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The Future of Civil Rights: A Dialogue

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The Future of Civil Rights: A Dialogue

Part I: Civil Rights Stories in the United States

Editor (John Paul Ryan): The Civil Rights Movement is generally viewed as one of the defining events of the American story between (approximately) 1954 and 1968. In your view, what is the most important civil rights story in the U.S. *after* 1968?

Chai Feldblum (Georgetown University Law Center): There is a *continuing* civil rights story, post-1968, that concerns the same categories with which our civil rights movement was first engaged: race, ethnicity, religion, and gender. While our society has definitely changed a significant amount in all these arenas, achieving substantive equality for many of these groups remains an ongoing challenge.

Without doubt, however, additional groups have entered the civil rights arena since 1968. Moreover, given the (at least, formal) success of civil rights in the original arenas, most of these later groups have adopted the approach of “identity politics” (a phrase I use to be descriptive, not pejorative).

For people with disabilities, the period from 1973 to 1977 was essentially the “1960s.” With little fanfare or attention, Congress passed section 504 of the Reha-

Editor’s Note: Eight social science, humanities, and legal scholars discuss a wide range of perspectives on civil rights. The conversation traverses civil rights stories in the U.S. and abroad since 1968, the relationships between immigration and civil rights, the enforcement of civil rights and the role of the courts, and the impact of September 11 on civil rights in the future. See this dialogue also at www.abanet.org/publiced/focus

bilitation Act of 1973, a provision that prohibits entities receiving federal funds from discriminating against an “otherwise qualified person with a handicap.” As the then-Department of Health, Education and Welfare struggled over a period of four years to develop and issue regulations to implement that section, a new breed of a disability rights group emerged—one that explicitly rejected the “medical” model of disability and instead embraced a “civil rights” model. Over time, various disease-based groups developed an awareness of, and commitment to, civil rights, culminating in a broad-based coalition that supported the Americans with Disabilities Act of 1990.

In the meantime, the sea change for groups advocating civil rights for gay men, lesbians, and bisexuals occurred in 1992. Although a bill to include protection against discrimination based on sexual orientation in existing civil rights laws had been introduced in every Congress since 1974, no serious legislative efforts had been undertaken on those bills. By the fall of 1992, the Leadership Conference on Civil Rights—a broad-based civil rights coalition—endorsed the *concept* of a gay civil rights and established a drafting committee to produce a bill. That bill, the Employment Non-Discrimination Act (ENDA)—introduced in 1994 and in every subsequent Congress—has been steadily gaining co-sponsors and support.

But significant challenges remain. For example, the Supreme Court’s constricted interpretation of the ADA’s definition of “disability” means Congress will have to revisit this area. And the exclusion of protection for transgender individuals from the scope of ENDA raises serious questions of both justice and politics.

John Skrentny (University of California, San Diego/Sociology): I agree with Chai Feldblum that substantive equality remains far off, but I would stress that the Civil Rights Movement had important cultural legacies that shape our politics today. We can see the changed political culture in American domestic politics regarding civil rights. Thus, while it is true that major new initiatives to protect equal rights for disadvantaged groups are not coming as quickly and strongly as they did in the 1964–1975 period, another part of this story is that civil rights *retrenchment* is extremely perilous terrain, politically speaking. For example, although affirmative action is a policy that benefits the most disadvantaged persons in American society (and one might assume the most politically weak), it has been very difficult for Republicans at the national level to do away with it. The Reagan administration tried and failed to end employment-based affirmative action; it had to settle for a quiet de-funding and weakened enforcement of regulations that it did not have the political strength to eliminate. The “revo-

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lutionary” Republicans in the 1995 Congress similarly lost their nerve.

Successes in ending affirmative action have been achieved usually where politicians did not have to risk their reputations; no politician wants to appear racist or sexist in the eyes of civil rights activists or the news media. Thus, the referendum has been a major way to overturn affirmative action. Another form of retrenchment on civil rights has come through the courts.

Where affirmative action or some other civil rights policy has been weakened, and when national politicians do speak about it strongly, we can see another sign of the changed political culture: *they make their arguments based on the interests of the disadvantaged groups*. Politicians say that affirmative action or bilingual education, for example, actually hurts the intended beneficiary. Smart politicians know that any expression of a belief in white or male superiority would be political suicide, and simple invocations of the importance of, say, “states’ rights” without recognition of the importance of the minority groups themselves are almost as disastrous politically. In short, American political culture has changed since the Civil Rights Movement, and we can see it in the choice of political strategies and the failure of attempts at retrenchment.

One major exception involves the rights of gays and lesbians. Thus far, this group has failed to get even the basic, classically liberal “difference-blind” protection that groups based on race, religion, sex, national origin, age, and disability have enjoyed for decades. Gays and lesbians are certainly the victims of discrimination, but except for the most politically progressive places, they remain a group apart from other minorities. Resistance to the rights of gays and lesbians is strong and less disguised, as Clinton’s debacle with gays in the military showed.

Anita Hodgkiss (Lawyers’ Committee for Civil Rights Under Law): I am somewhat uneasy about the enterprise of identifying certain post-1968 events that are the most important civil rights stories. So many of African Americans’ stories either are not told or are told as situated in the world view of whites. The same is true of persons with disabilities, other racial minorities, women, gay and lesbian individuals, and disadvantaged groups generally. It is un-

clear what makes some events more important than others, what it means for an event or series of events to be defining, and from whose perspective.

The Civil Rights Movement is generally viewed as a defining event of the American story between 1954 and 1968, even though the struggle for equal rights has been a defining aspect of African Americans’ story in this country from the beginning of slavery to the present day. For example, *Gomillion v. Lightfoot*, the 1960 Supreme Court case that found the city of Tuskegee’s scheme to draw city boundaries in such a way as to exclude every black person from the city to be unconstitutional, arose from a decades-long struggle over the right of blacks to register and vote in the city. When Mr. Gomillion arrived in Tuskegee, he wanted to register to vote. For many years he and others continued their efforts to achieve that goal. They taught illiterate citizens how to pass the state’s increasingly complex literacy test. When registrars would apply the test inconsistently and contrary to state laws and regulations, they brought a lawsuit. When registrars refused to register blacks, they requested and were provided federal examiners. Once black voters finally began to register in more than nominal numbers, the city unapologetically fought back with the creative idea of simply altering the city boundaries so that no African Americans lived there. This landmark civil rights case was just one step in a continuing process of seeking to make the promise of American democracy a reality. Moreover, barriers to registration and voting by African Americans did not end with the Supreme Court’s decision in 1960. What made the period of 1954–1968 defining was not simply that activity was occurring or that it appeared to be successful.

Within the United States, there seem to be more nominees and no obvious winner for the most important civil rights story. Was it Jessie Jackson’s two campaigns for president? Or the passage of the ADA, the National Voter Registration Act, or the Voting Rights Act Amendments of 1982? Or the precarious survival of *Roe v. Wade*? Should we look to the influence of the Million Man March or the final conviction of police officers on civil rights violations in the beating of Rodney King? Were we more pained by the horrible murder of Robert Byrd or that of Matthew Shepard? Will the rise of the Environmen-

tal Justice movement, the vitality of the anti-globalization movement, or the survival of limited affirmative action ultimately prove to have most advanced civil rights? I think the prize for most important civil rights story after 1968 is not the story of a victory but the story of a near-defeat. We have nearly been defeated by the increasingly subtle and infinitely more resilient forms of institutionalized racism, sexism, and other forms of intolerance and oppression that thrive virtually uncontested throughout America today. That is the important story that must be told.

Margaret Montoya (University of New Mexico School of Law): I do not question the centrality of African Americans in key developments in civil rights history. However, dating the Movement from 1954 to 1968 tends to obfuscate contributions by other racial/ethnic groups. For example, there were important pre-1954 school desegregation cases in California involving Asian American and Mexican/Mexican Americans that are infrequently stud-

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ied. The 1947 Ninth Circuit case, *Westminster School District of Orange County v. Mendez*, which prohibited the *de jure* segregation of Mexican American children in Orange County, California, represented a collaboration among lawyers (including Thurgood Marshall and Robert Carter) and organizations that would reappear in *Brown v. Board of Education*. This history of cooperation and conflict among the racialized communities and other subordinated groups is slowly being explored and becoming better known. To draw upon Anita's analysis, avoiding total defeat in the future will depend on successful coalitions, pooled resources, and collectivized narratives.

I also resist the idea that there could be one civil rights "story" that overshadows (or trumps or subsumes) all others in the post-1968 period. So let me add two more signposts along these various trajectories that others have addressed. I think that affirmative action policies were crucial to the dismantling of the architecture of overt racism. No decision involving affirmative action was more important, in my opinion, than the 1978 Supreme Court decision in *Bakke*, which created momentum for the elite schools, both public and private, to recruit and admit small but significant cohorts of students of color. Ironically, at the time *Bakke* was decided, many of us thought we had "lost." Now we defend it as a high point, given what has followed. The efficacy of affirmative action, in spite of its many constraints, is proven by the energetic efforts of the political right to eliminate it.

The Delano Grape Strikes led by Cesar Chavez and Dolores Huerta that ended in 1970 with the signing of the first labor union (United Farm Workers) contracts with the growers were a series of events that reconfigured the civil rights movement and fueled the Chicana/o Movement among workers, students, and artists. The widespread unfamiliarity of this story among journalists, public policymakers, and the intelligentsia advances the interests of those who now want to collapse Latinos/as into a white ethnic identity. Suffice it to say that the geography, languages, issues, leaders, and tactics of the national Civil Rights Movement expanded as a result of organizing farm workers.

Gloria Browne-Marshall (John Jay College of Criminal Justice): I find it difficult

to narrow the Civil Rights Movement to the time period, 1954 to 1968. It would mean that the struggle began with *Brown v. Board of Education* and ended with the assassination of Martin Luther King, Jr. Africans, excluding prior African explorers, arrived in Jamestown in 1619. Relatively soon after 1619, their "difference" and ability to survive the elements, coupled with their political vulnerability, led a labor-desperate colony to systematically reduce the social, economic, and legal status of Blacks.

Even during those very early days, Blacks fought for their rights under law

*A broad-based
coalition of
civil rights and
health groups
supported the ADA.*

[CHAI FELDBLUM]

and as human beings. All of the battles, large and small, known and unknown, in the courts and in the fields were important. Dred Scott, *Plessy*, the Niagara Movement, Charles Hamilton Houston's legal strategy, anti-lynching demonstrations, Black labor movements, Pan-Africa conferences, Marcus Garvey, race riots, and much more were part of an ongoing civil rights struggle prior to *Brown* that continues today.

I find the most important civil rights story in the U.S. after 1968 to be what Blacks in America take for granted. The expectations in everyday life are very high, compared with life prior to 1968. What was defined as privilege in 1968 is almost commonplace today—e.g., higher education. Colin Powell is secretary of state and Elaine L. Chao is secretary of labor. Every day, Black people are living better than generations past. In spite of the prevalence of racism, all aspects of life for Blacks in America have generally improved as compared with pre-1968. Some areas and lives improved much more than others. But the story is in how much Blacks may now take for granted. This is also the tragedy of the story. So much has been gained that Blacks and other people of color take for granted the sacrifices made by so many

who incurred great hardship over such a long period of time. Past sacrifices were made without ever knowing who would be the future beneficiaries. The civil rights story is an epic, not a chapter.

It took much more than all of the rioting, fear, murder, prayer, lobbying, protest, National Guards, litigation, shame, sacrifice, planning, international pressure, coalition building, and political machinations that took place during those 14 years for change to occur in this country. The benefits taken for granted today will not be sustained without continued hard work and sacrifice. The present level of self-satisfaction, apathy, and stinginess among a great number of Blacks and other people of color who are receiving the benefits of past generations does not bode well for future generations. The important post-1968 story is beautiful and tragic. We arrived and promptly forgot from whence we came.

Tim Borstelmann (Cornell University/History): Within the United States, the struggle for full human equality continued after 1968 and continues today—particularly for gay and lesbian Americans, discrimination against whom remains legitimate in the eyes of tens of millions of their fellow citizens, in a manner sure to be a source of shame to future generations, much like Jim Crow is today. In addition to the important markers along the road that others have rightly emphasized—particularly for the disabled, Latino Americans, Native Americans, and Asian Americans—I would add two more.

The passage of Title IX by Congress in 1972, which required equality in spending for men's and women's sports by educational institutions receiving federal funds, proved a turning point on the road to gender equality. For generations that came of age after Title IX, old assumptions about supposed differences between men and women and how they understood and used their bodies were increasingly unconvincing and irrelevant.

A second important marker on the post-1968 road was the televised mini-series *Roots* in 1977, which was viewed by the largest American audience up to that time. The tale of multigenerational trauma and survival of an African American family resonated not only with black Americans but also with more white Americans than any previous such story. It helped le-

gitimate the experiences of slavery and segregation for the majority of Americans, and it also helped stimulate the renewal of white ethnic consciousness of the late 1970s, with a renewed attention to European immigration in American history—part of the growing identity politics of contemporary American life.

Gloria Browne-Marshall: Another important story in the post-1968 Civil Rights Movement is the quest for reparations for African Americans. It is not a new chapter in civil rights history; a part of the significance of the quest for reparations is its staying power. The issue of reparations brings to the forefront a rarely discussed component of slavery and racism: greed—in particular, the avarice that would lead to enslaved labor in this country, as well as the social, economic, and political benefits derived by most European Americans and others from the continued oppression of Blacks in America. In brief, Blacks were made chattel slaves to benefit the builders of this country. Except for modern employment cases, most civil rights cases sought a remedy in equity. Until only a few years ago, lone voices cried out for reparations (in varying forms, including land and monetary reparations) and were met with ridicule. Now, Harvard law professors, community activists, civil rights attorneys, politicians, and everyday people are part of a “Reparations Movement.”

Part II: Civil Rights Stories Around the Globe

Editor: What would you identify as key civil rights stories around the globe since 1968?

Erik Bleich (Middlebury College/Political Science): If the Civil Rights Movement has been a defining event in American history, it has also had a significant and lasting impact around the world. One broad effect of the U.S. experience has been to highlight the role racial identities can play as political tools to counter discrimination, oppression, and marginalization. For example, the Black Consciousness movement in South Africa shared many characteristics with the Black Power movement in the United States. Moreover, the Black Soul movement in Brazil and Afro-

German activists drew direct inspiration from the U.S. civil rights story. I don’t want to suggest that these groups owe their impetus or direction exclusively to lessons from the United States, but it is true that the Civil Rights Movement helped to inspire and to legitimate action on the basis of race on a number of continents.

In one case, the very laws and policies of a country owe a tremendous amount to those developed in the United States in the 1960s and 1970s to deal with issues of race and racism. When passing a series of Race Relations Acts in 1965, 1968, and

*Civil rights
retrenchment is
perilous terrain
for politicians.*

[JOHN SKRENTNY]

1976, British leaders looked explicitly to the United States (and to Canada) for solutions to what they interpreted as budding civil rights problems of their own. Before all three rounds of major race legislation, British activists, policymakers, and politicians studied the U.S. carefully to learn the latest strategies for dealing with racial tensions. They then incorporated important elements of American laws into their own institutional structures, such as protections against indirect discrimination (inspired by the *Griggs v. Duke Power Company* decision of 1971 against disparate impact discrimination) and provisions allowing for positive action (targeted outreach and special training provisions for ethnic minorities), justified by the growing acceptance of affirmative action in the United States.

Of course, not every country looked to America for civil rights ideas. In fact, French leaders more often than not have vocally rejected the United States model and sometimes have gone so far as to label recognition of identity groups and identity-based claims as the first step on the road to balkanization and apartheid. Nevertheless, the U.S. civil rights movement has had a substantial impact on discourses, politics, and policies in a wide variety of countries beyond its borders.

Margaret Montoya: The international story that I would highlight is the Declaration of Indigenous Peoples developed under the aegis of the United Nations in the early 1990s. Even today, indigenous peoples and nations are largely invisible and inaudible. Throughout the world they are struggling to be recognized, often requiring constitutional changes, as they try to regain their legal identities, lands, languages, and basic human rights. Part of that struggle is to emerge from under the domination of mestiza/o majorities, as in much of Latin America, including the U.S. Southwest.

Anita Hodgkiss: My vote for the most important civil rights story post-1968 in the international arena goes, without hesitation, to the story of the dismantling of apartheid in South Africa. Not only did this spectacular handing over of the reins of power occur with less violence than might be expected, but the South African people set about crafting one of the most civil rights-friendly constitutions anywhere in the world. Certainly, this story is not without its rocky moments, and the implementation and enforcement of constitutional guarantees is still in the early stages. Reminders of the “good old days” of apartheid are all around. There is a clear danger that South Africa will have its own post-Reconstruction era. Despite all of this, it is still the most amazing advance in the cause of civil rights since 1968.

Tim Borstelmann: Anita rightly points us to the destruction of apartheid in South Africa as a crucial piece of the broader international history in which the story of American civil rights struggles belongs. While peoples of color in the United States and around the globe had resisted racial bondage, discrimination, and hierarchy for centuries before 1945, it was in the decades following World War II that the struggle to end legalized racial inequality reached flood tide. Colonialism—mostly European, but also Japanese and American—in Asia, Africa, the Middle East, and the Caribbean was rolled back by varying combinations of force and persuasion. The two great powers of the post-1945 era, the United States and the Soviet Union, touted their anti-colonial heritages and officially supported the new United Nations and its commitment to defending human rights. At the same

time, the Cold War encouraged the governments in Washington and Moscow to demonstrate their support for the “freedom” they each trumpeted. The black freedom struggle in the American South took encouragement from the successes of nonwhite freedom struggles from India to Ghana. By 1968, only southern Africans still lived under official systems of racial inequality. Slowly, painfully, through the liberation of Angola and Mozambique in 1975, the creation of Zimbabwe out of Rhodesia in 1980, the decolonization of Namibia in 1990, and—at last, in 1994—the first color-blind elections in South Africa, the political system of white supremacy finally passed from world history. Its effects still linger, but its legitimacy is gone.

Part III: Immigration and Civil Rights

Editor: Could you discuss some of the ways in which changes in immigration have affected civil rights in the U.S.—in terms of public policy, litigation strategies, and/or scholarly discourse about civil rights?

Angelo Ancheta (Harvard University/Civil Rights Project): Prior to 1965, U.S. immigration laws severely limited migration from Latin America, Asia, and the Pacific based on race and national origin; indeed, this largely continued until 1978. Subsequent changes in the laws have resulted in the enormous growth of Latino and Asian American communities in the United States during the past 30 years. Discrimination against these communities is not new, but demographic shifts accentuate the need to develop civil rights frameworks that expand a strictly black-white racial paradigm. I would suggest three important trends and significant problems for civil rights enforcement.

First, immigrant population growth has generated new forms of discrimination that are not strictly race based. Citizenship-based discrimination, which often has adverse effects on groups such as Latinos and Asian Americans, is poorly addressed constitutionally and statutorily. The “plenary power” doctrine, which grants extraordinary powers to the federal government to regulate immigration, usually trumps equal protection claims designed to protect non-citizens from discrimination. Federal statutes addressing citizen-

ship discrimination are very limited and inadequately enforced. Some attributes of ethnicity especially sensitive to discrimination, such as language (e.g., English-only rules) and accent, have also become more prominent because of immigration. Yet, enforcement mechanisms such as Title VII [the Bilingual Education Act], as well as judicial interpretations of these laws, have not clearly defined the protections against discrimination based upon ethnicity and language.

Second, the growth of new immigrant populations highlights critical differences in how non-black minority groups are

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[TIM BORSTELMANN]

racialized as non-Americans. For groups such as Latinos, Asian Americans, and Arab Americans, discrimination is often based less on notions of racial inferiority than on notions of racial foreignness. Despite having been in the United States for several generations, members of these groups are still treated as if they are foreign-born outsiders. The best historical example is the World War II internment of more than 120,000 Americans of Japanese ancestry, most of whom were American citizens, who were taken from their homes and placed in camps because they were racialized as “enemy aliens” and threats to national security. Campaign finance scandals involving Asian Americans and alleged breaches of national security by Chinese American scientists are more contemporary examples, as is the expansion of discrimination against Arab Americans, who are often racialized as “terrorists” in the post-September 11 environment. When framed as a tension between national security interests (including border integrity) and civil rights interests, “foreigner” discrimination is often unaddressed.

Third, immigrant population growth has generated challenging problems in inter-group—particularly inter-minority—

relations. Coalition building is an essential part of advancing the Civil Rights Movement in the 21st century. But coalition building is difficult in practice, and inter-group tensions can pose serious obstacles. Recall that this year marks the 10th anniversary of the civil unrest and rioting in southern California following the verdict in the Rodney King case. Notwithstanding the media’s sensationalizing of inter-group violence, recent public opinion polls suggest that tension and distrust between various racial and ethnic minority groups remain strong. Competition among minorities—whether it is actual or perceived—poses significant challenges to positive race relations and civil rights enforcement, which still tend to operate under a binary model of white versus non-white. New theories and practices need to be developed to expand the civil rights agenda to address these new developments.

John Skrentny: While I agree with most of what Angelo Ancheta has said, I do take issue with several points. First, my understanding is that there were no quotas on immigration from the western hemisphere, including all Latin American countries, before 1965; in fact, an overall western hemisphere quota was first established in 1965. This new quota was part of a deal to get support for the reform from members of Congress from the South, according to papers I have studied in the Lyndon B. Johnson Presidential Library.

Second, before 1965 immigration from southern and eastern Europe was severely limited by discriminatory immigration law. Our normal understanding of the term “minority” blinds us to the fact that the law did not treat all whites alike; Italians, Poles, Jews, Hungarians, and various Slavic groups were all treated as undesirable. Though Jewish Americans are now doing very well, they still face discrimination; the other white ethnic groups are hard to find in the elite levels of American society. Indeed, George W. Bush’s supposedly diverse cabinet contains no representatives of these mostly Catholic and Orthodox groups.

Third, affirmative action has never had a “strictly black-white racial paradigm.” From the creation of the first race-counting forms for employment in the late 1950s, Latinos (then called “Spanish Americans”), Asian Americans (or “Orientals”), and American Indians were

placed in categories alongside of the category for blacks. Though our modern civil rights laws and regulations were created with the severe discrimination against African Americans in mind, and partly in response to the violence in black neighborhoods in the nation's cities, in fact, policymakers have always included the other groups they designated as minorities. No one noticed much, since these groups were smaller then and the problems of blacks were so much more pressing and salient. Now, however, with the increased Latino immigration we have a situation in which many programs designed for blacks now benefit larger numbers of Latinos than blacks. And women of all backgrounds are the largest beneficiary of all, though they are excluded from affirmative action in university admissions in most places.

Margaret Montoya: I wish to take issue with John Skrentny's observation that "women of all backgrounds" have benefited from affirmative action. While that is correct in the sense that women of color have been accepted into the elite schools for undergraduate and postgraduate studies and we have found our way into law firms, faculties, and corporations, it is *not* true that we have fared better than men of color or as well as white women. Even though white women remain underrepresented at higher levels (the "glass ceiling" phenomenon), women of color have faced many more attitudinal and structural barriers.

John Skrentny: Thus far, we have not seen any significant tensions arising from policies that provide immigrants or their children with special treatment over Euro-Americans, who continue to view affirmative action as if it were a "black-only" program. Whether the politics will stay so focused remains to be seen, but thus far it is not a political issue making affirmative action vulnerable. However, if the Supreme Court continues to use a "strict scrutiny" standard to review affirmative action regulations, the expansiveness of the policy beyond blacks might run into some legal trouble, as it did in the 1989 *Crason* case. Moreover, as Angelo Ancheta points out, there is evidence of conflict between minority groups, especially over government jobs at the local level, where African Americans are overrepresented and Latinos underrepresented. These are new and strange times. As the

historian Hugh Davis Graham argues in his new book, *Collision Course: The Strange Convergence of Affirmative Action and Immigration Policy in America*, there is no evidence that policymakers intended, much less debated, immigrant inclusion in civil rights programs such as these, and there is no clear road map for how to manage these conflicts.

Margaret Montoya: I agree with what Angelo has said about the new problems with immigration enforcement. Changes in immigration laws and free trade legislation have brought renewed interest in border crossings involving people, goods, cap-

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[ANGELO ANCHETA]

ital, knowledge, and contraband. Legal scholars working within such new genres as Critical Race Theory, Latino/a Critical Legal Theory, Asian Pacific-American Legal Theory, and Indigenous Critical Theory have used borders and border crossings to explore their literal and metaphorical significance. Spatial and cultural displacements and border crossings as identity-defining experiences are frequent themes. Films (e.g., John Sayles's *Lone Star*) and music (e.g., Los Tigres del Norte) provide textual and symbolic representations that expose the workings of the law in the regulation of legal identities and the transformation of racial stereotypes.

The im/migrant has been repositioned within scholarly discourse as subject rather than object, as the producer of economic value rather than mere consumer of marginal commodities, and as a creator of new forms of cultural capital and a critic of urban design. New projects seek to normalize trans-boundary migrations around the globe (see, e.g., David Theo Goldberg's recent work) and introduce us to new narratives from the peoples involved in these global movements, thereby vindicating their decisions to transgress borders (see, e.g., Ratna Kapur's scholarship on the agency exhibited by East Indian sex workers).

Gloria Browne-Marshall: Stunted growth in the population of Black Americans will have a detrimental effect in terms of public policy, voting power, and representation in federal, state, and local government. The decades-long stagnation in the population of Blacks in America is frightening and generally ignored. Although the power of the civil rights movement was not based on numbers alone, the majority-minority issue has another side that is rarely discussed. Blacks in America continue to face unnatural obstacles to population increases that would occur naturally and through the process of immigration. The Black population in America is not growing in healthy numbers, due to discrimination. Discrimination in education is destroying dreams. Discrimination in employment is destroying livelihoods. Discrimination in health care is shortening Black lives. The stress of *living while Black* makes one more susceptible to disease. Blacks continue to have disproportionately high child mortality rates. Discrimination within the criminal justice system continues to destroy families, generation after generation.

This country has grown steadily because of a level of social, political, and economic stability that has allowed generational planning. Discrimination destabilizes. Without stability, Blacks in America—individually and as a "community"—cannot create and implement viable long-term plans that would lay the necessary foundation for a healthy level of population growth.

The population of African Americans is defined by specific historical circumstances that will not occur again. Immigration should have increased the Black population. However, discriminatory immigration policies have limited, and will continue to limit, African and Caribbean immigration into the United States. The relative stagnation in the Black population will act as an additional barrier to a political process in which census numbers play a significant role.

Chai Feldblum: One section of the 1996 Welfare Reform Act (i.e., Personal Responsibility and Work Opportunity Reconciliation Act) has had incredibly adverse effects on immigrants. The rhetoric of "self-sufficiency" and "self-reliance," which permeated the welfare reform debate, was used with incredible ease to justify the denial of benefits to legal immi-

grants, and undocumented immigrants suffered even worse. Moreover, it was obvious to many of us in Washington that the primary goal of that section was to save money. The Congressional Budget Office numbers made it clear that the immigrant benefit section of the law was the place where Congress was able to realize its mega-dollars savings.

The interesting question for me then—thinking in the context of civil rights—is why these draconian restrictions on immigrant benefits failed to ignite the fervor of the mainstream civil rights groups. The identity-based groups whose constituents are likely to be adversely affected (e.g., La Raza) are quite heavily involved in the struggle, but it has not become an issue that has cut across the range of race, gender, disability, and sexual orientation groups that make up the mainstream Washington civil rights arena, who often do get involved in each other’s struggles. Instead, it has been human services groups and immigration groups that have been in the forefront of the effort to oppose the cuts and now to reinstate benefits.

Perhaps it is hard to mesh the rhetoric of civil rights with the broad-based denial of benefits to “everyone” who comes into the country. Or perhaps it feels hard to use the constructs of civil rights (with its long-term connotation of “negative freedom”—i.e., the right to have one’s particular characteristic ignored) with the affirmative aspects of the conferral of government benefits. I’m not sure. What is interesting to me is that it has been good old-fashioned American politics that has generated some change in Washington since 1994, helping to support a slow, but steady, restoration of benefits. Voters from immigrant communities were outraged by these benefit denial provisions, even if a large segment of mainstream America was mostly unaware of the changes in the law. And voters from immigrant communities turned out at the polls in the 1996 elections. Democracy, at least in some respects, has had an effect.

Tim Borstelmann: One of the most interesting aspects of U.S. immigration law over the course of the 20th century has been its reflection of the majority of American society’s vision of who Americans are and who they should be. The discriminatory policies against all but northwestern Europeans written into the legislation of

1917, 1921, and 1924 mirrored the belief that “American” meant, really, people who were not only “white,” but also a particular kind of “white” in terms of their cultural history. The events from World War II through the black freedom struggle profoundly altered this assumption. Fighting with China as a critical ally against Japan in World War II led to the 1943 legislation that allowed at least some Chinese to become naturalized Americans. Similarly, fighting with South Korea against North Korea and the People’s Republic of China in the Korean War was crucial for the 1952 legislation that stopped the exclu-

*Legal scholars have
used borders and
border crossings to
explore ethnicity,
race, and culture.*

[MARGARET MONTOYA]

sion of Asians. The 1965 immigration law ending the national origins system fit precisely with the Johnson administration’s racial reforms at home. The logic was consistent: if American citizens were not to be discriminated against on the basis of their skin color, then potential American citizens must also not be. In 1965—ironically, within a month of Rhodesia moving in the opposite direction—the United States gave up its long tradition of trying to establish and maintain itself as a white republic.

It is perhaps worth noting that U.S. immigration legislation using ethnic and racial definitions to exclude large populations fits in a broader international pattern in the early 20th century. Other predominantly white settler countries and colonies did the same thing: Canada, New Zealand, Australia, South Africa, and Rhodesia. The first decade and a half of the 20th century marked the apex of white power in global affairs—the height of European and American colonial control in Asia, Africa, the Middle East, and the Caribbean. Thus, white Americans’ assumptions of supposed racial inferiority, and their anxiety about which Europeans really qualified as “white,” made them typical of their international era. Anti-racist

and anti-colonial organizers of the period, from Du Bois and Garvey at home to Gandhi and Ho Chi Minh abroad, had to fight their way out from under an international system of extraordinary weighting against them. They took encouragement from such signs of changing times as the 1896 Ethiopian defeat of Italian invaders at Adowa and the 1905 Japanese victory over the Russian fleet in the Sea of Japan.

Part IV: The Enforcement of Civil Rights

Editor: What is the current state of civil rights enforcement? In what areas do we need more aggressive (or effective) enforcement practices by the government? Are the courts now helping or hindering the enforcement of civil rights?

Anita Hodgkiss: Having left the Justice Department’s Civil Rights Division about a year and a half ago, I think I am far enough away from it to have a little perspective; however, I do have something of a radical view. Civil rights enforcement at the federal level, under any administration, is completely at the mercy of political forces that do not feel bound by any duty to enforce the law. Time and again, it appalled me to see cases or other enforcement actions blocked, not on the merits but because it would be—or became—too controversial. This occurred in virtually all areas except perhaps the disability rights section, where for some reason the government feels a little more willing to advance the rights of persons with disabilities. Similar problems were not encountered as frequently with any of the criminal statutes that the Department enforces or any of the U.S. Attorneys’ offices. Do you think the Justice Department would cease prosecution in an unpopular drug case or mail fraud, wiretap, or any other criminal prosecution that comes under political scrutiny? The Microsoft antitrust prosecution was heavily criticized, but no one in authority forced the Antitrust Division to get out of the case. The only area that even came close to being as politicized as the Civil Rights Division was the Environment Division, but even that division enjoyed significantly less scrutiny and greater discretion in its choice of, and handling of, enforcement actions than did the Civil Rights Division.

The federal government rarely files its own civil rights cases. Most frequently the Civil Rights Division joins cases that private litigants have filed and then proceeds to take more cautious and conservative positions than those that the private plaintiffs advance, thereby undermining the efforts of private plaintiffs and their counsel to achieve their goals. The Justice Department carries great weight with some judges and certainly has greater resources than any plaintiffs' civil rights attorney. But institutionally, advocacy is not rewarded at the Department. The incentives encourage line attorneys to "keep their heads down," get involved only in the "sure winners," and minimize the number of matters they work on. People who come to the Department with commitment and a belief in the mission of protecting civil rights endure extreme frustration, and then they leave. In my experience, line attorneys' case decisions—whether to bring a case or how to litigate it—were routinely overturned by the management of the Civil Rights Division, including the deputy attorney general, the associate attorney general, the attorney general, the solicitor general and his office, the Office of Legal Counsel, the White House Counsel's office, general counsels of other federal agencies such as the Department of Education, and, occasionally, members of Congress. An unfavorable editorial in *The Washington Post* could be a death blow for a case; while an editorial suggestion that DOJ enforcement would be a good thing brought an investigation, it didn't necessarily result in a case being filed. It seemed bizarre to me that civil rights enforcement was at the mercy of the *Post* editorial board.

Do we need more aggressive or effective government enforcement? We need to rethink the government enforcement model. What we need are new and more effective measures to encourage and support private enforcement of the civil rights statutes. Note that opponents of vigorous civil rights enforcement are targeting the private right of action; they are not seeking to de-fund the Civil Rights Division. They know where the greatest threat comes from.

Angelo Ancheta: I concur with Anita's analysis. I would also reinforce the point that private enforcement of civil rights laws has been seriously handicapped by recent court decisions that have both undercut congressional powers to enact civil

rights laws and limited the ability of private plaintiffs to bring lawsuits to enforce the civil rights laws. The most serious blow was the U.S. Supreme Court's decision in 2001 in *Alexander v. Sandoval*, in which the Court ruled that there is no implied right of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964, which prohibits discrimination by recipients of federal funding. By holding that private plaintiffs cannot file Title VI lawsuits under a disparate impact theory, the Court severely limited the range of civil rights enforcement tools in areas such as

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[ANITA HODGKISS]

education, environmental justice, and health care. Now, private plaintiffs must either rely on intentional discrimination theories to litigate Title VI in federal court or turn to governmental civil rights enforcement agencies, which are underfunded and often compromised by political interests. Civil rights advocates are working on restorative legislation, but it will be difficult, particularly with the Republican-controlled House, to push forward with a civil rights agenda that includes stronger enforcement tools for private plaintiffs.

Gloria Browne-Marshall: I take a rather different viewpoint of civil rights enforcement. Given the anti-affirmative action crusades and political conservatism presently taking place in this country, I find the state of civil rights to be extremely healthy for European-American men and women who are educated, middle-class American citizens. A review of the outcomes in major cases reveals enforcement of civil rights practices that benefit this particular socio-economic group to be quite aggressive. On the other hand, courts have retreated from aggressive enforcement on behalf of minority groups. Given the balance of power in the U.S. Congress and the U.S. Supreme Court,

this maverick brand of federalism will continue for several more years. We may well live with its effects for decades.

A fear of enforcing legislation that would protect minorities exists in spite of studies of health care, criminal justice, housing, employment, and education that indicate the endemic nature of racism in the United States. I agree with Anita's analysis and often wonder what is needed to improve enforcement in spite of the sheepish nature of the Department of Justice. How much is within the control of minorities themselves, especially Latinos and Black Americans? Racism exists in spite of education and assimilation, as well as economic, social, and political attainments that are assumed to lead to a change in the treatment minorities receive and provide the necessary power to effect changes in enforcement. One may act only upon those things within one's control.

Therefore, minority groups and coalitions must have a long-term plan of action that is pro-active instead of reactive. So much in civil rights enforcement is cyclical and is too often based on the political altruism of the majority. Attaining a certain economic status has *not* inevitably led members of the majority community to consider minorities "worthy" of equal rights. As with any successful movement benefiting minority groups, a combination of grassroots activism, political lobbying, legislation, and selective litigation has led, indirectly, to more aggressive enforcement of legislative protections.

Margaret Montoya: I don't want to minimize the problems with remedying overt forms of discrimination that Anita and Angelo have pointed out. But I also think that, as some types of discrimination have become more subtle, enforcement has become more difficult. These forms of discrimination are as likely to be felt by those who have gained entry into the corridors of power as by those who are still cleaning them. I am thinking now of the scorn, sarcasm, disrespect, silence and silencing, mean looks, rolling eyes, invisibility and hyper-visibility reported by people of color and other disfavored groups in schools, workplaces, and business establishments. The prevalence of "micro-aggressions" that are hard for many of us to name, much less grieve through a formal procedure, has been empirically analyzed in such studies as those examining the affirmative action litigation involving the Uni-

versity of Michigan Law School (the White-Solorzano Report, for example). I know that such micro-aggressions take their toll on individuals and groups, yet I am hard pressed to know how to remedy them.

Part V: September 11 and the Future

Tim Borstelmann: In the wake of the September 11 attacks, the problem of reconciling national security imperatives with civil rights protections appears in stark relief. The debates over this tension have often appeared quite differently on college and university campuses than in the mainstream of American society. Civil rights protections seem to remain paramount on many campuses, reflecting both principled commitment to equality of treatment and the appreciated presence of a substantial number of international students. On these campuses, profiling of any kind carries with it the suspicious smell of discrimination and its odious history.

Away from campus, discussions of profiling citizens, other residents, and visitors often have a different tone. Simple xenophobia and racism appear at times, as the course of American history would predict. But more often, there is a “common-sense” approach to the problem of deterring potential terrorist attackers in the U.S. Those involved in the September 11 attacks, like those involved in other terrorist assaults during the past decade—on the U.S.S. *Cole*, the U.S. embassies in Kenya and Tanzania, etc.—have had certain obvious traits in common. They all appear to have been Middle Eastern or Middle Eastern-descended Muslims of a particularly anti-Western, jihadist faith. But they have also been male and young, between 18 and 40. This is crucial, according to this perspective: women, children, and older men who are also Muslims simply do not fit this particular profile, just as young men who are not jihadist Muslims do not. Paying more attention to people entering the country who fit this profile seems, to most Americans, logical, not discriminatory. In one way or another, this perspective is often framed as “the terrorists weren’t older WASP women” or “the terrorists weren’t young Chinese immigrant men.” When we got on a plane later last fall, did we re-

ally not scan the other passengers to see if they might fit this category?

This perspective, it must be emphasized, is perhaps less about race and ethnicity than it is about sex and age. Young men, in all cultures, appear to be the source of the vast majority of violent acts. One of the most striking features of the cultures of Al Qaeda and the Taliban was the utter isolation of young men from any contact with women, a point many observers have noted in helping explain some of the brutality of those cultures. Another way to make this point is to note that, after September 11, one of the categories of people least likely to be identified

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[GLORIA BROWNE-MARSHALL]

with Al Qaeda terrorists from overseas was African Americans, who—on average—have the oldest ancestry on American soil of any of their fellow citizens.

Profiling of any kind is deeply problematic. Yet police and average people do it all the time, sometimes as a matter of prejudice but often as a matter of what they consider to be common sense. And they do it about sex and age as much as they do it about race and ethnicity. The task for the United States, it seems, will be to accommodate its citizens’ common-sense concerns, while rigorously protecting the civil rights of all persons against the often-demonizing tendencies of popular fears.

Gloria Browne-Marshall: I believe one of the most important civil rights issues will continue to be access to a quality education, specifically for grades K–12. This will remain one of the most important civil rights issues in the U.S. over the next five-to-ten years and will increase in importance globally. It is not a coincidence that *Brown* was the case that successfully defeated *Plessy*. At present, most public schools in major urban areas are filled

with students of color. The education provided to them is often little more than preparation to replenish the labor class. The investment in public schools decreased with the white student population, which in turn declined with the advent of integration. The battle for a quality education continues. Thirty year old desegregation and educational equity cases are being litigated as of this writing.

K–12 education is the shared experience of almost all adults in this country. It is at the core of the socialization process. Neighborhoods thrive or decline, and families and businesses choose to relocate, based upon the quality of the schools. Education is a platform issue on every political campaign.

Education does not always receive the civil rights limelight. But zero tolerance policies, vouchers, standardized testing, bilingual education, busing, diversity, gender equity, teacher testing and standards, admissions criteria, state funding, and immigration issues, in addition to the pervasive nature of discrimination in education, will cause the issue of education, both K–12 and higher education, to remain an important civil rights issue for the future.

Education is the primary path taken to break the cycle of poverty in this country and around the world. Equal education for girls, historically disenfranchised persons, and those in lower economic groups will be very important issues nationally and internationally.

Margaret Montoya: I think that *Bush v. Gore* and the Republican shenanigans around the last election will continue to haunt us in the years to come. Why do I call this a civil rights issue? Because I believe that the Supreme Court hijacked our democratic processes in order to hand the election and the presidency to George W. Bush. This society has struggled to extend the protections of the Constitution and the Bill of Rights to disenfranchised groups. Slowly and painfully, women, people of color, and lower income citizens have won rights of expression, assembly, voting, jury service, and interracial marriage, as well as limited economic rights. This history of struggle has vindicated the values and principles on which this country was founded, and thus U.S. democracy evolved into a meaningful political arrangement. *Bush v. Gore* dishonors that history and discredits this nation’s democ-

matic commitments. The Supreme Court, in violation of the rule of law, reached its decision by trammeling on the voting rights of immigrant communities and untold (and untold) citizens of color. The tragedy of September 11 and the subsequent erosion of civil liberties, especially for Arab Americans, have postponed our reckoning with this unwarranted seizure of power by the federal courts.

Chai Feldblum: One of our true remaining challenges in civil rights law is to have the majority accept that equality must mean real, substantive equality, and not simply formal equality. I believe the distance we have yet to go in this regard is manifest in the public's resistance to viewing effective accommodations for people with disabilities as a form of equality (rather than as a form of special rights) and in the fact that our proposed national gay rights bill (which I helped draft) cannot politically provide full equality through the provision of domestic partner benefits.

I hope that in the next ten years we will see a more invigorated conversation along the following lines. To me, certain people stand "upright" in our society because our societal norms are already set up to accommodate them. For example, people who can walk unaided have no problem getting into buildings with stairs; similarly, people who love members of the opposite sex have no problem getting married and hence enjoying employment benefits reserved for married couples. But those same norms cause other individuals in our society to live "on a tilt." For example, people who use wheelchairs can't get into a building built with steps, and gay people who can't marry their loved ones often have little access to employment-provided health benefits for their domestic partners.

The best way to achieve true equality for all members of our society would be to change the underlying norm so that everyone would stand equally upright at the same time. For example, we should build buildings with ramps, not steps, and we should allow gay couples and heterosexual couples to marry. That would achieve both equality and integration for all.

But, as a practical matter, we either can't or won't always change the underlying norm. For example, the current norm in our country is to learn English, not

English and American Sign Language (ASL) at the same time. It is this accepted social norm which puts deaf people on a tilt in our society (and not simply the physical fact that deaf people can't hear.) But I don't anticipate our society changing its underlying norm any time soon, so that everyone will learn English and ASL together as they grow up.

A second-best alternative, therefore, is to rotate the tilt under the disadvantaged people themselves so they are able to stand upright with everyone else. This means, however, viewing "equality" as requiring not that everyone be treated equal-

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leaders can
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experiences of
other countries.*

[ERIK BLEICH]

ly (i.e., the same), but rather, as requiring that everyone in our society be treated "as an equal." Under such a framework, employers would legitimately be required to make physical changes in their own buildings to allow particular employees who use wheelchairs to perform jobs in those buildings that have steps. Similarly, conference organizers would legitimately be required to provide sign language interpreters for conference attendees who are deaf, and employers who offer benefits to married couples would legitimately be required to offer those same benefits to gay domestic partner couples. In each case, the individual business would be "rectifying the tilt" under that one particular employee or client, and hence treating that individual "as an equal" in a society in which general societal norms have traditionally disadvantaged such individuals. While it is not optimal to require individual businesses to compensate for the inequalities wrought by general societal norms, it is a minimum step toward achieving substantive, rather than formal, equality for those who have been disadvantaged by such norms.

I hope one of the civil rights challenges we will embrace in the coming years is a willingness to engage in a conversation

about true equality, which will ultimately result in treating all our brothers and sisters (including those who have transitioned from brothers to sisters!) "as equals" in our society.

Erik Bleich: There are two possible directions for the future of civil rights at the global level. First, we may see the U.S. take the lead in setting the civil rights agenda for many countries in the same way that Japan has been portrayed—at least until its economy slumped in the 1990s—as the lead "flying goose" in East Asia, heading up the V of economic growth and prosperity for its Asian neighbors. If this is true, over time we will see the issues currently debated in the United States arrive on the agenda of other countries. To some extent this has already happened in the field of primary and secondary education, Gloria Browne-Marshall's pick as the most important issue. Education about equality, citizenship and (anti) racism has become relatively widespread in Europe. Critics think it is popular because it eases the consciences of countries that are avoiding difficult choices about immigration law, citizenship policies, and enforceable legal protections against discrimination. Nevertheless, education policy is one area for action that many in Europe agree is quite important.

A second direction, however, involves doing away with the image of the U.S. as the "lead goose." This implies that each country may go its own way, picking and choosing the fights that seem most appropriate given local circumstances. French activists and policymakers, for example, have spent more energy in the post-war decades fighting hate speech than discrimination. In part, this is explained by their memory of the Vichy past and the hate speech that set up deportation of Jews, and in part it is accounted for by the political weight of the Front National and its ability (through borderline hate speech) to stigmatize immigrants, minorities, and any efforts to "rotate the tilt" to make them more equal. In a parallel fashion, slave reparations may become an issue with which the U.S. struggles that won't necessarily affect every other country.

If this vision is more accurate than the first, it would be impossible to conclude which one or two issues will be most

pressing at the global level. Yet, as each country works out its own solutions to more “local” problems, there is a real opportunity for civil rights activists around the world to learn from their neighbors. Hate speech is an important issue in the United States, but it’s not one that we have at the top of our agenda. Reparations may become an issue in France, where many citizens in overseas departments are descendants from slaves. For those interested in promoting civil rights, other countries’ laws, policies, and approaches rarely provide a

silver bullet for local problems. But they can offer lessons about raising the profile of important issues and about the pros and cons of policy choices that already have a track record elsewhere. If this is true, then perhaps one of the most important issues over the next few years will be whether civil rights activists and policymakers can look beyond their local contexts to see the bigger picture.

Margaret Montoya: In thinking back to where we began our conversation—about

civil rights stories—I am reminded of the resilience and creativity of our communities. Many of us draw strength from our group-based identities; for that reason, I don’t aspire to a color-blind future for my children. Instead, I hope to give them a new understanding of commitments, narratives, aesthetics, and potentialities that have been illuminated by the Civil Rights Movements. I think all of our stories have become more complex over time, as we learn that we participate in different economies of power and privilege.

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