahill*, 303 A.2d 273, 297–98 (N.J. 1973) (finding that the state’s financing system did not meet the constitutional requirement that the education system be thorough and efficient).

254. 487 P.2d 1241 (Cal. 1971), *superseded by* CAL. CONST. art. I, § 31 (section 31 was added by Proposition 209 in 1996).

255. See Christopher R. Lockard, *In the Wake of Williams v. State: The Past, Present, and Future of Education Finance Litigation in California*, 57 HASTINGS L.J. 385, 387 (2005) (noting Bell’s work on *Serrano*); see also EDUCATIONAL POLICY AND THE LAW, *supra* note 244, at 780–81, 797–804 (discussing the immediate reaction to and continuing legacy of *Serrano*).

substantive measures of educational quality, advocates in these cases have fought to ensure that all children receive an education that prepares them for high school graduation, college, and employment.<sup>256</sup> These cases often focus on socioeconomic status rather than race, but their connection to *Brown* is inherent.<sup>257</sup> They aim to offer disadvantaged children a quality education that is equal to that of more wealthy suburban children—an education that offers them that basic chance “to succeed in life” described in *Brown*.<sup>258</sup>

The connection between *Brown* and state education litigation is best exemplified by Clarendon County, South Carolina. The 1954 *Brown* decision was actually a consolidated case that included plaintiffs from school districts in counties of four different states, one of which was Clarendon County.<sup>259</sup> This community, however, like so many others, never achieved the full promise of *Brown*.<sup>260</sup> The all-black school system abandoned the pursuit of integration as irrelevant long ago, but, continually hobbled by fiscal neglect, insufficiency, and inequality, it eventually turned to the state constitution in recent years seeking educational adequacy.<sup>261</sup> In *Abbeville County School District v. State*,<sup>262</sup> the South Carolina Supreme Court responded by holding that the state constitution mandates that in every school district in the state, “each child . . . receive a minimally adequate education,”<sup>263</sup> and on remand, the trial court found that the state had failed to deliver such an education to poor children.<sup>264</sup>

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256. See generally Malhoit & Black, *supra* note 251, at 62–67 (discussing the effects of published reports containing statistics that American children are receiving a poor education on many measures).

257. See Robert Berne & Leanna Stiefel, *Concepts of School Finance Equity: 1970 to the Present*, reprinted in EDUCATIONAL POLICY AND THE LAW, *supra* note 244, at 767, 770 (“Although the Supreme Court did not tie its findings in the *Brown* case to financing of schools, the subsequent remedies to the findings involved additional financial resources, which quickly affected school finance.”).

258. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

259. See *id.* at 486 n.1 (noting that *Brown* consolidated *Briggs v. Elliot* from Clarendon County, South Carolina).

260. See Ellis Cose, *A Dream Deferred*, NEWSWEEK, May 17, 2004, at 52 (discussing the inequalities that persist in schools today).

261. See *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999) (holding that the South Carolina Constitution requires that “each child . . . receive a minimally adequate education”).

262. 515 S.E.2d 535 (S.C. 1999).

263. *Id.* at 540.

264. Molly A. Hunter, Nat’l Access Network, South Carolina Court Orders Preschool Through Third-Grade Interventions to Counter Poverty, Declares State Education Funding System Unconstitutional (Dec. 30, 2005), <http://www.schoolfunding.info/news/litigation/12-29-05sctrialct.php3>.

Cases such as *Abbeville* accord, in part, with Calmore's advocacy for justice in place, meaning that African Americans should not have to relocate or abandon their communities to obtain a remedy to inequality, but rather inequality should also be remedied by rebuilding and strengthening racially isolated minority communities in the places they currently exist.<sup>265</sup> Educational equity and adequacy cases, likewise, implicitly reject the notion that integration is the "only game in town"<sup>266</sup> that can provide students with a quality educational opportunity and, instead, are premised on repairing the existing educational system in poor and minority neighborhoods.<sup>267</sup> This state litigation finally seeks to deliver a quality education to black children in black schools in black communities, which is what some communities disgruntled with desegregation and skeptical of the insinuation that blacks need to sit next to whites to learn have demanded since the 1970s<sup>268</sup> Thus, the cases reflect Calmore's sentiment that "black America [must] seek spatial equality even in the absence of integration" because integration is too easily abandoned and racially isolated communities are left to wane without options.<sup>269</sup> "Too often integration, as an imperative, has simply displaced an orientation toward spatial equality."<sup>270</sup>

Moreover, cases based on educational adequacy or quality have been met with success in the highest courts of the states. A wave of

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265. See generally Calmore, *Spatial Equality*, *supra* note 159 (discussing the importance of spatial equality and its effects on true integration). Likewise, Calmore builds part of his social justice lawyering course around this concept, requiring students' major writing assignment, the social justice complaint, to make a claim for justice in place or spatial reparations. See Calmore, *Chasing the Wind*, *supra* note 5, at 1201 n.120 (describing the assignment).

266. Calmore, *Racialized Space*, *supra* note 25, at 1246 (noting and criticizing Massey and Denton's positing of integration as "the only game in town" (citing MASSEY & DENTON, *supra* note 5, at 216)).

267. See, e.g., *Abbott by Abbott v. Burke*, 575 A.2d 359, 408 (N.J. 1990) (holding that the current state statute "must be amended, or new legislation passed, so as to assure that poorer urban districts' educational funding is substantially equal to that of property-rich districts"); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 328–29 (N.Y. 2003) (asking the state to improve the quality of education for children in the predominantly minority public schools); *Abbeville*, 515 S.E.2d at 538 (asking the state to increase funding to "less wealthy" schools to provide an adequate education).

268. See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482–93, 505–15 (1975) (discussing the conflict between civil rights attorneys who seek to pursue the strategy of school integration with the community interest in obtaining an improved education, particularly in all-black school districts).

269. Calmore, *Spatial Equality*, *supra* note 159, at 1492; see also Calmore, *Racialized Space*, *supra* note 25, at 1246 (critiquing the rejection of policies to "build and strengthen indigenous social and political institutions from within the ghetto").

270. Calmore, *Spatial Equality*, *supra* note 159, at 1492.

litigation has swept the nation over the last two decades, demonstrating the deprivations, inadequacies, and simply low quality of education that many poor, minority, and rural children receive.<sup>271</sup> State courts, for instance, have regularly responded by holding that their state constitutions guarantee every child in the state a “sound basic education,” requiring substantive components which include:

(1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student’s community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.<sup>272</sup>

The most ironic case may be from Connecticut, where the state’s supreme court recognized a qualitative right to education, but also found that “the existence of extreme racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity and requires the state to take further remedial measures.”<sup>273</sup> This duty exists regardless of whether the

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271. See Malhoit & Black, *supra* note 251, at 58–67 (recounting the waves of state education litigation). James Ryan, however, has found that suits brought on behalf of minority schools may be less successful than those brought on behalf of rural white schools, presumably because of the continuing influence of race in our country. See generally James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432 (1999).

272. Leandro v. State, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (citation omitted). Several other courts have adopted the exact same or very similar requirements. See, e.g., Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212–13 (Ky. 1989) (setting forth a list of nine required characteristics of an “efficient” school); *Campaign for Fiscal Equity*, 801 N.E.2d at 332 (reinstating the trial court’s holding that students were entitled to a sound basic education); *Abbeyville*, 515 S.E.2d at 540 (requiring three components for a school to provide an “adequate” education); Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979) (listing eight elements of an “efficient” school system).

273. Sheff v. O’Neill, 678 A.2d 1267, 1281 (Conn. 1996). Plaintiffs returned to the courts in 2005 in a strictly adequacy-based suit in *Connecticut Coalition for Justice in Education Funding, Inc. (“CCJEF”) v. Rell*. See CCJEF v. Rell, No. HHD-CV-05-4019406-S (Conn. Sup. Ct. filed Apr. 24, 2007); see also Thomas Kaplan, *Group Lobbies for CT Schools*, YALE DAILY NEWS, Feb. 22, 2007, available at <http://www.yaledailynews.com/articles/view/20067>.

segregation or isolation is de facto or de jure.<sup>274</sup> Thus, the state constitution dramatically expanded desegregation rights beyond those found in the federal courts.

Finally, some states have even enacted proactive legislation. For instance, after being sued and successfully defending an adequacy case,<sup>275</sup> the State of Florida amended its constitution to strengthen the right to an education.<sup>276</sup> The constitution previously required the state to deliver an “adequate” education, but now requires the state to provide students with a “high quality system of free public schools that allows students to obtain a high quality education.”<sup>277</sup>

However, because the educational clauses and decisions are so sweeping, extend substantive rights, and place heavy financial burdens on states, obtaining a quick and full remedy has been the most difficult aspect of the litigation.<sup>278</sup> Some plaintiffs fight with their legislatures for years for the additional resources necessary to remedy the demonstrated deficiencies, and many still fall short of a full remedy.<sup>279</sup> With that said, this litigation has nonetheless

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274. *Sheff*, 678 A.2d at 1280–82. Justice Breyer, however, points out that the Court’s recent decision in *Seattle* threatens to overturn decisions and actions such as those in Connecticut. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. \_\_\_, \_\_\_, 127 S. Ct. 2738, 2833 (2007) (Breyer, J., dissenting).

275. *Coal. for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles*, 680 So.2d 400, 408 (Fla. 1996).

276. FLA. CONST. art. IX, § 1.

277. *Id.*

278. Malhoit & Black, *supra* note 251, at 67–72 (discussing the varying approaches courts have taken in implementing remedies). In fact, some state legislatures have proved so recalcitrant that the courts effectively gave up on the cases and, after indicating a remedy was required, adjudged the cases nonjusticiable based on separation of powers. See, e.g., *Ex parte James*, 836 So.2d 813, 819 (Ala. 2002) (“[W]e now recognize that any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature.”); *State ex rel. State v. Lewis*, 789 N.E.2d 195, 202 (Ohio 2003) (eliminating jurisdiction in every court in the state to hear further school funding claims because the court believed separation of powers required it).

279. See Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 552 (1992) (stating that in spite of educational reform, the “crisis has persisted with an unnerving intractability” (footnote omitted)); Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984–1995*, 26 LAW & SOC. INQUIRY 631, 670–71 (2001) (questioning the effectiveness of the remedies and identifying only moderate gains in educational outcomes); Jonathan R. Werner, *No Knight in Shining Armor: Why Courts Alone, Absent Public Engagement, Could Not Achieve Successful Public School Finance Reform in West Virginia*, 35 COLUM. J.L. & SOC. PROBS. 61, 62 (2002) (noting that West Virginia has yet to succeed in its reform efforts); Julie Zwibelman, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 HARV. C.R.-C.L. L. REV. 527, 532, 537–40



completely changed the way school districts are funded.<sup>280</sup> In response to these cases, States have added hundreds of millions of dollars to their educational budgets,<sup>281</sup> increased teacher salaries,<sup>282</sup> built new schools,<sup>283</sup> and added meaningful educational programs such as preschool education for at-risk students.<sup>284</sup> In Arkansas, for instance, the State “committed \$846 million for facilities . . . and increased operating aid by over \$400 million . . . in the 2003–05 biennium” alone.<sup>285</sup> Likewise, in response to adequacy litigation, New

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(2001) (stating courts are often reluctant to impose stiff remedies in these cases, using New York, Ohio, and Tennessee as examples).

280. See, e.g., EDUCATIONAL POLICY AND THE LAW, *supra* note 244, at 800–03 (describing the changes to Texas’s school financing scheme that occurred during the course of and in response to four decisions in the Supreme Court of Texas). In fact, Texas’s financing scheme has since returned to the Supreme Court of Texas. See *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 757 (Tex. 2005) (“Once again this court is called upon to determine whether the funding of Texas public schools violates the Texas Constitution.” (footnote omitted)); *W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 562–63 (Tex. 2003) (“This is the fifth in a series of cases to come before us challenging the constitutionality of the Texas public school finance system.”).

281. See, e.g., CINDY HEINE, KENTUCKY SCHOOL UPDATES: A PARENT/CITIZEN GUIDE FOR 2002–04, at 76 (2002), available at <http://www.prichardcommittee.org/pubs/updates.pdf> (tracking an increase in “overall state funding for education . . . from \$1.6 billion in 1989–90 prior to the court ruling to \$2.1 billion in 1991–92 and \$2.9 billion in 2001–02”); Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 919, 921 (1998) (identifying a \$246 million increase to the New Jersey education budget one year and a later decision that would require another \$312 million); Matthew Samberg, Nat’l Access Network, Litigation Update: Constitution Satisfied in Arkansas, Mixed Ruling in Alaska, Suit Dropped in Kentucky, New Hampshire Meets Court Deadline (July 3, 2007), <http://www.schoolfunding.info/news/litigation/7-3-07litupdate.php3> (noting a \$400 million increase in Arkansas’s school budget); see also Todd Silberman, *Schools’ Spending Gap Grows*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 22, 2005, at B1 (reporting on North Carolina’s creation of a \$25 million fund to supplement the educational budgets of “low wealth” school districts).

282. See, e.g., *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232, 237 (Tenn. 2002) (indicating that in response to its previous decision, the legislature enacted a “plan [that] provided for state and local funds ‘in support of teachers’ salary equity’ to increase teacher compensation in school districts averaging less than \$28,094 per year per instructional position.”); HEINE, *supra* note 281, at 76 (calculating an increase in teacher salaries in Kentucky and a rise in national ranking).

283. See *Pendleton Citizens for Cmty. Sch. v. Marockie*, 507 S.E.2d 673, 676 n.2 (W.Va. 1998) (noting that the state’s new facility construction fund was created in response to previous school finance litigation); Tractenberg, *supra* note 281, at 921 (finding that the Supreme Court of New Jersey’s decision would require anywhere from \$1.8 billion to \$2.8 billion in new funds for school facilities in the state).

284. *Abbott by Abbott v. Burke*, 710 A.2d 450, 464 (N.J. 1998); see also *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 642, 599 S.E.2d 365, 393 (2004) (reviewing the trial court’s order of preschool education, but finding that such an order would only be appropriate after the state had itself first failed to “live up to its constitutional duties”).

285. Access Quality Education: Arkansas Litigation, [http://www.schoolfunding.info/states/ar/lit\\_ar.php3](http://www.schoolfunding.info/states/ar/lit_ar.php3) (last visited Feb. 25, 2008).

Jersey became a leader in offering preschool education to at-risk students and in 2002, for instance, the governor boosted funding for preschool education by \$150 million.<sup>286</sup> Such progress simply cannot be ignored or understated.

These efforts, decisions, and remedies likewise exemplify a cultural shift in the way society understands its obligation to its children.<sup>287</sup> These educational improvements are not simply the work of leftist advocates, liberal judges, or Democratic politicians. Conservative attorneys, attorneys at both small and major law firms, and ad hoc coalitions, who simply formed themselves out of conscience, have also brought these cases.<sup>288</sup> Judges from the conservative side of the ideological spectrum have issued rulings favorable to plaintiffs.<sup>289</sup> And Republican governors have settled these cases and agreed to provide huge influxes of resources.<sup>290</sup> Such

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286. Education Law Center, History of *Abbott*: Progress Toward Equal Educational Opportunity for Urban Students in New Jersey, <http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottHistory.htm> (last visited Feb. 25, 2008). After Arkansas had gone through funding litigation, the National Access Network concluded: "Arkansas has also become a leader in providing preschool opportunities to its 'at-risk' children." Access Quality Education: Arkansas Litigation, *supra* note 285.

287. See Calmore, *Warren Court Legacy*, *supra* note 17, at 1098–100.

288. The plaintiffs in Tennessee's educational finance case were represented by Lewis R. Donelson, a partner at one of the state's largest firms, Heiskell, Donelson, Bearman, Adams, Williams & Kirsch. *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232 (Tenn. 2002) (listing Donelson as counsel). An example of one such coalition is The Consortium for Adequate School Funding in Georgia. Approximately fifty school systems have joined the coalition. It is in current litigation against the State. See Consortium for Adequate School Funding in Georgia: About CASFG, <http://www.casfg.org/about> (last visited Feb. 10, 2008). Likewise, in New Hampshire,

it was not a group of radicals, but patriarchs of the state's legal establishment who joined Tobin and lawyers Arpiar Saunders and John Garvey in asking the high court to find that the state was shirking its duty to educate its children while imposing "confiscatory" property tax rates on some citizens and not on others.

Ralph Jimenez, *Property Tax Key in School District Suit*, BOSTON GLOBE, Sept. 19, 1993, at NH7.

289. It was a Republican trial court judge who ordered the State of North Carolina to devise plans to remedy inadequate educational opportunities in certain school districts and who finally ordered the state to provide pre-kindergarten instruction for at-risk students. Jack Betts, *Lawmakers Not Dancing, So Governor Is Cutting In: Easley Steps Up with Funds To Meet Judge Manning's Education Mandate*, CHARLOTTE OBSERVER, Oct. 10, 2004, at 1P, available at 2004 WLNR 3282456. The Supreme Court of North Carolina, however, later held that it was in the state's prerogative to first decide whether pre-kindergarten or some other program was the most effective remedy. *Hoke County*, 358 N.C. at 642–45, 599 S.E.2d at 393–95.

290. See, e.g., *Arkansas Approves New Aid for Schools*, EDUC. WEEK, Apr. 19, 2006, at 24 (indicating Governor Mike Huckabee had approved an additional \$132.5 million in funding to schools in an attempt to resolve the lawsuit against the State); Linda Jacobson, *California Bill Proposes \$2.9 Billion in Aid for 600 Schools*, EDUC. WEEK, Sept. 6, 2006, at

widespread support indicates we have moved from a society that in 1954 may or may not have “undertaken to provide” education to one that believes it is society’s responsibility not only to provide it, but to make it meaningful.<sup>291</sup> Notwithstanding the shortcomings one could point out, that gives me hope.

I will not further elaborate, but our cause for hope does not end here. We need not look far to find hope when a conservative Supreme Court overturns its precedent that homosexuals do not have the right to engage in private consensual behavior,<sup>292</sup> defies the same President that it placed in power<sup>293</sup> by holding that he could not do with other humans—terrorist or not—as he pleased,<sup>294</sup> and surprisingly reaffirms the power of the federal government and courts to regulate and punish the pollution of the environment,<sup>295</sup> sexual harassment,<sup>296</sup> and retaliation against employees who would oppose

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32 (discussing the governor’s settlement of a school finance case for \$2.9 billion in additional funding and the legislative bill implementing it).

291. *Compare* *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (regardless of the importance of education, only requiring a remedy insofar as the state voluntarily chose to provide an education), *with* *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 327, 331–32 (N.Y. 2003) (beginning “with a unanimous recognition of the importance of education to our democracy” and finding that delivering the skills necessary to vote, work, serve on juries, and be successful throughout high school is the constitutional responsibility of the state). *See generally* Michael A. Rebell, *Education Adequacy, Democracy, and the Courts*, in *ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY* 239 (Timothy Ready et al. eds., 2002) (finding “there is widespread agreement that an adequate system of education is one that ‘ensures that a child is equipped to participate in political affairs’” (quoting Deborah A. Verstegen & Terry Whitney, *From Courthouses to Schoolhouses: Emerging Judicial Theories of Adequacy and Equity*, 11 *EDUC. POL’Y* 330, 331 (1997))).

292. *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986)). The Court in *Bowers* responded to Hardwick’s claim that the State could not criminalize the private consensual homosexual conduct by stating, “[i]t is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.” *Bowers*, 478 U.S. at 192. Reversing that holding, the Court wrote in *Lawrence* that “[t]he petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.” *Lawrence*, 539 U.S. at 578. Likewise, the Massachusetts Supreme Judicial Court issued a landmark decision holding that homosexuals had the same right as heterosexuals to be married in the state. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

293. Some argue that *Bush v. Gore*, 531 U.S. 98 (2000), was a blatant political act by a majority of the Supreme Court to preserve a victory for the candidate that they personally wanted to see as President. *See, e.g.*, Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *VA. L. REV.* 1045, 1045–66 (2001).

294. *See* *Hamdan v. Rumsfeld*, 548 U.S. \_\_\_, 126 S. Ct. 2749 (2006).

295. *See* *Massachusetts v. E.P.A.*, 549 U.S. \_\_\_, 127 S. Ct. 1438 (2007).

296. *See* *Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629 (1999).

discrimination.<sup>297</sup> Thus, we, like our students, must not despair, but must unearth hope to make it visible.

### C. *Living a Life of Hope, Growth, and Constancy*

This Article will now return squarely to where it began—with John Calmore—and find hope not only in the law but in him as a person. His career as a practitioner, teacher, and scholar exemplifies an interesting evolution that should inspire us. His body of scholarship is not merely a reflection of his ideas, but also a reflection of him personally. Unlike some, he eschewed the tendency to become more inflexible in his position or more pessimistic with age.<sup>298</sup> Instead, he evolved, while staying true to his core self. In a recent article, John Calmore referred to himself as a “marginal man,” meaning one defined by “‘the break-up and mixing of cultures attendant upon migration and the great cultural revolutions’ ”<sup>299</sup> and one whom “‘fate has condemned to live in two societies and in two, not merely different but antagonistic cultures.’ ”<sup>300</sup> Yet, I cannot see him as anything less than someone who has transcended our polarized, racialized, and marginalized society to eventually become an “everyman,”<sup>301</sup> focused on justice, inclusion, and comity for and with all. In his work, I see someone who used his ever-increasing faith in humanity to cultivate themes that incorporate people, not divide or assimilate them. Thus, he attempted to build an identity and place for everyone.

Calmore’s earlier and most prominent piece on critical race theory starts and ends from the smallest point of departure, fighting

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297. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). For a discussion of how the Court’s decision in *Jackson* potentially expands plaintiffs’ private causes of action in discrimination cases, see generally Derek W. Black, *Mysteriously Reappearing Cause of Action*, *supra* note 150.

298. One oft-cited quote, the source of which is unverified, asserts: “If you’re not liberal when you’re 25, you have no heart. If you’re not conservative by the time you’re 35, you have no brain.” See The Churchill Centre, *Quotes Falsely Attributed to Him*, <http://www.winstonchurchill.org/i4a/pages/index.cfm?pageid=112> (last visited Feb. 25, 2008) (indicating the false attribution to Winston Churchill).

299. Calmore, *Whiteness as Audition*, *supra* note 32, at 112–13 (quoting Everett C. Hughes, *Social Change and Status Protest: An Essay on the Marginal Man*, in *RACE, CLASS, AND POWER* 290, 290 (Raymond W. Mack ed., 1963)).

300. Calmore, *Whiteness as Audition*, *supra* note 32, at 113 (quoting Robert Park, *Introduction to EVERETT V. STONEQUIST, THE MARGINAL MAN: A STUDY IN PERSONALITY AND CULTURE CONFLICT*, at vii, xv (1961)).

301. The term derives from a sixteenth-century English morality play. See generally *EVERYMAN AND MEDIEVAL MIRACLE PLAYS* (A.C. Cawley ed., 1999). The term in common usage now means “an ordinary person representative of humanity.” *WEBSTER’S II NEW COLLEGE DICTIONARY* 389 (3d ed. 2005).

only for the respect to stand in opposition to and independent of dominant cultural norms, and to do so as an African American scholar speaking from an African American perspective.<sup>302</sup> He asserted a race-conscious perspective that was authentic, representative, and critical.<sup>303</sup> No end beyond that was necessarily contemplated. He identified the "nation's pressing challenge,"<sup>304</sup> but posited no collaborative, interracial, or mainstream project that could meet it. As alluded to earlier, he only supposed that hope might lie in the birth of new generations less entangled with our biases.<sup>305</sup> In some of his other early pieces, he likewise explicated disappointments that reaffirmed his prognostication.<sup>306</sup> If anything, his understanding of injustice actually grew in scope, and the reality of its scope loomed larger over the prospect for progress. For instance, his writing identified racial oppression as intersecting with place and poverty, leaving many inner-city minorities not only exploited, but also "optionless."<sup>307</sup> Thus, tackling discrimination alone could not resolve the problem.

However, a change in place in the second half of the 1990s also seemingly coincided with a further broadening of his scholarship. Calmore came to the University of North Carolina School of Law in the fall of 1997. He continued to address issues of race and inner-city poverty, but within a few years his scholarship began to focus on the wider category of social justice, which was becoming explicitly memorialized in his textbook and class in social justice lawyering.<sup>308</sup> In some respects, this was also a response to a change in his reality, as he had come from Los Angeles, a region that is more multicultural and spatially closer to the issues of inner-city poverty, to the college town of Chapel Hill, which, although liberal in thought, is not as

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302. See Calmore, *Critical Race Theory*, *supra* note 19, at 2137 (arguing that critical race theory "voic[es] . . . dissent from many of the law's underlying assumptions" and is grounded "in a sense of reality that reflects our distinctive experiences as people of color").

303. *Id.*

304. *Id.* at 2229.

305. *Id.*; see also *supra* note 22 (discussing "cohort replacement").

306. See, e.g., Calmore, *Spatial Equality*, *supra* note 159, at 1490 (noting that until society reckons with racism, "denial and neglect will continue to stand in the way of establishing a coherent urban policy that addresses not only matters of housing and community development, but also the larger issues of social, economic, and racial justice. For now, the nation continues to run scared and time continues to run out.").

307. Calmore, *Call to Context*, *supra* note 5, at 1938; see also Calmore, *Spatial Equality*, *supra* note 159, at 1492 (noting that in many cities, social stratification along race lines has been "spacialized").

308. See generally MAHONEY, CALMORE & WILDMAN, *supra* note 6 (providing a curriculum and mode of approaching the law for those who will practice social justice law).

multicultural. In short, he came to a place where he was teaching predominantly white students, many of whom had grown up in rural settings,<sup>309</sup> which I suspect challenged him to begin building new bridges and methods himself.

Regardless of the cause, a larger John Calmore emerged in the second half of his career, still race-conscious, but more humanist than ever before. His work responded to the new community and students that surrounded him. In a piece that was published during his move from Loyola to Chapel Hill, his interest in “strong democratic talk” clearly foreshadowed this evolution.<sup>310</sup> He writes that strong democratic talk is “conversation that helps us to discover common bonds” and “allows the parties to explore mutuality and reformulate views.”<sup>311</sup> Employing this as pedagogy, he impresses on his students that “we all must learn much more about ourselves and everyone else. [We must a]void collective self-centeredness (‘racialism’ some might say).”<sup>312</sup> Relying on “what brings people together, not what divides us,”<sup>313</sup> he believes we can “stimulate a little rational conversation among groups who generally look, walk, and talk past each other.”<sup>314</sup> Thus, after spending years hewing a space for critical race theory and African American voices, his work also began hewing a space for all voices and developing a sense of justice that includes and spans beyond race. In essence, asserting his African American voice entailed asserting his human voice.

His humanist and broader perspective became explicit in the years following his arrival in North Carolina. In 2002, he wrote: “I have learned from Charles Lawrence and other progressives, ‘Transformative politics requires looking beyond winning or losing the particular legal dispute or political battle and asking how one’s actions serve to reinforce people’s awareness of our interdependence and mutual responsibility as members of the human family.’”<sup>315</sup> His

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309. Seventy-two percent of the entering class of 2007 at the UNC School of Law was from the State of North Carolina and came from forty-seven different counties in the state. UNC School of Law, Student Body Profile, <http://www.law.unc.edu/pastudents/experience/studentprofile.aspx> (last visited Feb. 25, 2008). The “minority presence” for that class was thirty percent. *Id.*

310. Calmore, *Close Encounters*, *supra* note 7, at 906.

311. *Id.*

312. *Id.* at 907 (quoting CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xxiv (Kimberlé Crenshaw et al. eds., 1995)).

313. *Id.* at 926.

314. *Id.* at 907.

315. Calmore, *Warren Court Legacy*, *supra* note 17, at 1133–34 (quoting Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 965 (2001)).

vision of justice and change increasingly became dependent on a connection to "human dignity,"<sup>316</sup> in which we all obviously can participate. Moreover, the importance of that connection was so strong for him that he ironically spoke as though it could simply wipe the slate of injustice clean, or at least create a level playing field in the fight for justice. He posited that a humane community can put indifference and fear aside, start over again, and "reimagine, reinvent, and reestablish America."<sup>317</sup>

This humanist approach also produced an evolution in his thinking as to the role whites will play in racial justice. Again, his early work is primarily focused on the African American scholar, an African American oppositional voice, and white racism.<sup>318</sup> The concern with those subjects never fades, but his later scholarship more clearly creates a space for whites to also be part of the oppositional voice to both general oppression and white racism. He writes: "Whites may assume responsibility without blame for the nation's racial predicament and, to the degree injustice is acknowledged, develop a non-racist sensibility and an anti-racist orientation."<sup>319</sup> Then in 2002, he directly calls on whites "to engage in the serious work of advancing a cultural shift that facilitates their movement from racial ambivalence to racial comity and a sincere embrace of our common humanity."<sup>320</sup> And rather than sit idly by, he engages in seeing whites begin this movement and writes that "[t]he hope for a better day lies in trying to move whites from ambivalence to comity."<sup>321</sup> Similarly, in North Carolina, re-socializing law students becomes a matter of re-socializing predominantly white law students.<sup>322</sup>

Moreover, although asserting opposition to whiteness as currently constructed, he begins articulating a progressive color consciousness in which whites participate. In a piece on whiteness, he

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316. *Id.* at 1134.

317. *Id.* The key to overcoming our biases and discriminatory urges is to view others "as the human beings that they really are, as members of society who deserve a fair shot at living their lives as part of the larger humanity within this nation." *Id.* at 1138.

318. See generally Calmore, *Critical Race Theory*, *supra* note 19 (arguing for the legitimization of African American oppositional scholarship through Critical Race Theory); Calmore, *Spatial Equality*, *supra* note 159 (showing Calmore's early work and its focus on finding a place for an African American perspective amidst largely white paradigms).

319. Calmore, *Close Encounters*, *supra* note 7, at 919.

320. Calmore, *Warren Court Legacy*, *supra* note 17, at 1103.

321. *Id.* at 1131.

322. See *supra* note 309 and accompanying text (summarizing the cultural and racial make-up of UNC law school classes).

calls on whites to begin incorporating African Americans into the national identity and norms rather than requiring African Americans to assimilate with the white/national identity and norms.<sup>323</sup> He cautions elsewhere, "I firmly believe that the multicultural future must not alienate, but, rather, incorporate Whites."<sup>324</sup> In essence, his vision for a new national identity is one of multiple, equal, non-competitive identities. All would, in effect, perform their racialized identity.<sup>325</sup> If whiteness could become enough of a color, it would allow whites to likewise be included in "a multicultural nation 'as people of color.'"<sup>326</sup> They too could "be subject to audition, an audition of humanity that connects us all."<sup>327</sup> In the end, Calmore's motivations seem to be premised on the notion that a rising tide will lift all boats.<sup>328</sup>

The above, however, is not to suggest that Calmore changed. Instead, he evolved while remaining true to his earlier self. Throughout, his writing was never conciliatory, flinching, or oblivious to any injustice; it remained consistently oppositional. It only broadened its scope in terms of who might be part of the opposition, how they might stand in opposition, and what they might oppose. Likewise, he never changed his core race consciousness, nor did his focus on broader categories of social justice dilute it. He challenged the universality of white experience in both his earliest and most recent pieces.<sup>329</sup>

In any number of respects, we see him repeating those same basic, yet insightful, concepts about race. In 1992, he conceives of whiteness as "a performance" that African Americans are asked to act out and a cultural construct against which they are measured.<sup>330</sup>

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323. See Calmore, *Whiteness as Audition*, *supra* note 32, at 127–28.

324. Calmore, *Close Encounters*, *supra* note 7, at 919.

325. See Calmore, *Whiteness as Audition*, *supra* note 32, at 128.

326. Calmore, *Close Encounters*, *supra* note 7, at 920 (quoting a student's reflection piece regarding a discussion in class).

327. Calmore, *Whiteness as Audition*, *supra* note 32, at 128.

328. Although the phrase "a rising tide lifts all boats" may have originated elsewhere, President John F. Kennedy popularized it in one of his later speeches. President John F. Kennedy, Remarks in Heber Springs, Arkansas, at the Dedication of Greers Ferry Dam (Oct. 3, 1963), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=9455> (transcript).

329. Compare Calmore, *Critical Race Theory*, *supra* note 19, at 2160–61 (characterizing critical race theory as "challenging the universality of white experience/judgment as the authoritative standard"), with Calmore, *Whiteness as Audition*, *supra* note 32, at 100–04 (arguing that the demands that "whiteness" makes on blacks—namely that blacks "perform" their race—are not "benign, but" an exercise of "group-based white supremacy, dominance, and power").

330. See Calmore, *Critical Race Theory*, *supra* note 19, at 2219.



Twelve years later, that concept becomes the thesis of a full article.<sup>331</sup> Similarly, early on, he critiques racial assimilation as an attempt by African Americans to run away from themselves and their communities.<sup>332</sup> That notion continues to fuel his scholarship over the next decade, as he advocates for spatial equality/justice-in-place and critiques integration and deconcentration of the inner-city poor (insofar as many assume they are the only option for progress).<sup>333</sup> Both the early critique of assimilation and the later call for spatial equality are premised on the dignity and value of African American communities and norms, which should not be run from or destroyed, but rather returned to and rebuilt.

Finally, although this piece has made much of Calmore's later focus on humanity, his sense of its power to redeem us was always present, just not as pronounced. Fifteen years ago, he quietly footnoted Maya Angelou and asked us to remember:

The fact that people became heroes and sheroes can be credited to their ability to identify and empathize with "the other." These men and women . . . [m]ake the decision to be conscious of the other—the homeless and the helpless, the downtrodden and oppressed. Heroism has nothing to do with skin color or social status.<sup>334</sup>

This suggests his later work did not reach a newfound faith in humanity, but simply a bolder one. The more he changed, the more he stayed the same, and by becoming an advocate for broader claims, he became a better advocate for those who started and remained closest to his heart. Thus, in closing, John Calmore gives me hope. He gives me hope that we can see past the immediacy of our reality,

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331. Calmore, *Whiteness as Audition*, *supra* note 32, at 102 (noting that "[t]his [current] essay is an extension of that earlier observation") (referring to Calmore, *Critical Race Theory*, *supra* note 19, at 2160).

332. See Calmore, *Critical Race Theory*, *supra* note 19, at 2226.

333. See, e.g., MAHONEY, CALMORE & WILDMAN, *supra* note 6, at 839–930 (including a chapter on redressing spatial inequality and injustice in housing); John O. Calmore, *Racism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1073 (1998) (finding that integration policy has failed and we "must look to [black] communities within as sites and opportunities, resisting their spatial oppression and overcoming, in place, the disabling, opportunity-denying circumstances that are marked by the tripartite intersection of race, class, and space"); Calmore, *Spatial Equality*, *supra* note 159, at 1488 (cautioning against over-reliance on integration and instead "demand[ing], as a matter of justice, that the enrichment program finally receive the policy attention and financial commitment necessary to compensate for decades of neglect and active exploitation" of black communities).

334. Calmore, *Critical Race Theory*, *supra* note 19, at 2229 n.388 (quoting Maya Angelou, *An American Odyssey: From Martin Luther King to Rodney King*, 8 NEW PERSP. Q., Summer 1991, at 36, 37).

envision a brighter future, and continue the work that will bring that future to fruition.

### CONCLUSION

When I spoke with John Calmore about the focus of this piece, he responded with approval coupled with what seemed to be a tinge of surprise. He remarked that he would, in fact, like others to remember his work for its hope, but seemed to not have foreseen that I would concentrate on it. When first contemplating the theme, it struck me as somewhat surprising as well because I remember often feeling during his classes that he was unsettled by despair, depression, or disgust over the current state of affairs. That I might instinctively associate him with hope, therefore, seemed somewhat quizzical. My own experience in teaching social justice lawyering and realizing that I also appeared unsettled and depressed to my students only added to the oddity of my choice of topic. Upon further reflection, however, I surmised that my negative emotions and outward appearance were primarily a reflection of my students' depression over and disappointment in the world and law—which we were labeling as unjust, intractable at times, and worsening—rather than a reflection of my inward feelings. I had hope for them and the future. The problem was that my students appeared to be shaken by what they learned and losing hope. It was that fact that frustrated and depressed me; the very people whom I wanted to share my hope did not. Speaking with Calmore and reviewing his work years later, I realize that he must have felt the same and that I misinterpreted his frustration with us as a lack of hope.

Yet my experiences as a student and professor reveal that having hope within us is not enough; we must share it. Interspersing our critiques with intermittent caveats about progress is not enough; we must emphasize its potential. Leaving students to find their own hope is not enough; we must help them. Many of our defeats and disappointments are far too indwelled in our spirits and conversations, particularly among the students who self-select our classes and already come carrying a good dose of indignation toward the prevalence of injustice. While we must press our students toward a more sophisticated understanding of injustice, we must not allow sophistication to inadvertently overwhelm inspiration. We do that by helping them retain the emotion that brought them to the class and law school in the first place: excitement and hope that the law, and they as lawyers, really can help cure at least a small portion of the world's ills. The tendency of law school curriculum and culture is to

deprive them of that. Moreover, the steadily rising cost of law school,<sup>335</sup> the declining amount of scholarships and financial aid,<sup>336</sup> and the widening gap between social justice law and law firm (and government) salaries<sup>337</sup> place pressures on students that may be reinforced, rather than counteracted, by the messages we send them.<sup>338</sup> If we do not inspire them, who or what will? If they are not inspired, who will be our social engineers? As I believe that John Calmore, the legacy of *Brown*, and various other surprising markers in our courts reveal, we have much with which to inspire students. We must simply look for it with the same earnest zeal with which we look for injustice.

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335. See, e.g., ABA COMM'N ON LOAN REPAYMENT & FORGIVENESS, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE 9 (2003) ("Despite their deep commitment to ensure access to justice for all citizens, many law school graduates" find that the increasing cost of a legal education "forces them to forego any form of public service."); Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 HOFSTRA L. REV. 879, 886 (2002).

336. See generally MAHONEY, CALMORE & WILDMAN, *supra* note 6, at 25–28 (discussing how the cost of law school and debt affect students' career choices); Robert Robinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 136–37 (2005) (finding the average debt of law school graduates is increasing).

337. See Lewis A. Kornhauser & Richard L. Revez, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 833, 865–74 (1995) (listing legal profession salaries by category); Robinson, *supra* note 336, at 136 & n.168 (discussing the gap).

338. For most, however, the sum total result of these pressures is not that students are depressed or discouraged, but that they simply abandon their choice of social justice lawyering for private practice. Kornhauser & Revez, *supra* note 337, at 833; Marilyn Yarbrough, *Financing Legal Education*, 51 J. LEGAL EDUC. 457, 461 (2001) (concluding that fewer students can afford to take public interest jobs). I fear, however, that many of those students who are forced into private practice or rationalize that practice, rather than freely choose it, will experience rude awakenings and a different type of depression. See Schiltz, *supra* note 10, at 881–88, 895–903 (revealing how unhappy attorneys are, particularly those in large firm practice, and how high salaries are not an antidote to that unhappiness).