1989

On Taking Back Our Civil Rights Promises: When Equality Doesn't Compute Essay

Richard Delgado
University of Alabama - School of Law, rdelgado@law.ua.edu

ESSAY

ON TAKING BACK OUR CIVIL RIGHTS PROMISES: WHEN EQUALITY DOESN'T COMPUTE

RICHARD DELGADO*

INTRODUCTION

Only some twenty years old, the "information revolution" has already subtly altered the landscape of legal disputing.[1] Although most of the changes to date have been facilitative—enabling us to do better the things we did before, such as researching cases, preparing documents, teaching certain materials, analyzing evidence, and billing clients[2] —in one area the impact is likely to be powerfully substantive as well. This area is civil rights, where the advent of computers and sophisticated methods of statistical proof portends sobering changes in the way we think about equality and racial justice. My reasons for believing so consist of two observations plus a prediction. The first observation is that computer-assisted analysis of data has enabled us to prove inequality more powerfully than ever before.[3] Inequality between Blacks and

* Professor of Law, University of Wisconsin. J.D., University of California-Berkeley (Boalt Hall), 1974. This essay was supported by a grant from the Ameritech Foundation. Charles Church provided invaluable research assistance.

1. On statistics and the information revolution generally, see D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980 & Supp. 1987); HANDBOOK OF SURVEY RESEARCH (P. Rossi, J. Wright & A. Anderson eds. 1983); R. MYERS, CLASSICAL AND MODERN REGRESSION WITH APPLICATIONS (1986); B. LINDGREN & G. MCELRATH, INTRODUCTION TO PROBABILITY AND STATISTICS (2d ed. 1966). *See also* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1331-91 (2d ed. 1983); Peterson, *Forward to Statistical Inference in Litigation*, 46 LAW & CONTEMP. PROBS., Autumn 1983, at 1; American Association of Law Schools Section on Law and Computers, NEWSLETTER, Spring 1988, at 5 (history of the Section).

2. For overviews of this "facilitative" role of computers, see P. MAGGS & J. SPROWL, COMPUTER APPLICATIONS IN THE LAW (1987); Miller, *Teaching Computers to Think Like Lawyers*, STUDENT LAW., May 1988, at 16; NEWSLETTER, *supra* note 1, at 11 (summarizing presentation by J. Clark Kelso); *id.* at 16 (address of David Hambourger on "Law Office of the Future" Project); Wiehl, *Computers Assuming New Roles at Law Firms*, N.Y. Times, Jan. 20, 1989, at B4, col. 3. But computer-assisted legal research may be a mixed blessing; *see, e.g.*, Berring, *Full-Text Databases and Legal Research: Backing Into the Future*, 1 HIGH TECH. L. J. 27 (1986); Dabney, *The Curse of Thamus: An Analysis of Full-Text Legal Document Retrieval*, 78 LAW LIBR. J. 5 (1986).

3. *See infra* notes 7-27 and accompanying text. Discrimination can be class-wide or individual. D. BALDUS & J. COLE, *supra* note 1, at 3-4. Redress can be based on unequal treatment or disparate impact. *Id.* at 329-48. Legal challenges to inequality and discrimination have been made in a multitude of settings, including wages, promotions, housing, credit, school arrangements, municipal services, welfare, criminal justice, and jury selection. *Id.* at 11-12. *See also* Hig-

whites, men and women, young and old can be made to stand out like figures carved in a mountainside, so boldly and clearly that no one can deny its existence. The potential for demonstrating this existed, of course, in the pencil and paper age. But computers enable us, in multiple settings, to show patterns of difference quickly, economically, and with any confidence level we see fit to require. The proof-of-facts side of a civil rights lawyer's life has thus taken a marked turn for the better.

My second observation concerns the law's response to this development. And that response has been, simply, doctrinal retrenchment.[4] Rather than accept at face value the evidence tendered by attorneys for African-Americans, women, and others, our system has been telling them, "You have misconceived our promises of equality. Equality does not mean what you thought, and under the new, narrower version we hereby announce, you cannot prevail." This doctrinal retrenchment has exactly paralleled the advances in factual proof, so that the net result is zero: redress for most forms of race- and sex-based discrimination is just as difficult as before, if not more so.[5]

My final step consists of a prediction—that the process described above is on a collision course with itself. The taking back of civil rights promises is producing a gap between our story of origins[6] and that contained in current civil rights law. When this gap reaches a certain point a crisis will occur, and one of two things will happen. Either our system will adjust the current story in the direction of the original version, or we will abandon our story of origins and drop the fiction that we are a

---

ginbotham, *A Brief Reflection on Judicial Use of Social Science Data*, 46 LAW & CONTEMP. PROBS., Autumn 1983, at 7. Most complex statistical proof is documented with the aid of computers. *See infra* note 7.

4. *See infra* notes 28-36 and accompanying text.

5. The spirit of this narrower version of equality in the sphere of affirmative action is summarized in City of Richmond v. J.A. Croson Co., 109 S.Ct. 706, 739 (1989) (Scalia, J., concurring: "It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to 'even the score' display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still.")

I am, of course, not arguing that advances in mathematical proof *alone* precipitated this retrenchment. Rather, I maintain that, along with other factors (the country's increasing conservatism, in particular), the advances made it likely to happen. On the idea that the structures by which we process legal information shape legal thought, see Delgado & Stefancic, *Why Do We Tell the Same Stories? Law Reform, Critical Librarianship and the Triple Helix Dilemma*, 42 STAN. L. REV. ___ (1989) (forthcoming); Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

6. I borrow this term from Milner Ball. Ball, *The Promises and Deficiency of the Story of Origins in American Constitutional Jurisprudence*, 87 MICH. L. REV. ___(1989) (forthcoming). The "story of origins" refers to those constitutive myths and ideals that we ascribe to ourselves, that are taught in civics classes and churches, that set out what we, as a nation, aspire to be. *See infra* notes 38-46 and accompanying text. On myths and storytelling generally, see Delgado, *Legal Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. ___ (1989) (forthcoming).

nation committed to equal justice. The forces propelling us toward this confrontation are already in operation. The first Part of this Essay describes how computers have assisted attorneys in proving inequality. Part II traces the law's response to computer-assisted proof of inequality for Blacks—namely redefining legal doctrine so as to make that condition increasingly unredressable. Part III shows that when the gap between traditional notions of justice and what the law protects reaches a certain point, we will be unable to conceal it from ourselves any longer. We may then decide quietly to put flesh back on the bones of race-remedies law. Or, probably even more quietly, we will decide that we are not serious about equality, rewrite our history and story of origins, and become a nation, like many others, built on tacit, permanent separation of race and caste.

I. Proof of Inequality—What Computers and Statistical Analysis Can Do

Computers can be programmed to carry out swiftly and accurately sophisticated statistical analyses of large amounts of data.[7] They can hold certain variables constant and look for the effect of others (such as race or sex).[8] They can analyze the contribution of dozens of variables at once.[9] They can test hypotheses, analyze variance, and determine when and with what degree of confidence we can assert that a pattern is unlikely to be the result of chance.[10]

Lawyers have used computer-generated data in suits brought by women alleging unequal pay, compared to men, in particular job categories,[11] and even greater inequality for work of comparable worth.[12] Black litigants have used statistical data to show that patterns of hiring, promotion, and firing for Blacks are worse than for whites and that

7. *See generally* D. Baldus & J. Cole, *supra* note 1; R. Myers, *supra* note 1; Kaye, *The Numbers Game: Statistical Inference in Discrimination Cases* (Book Review), 80 Mich. L. Rev. 833 (1982). Most complex statistical proof is carried out with the aid of computers. Peterson, *supra* note 1, at 1-2.

8. D. Baldus & J. Cole, *supra* note 1, at 77-100 (measures of minority group treatment); 211-28 (matching, multiple regression methods).

9. Sobel v. Yeshiva University, 839 F.2d 18 (2d Cir. 1988); D. Baldus & J. Cole, *supra* note 1, at 239-86; R. Myers, *supra* note 1; Levin & Robbins, *Urn Models for Regression Analysis, with Application to Employment Discrimination Studies*, 46 Law & Contemp. Probs., Autumn 1983, at 247.

10. D. Baldus & J. Cole, *supra* note 1, at 63, 72-73, 287-328; B. Lindgren & G. McElrath, *supra* note 1. *See* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338 (1966).

11. *E.g.*, Melani v. Board of Higher Educ., 561 F. Supp. 769 (S.D.N.Y. 1983).

12. AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985); Int'l Union, U.A.W. v. Michigan, 673 F. Supp. 893, 898 (E.D. Mich. 1987). *See* Norris, *Comparable Worth, Disparate Impact, and the Market Rate Salary Problem: A Legal Analysis and Statistical Application*, 71 Calif. L. Rev. 730 (1983).

these patterns cannot be accounted for by chance.[13] Computerized data have been used to show racial disparities in sentencing patterns and in the rates at which probation and parole are granted and the death penalty imposed.[14]

Investigators and advocates for Blacks have shown that Blacks' income is lower than whites', a difference that cannot be accounted for by years of seniority or education.[15] They have shown Black-white gaps with respect to longevity,[16] infant mortality,[17] income,[18] wealth,[19] rates of criminal conviction,[20] suicide and other forms of self-endangerment,[21] mental illness,[22] and drug addiction.[23] They have shown that the disparities between whites and Blacks on most of these measures are growing, not closing,[24] that the degree of residential seg-

13. *E.g.*, Bazemore v. Friday, 478 U.S. 385 (1986); Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224 (N.D. Tex. 1980). *See* Corcoran & Duncan, *Work History, Labor Force Attachment, and Earnings Differences Between the Races and Sexes*, 14 J. HUM. RESOURCES 3 (1979); Levin & Robbins, *supra* note 9.

14. Zeisel, *Methodological Problems in Studies of Sentencing*, 3 LAW & SOC'Y REV. 621 (1969); D. BALDUS & J. COLE, *supra* note 1, at 12, Supp. 1987 at 123-65; McCleskey v. Kemp, 481 U.S. 279 (1987).

15. Hacker, *American Apartheid*, N.Y. REV. BOOKS, Dec. 3, 1987, at 29, col. 1 (Black American men earn only 60% of what white American men earn; making allowance for differences in seniority and educational attainment of the two groups would close only a small fraction of the gap). *See also* R. FARLEY & W. ALLEN, THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA (1987) (analyzes census and other data on measures of Black emiseration).

16. Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923, 930 n.28 (1988) (citing U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 68 table 106 (106th ed. 1986) (Blacks' life expectancy four years shorter than whites') [hereinafter CENSUS]).

17. Delgado, *supra* note 16, at 931 n.31 (Black infant mortality is 94.1% higher than that of whites); *Black Infant Mortality Risks Studied*, 132 SCI. NEWS 218 (1987) (Black infants born in the United States twice as likely as white infants to die during first year of life).

18. Delgado, *supra* note 16, at 930 n.28 (comparing numbers of Black and white families living below the poverty line). Bernstein, *20 Years After the Kerner Report: Three Societies, All Separate*, N.Y. Times, Feb. 29, 1988, § 1, at 13, col. 1 (Black-white income gap has widened over the last 15 years).

19. CENSUS, *supra* note 16, at 45-47, 457 table 766.

20. Hutchinson, *Indiana Dworkin and Law's Empire* (Book Review), 96 YALE L.J. 637, 663 (1987); Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQUAL. J. 9, 30-33 (1985).

21. Delgado, supra note 20, at 32-33; W. GRIER & P. COBBS, BLACK RAGE 55-74 (1965). For a general discussion of life-endangering behavior, see Gibbs, *Black Adolescents and Youth: An Endangered Species*, 54 AM. J. ORTHOPSYCHIATRY 6 (1984).

22. W. GRIER & P. COBBS, *supra* note 21, at 154-80; *see also* Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 137-39 (1982) and sources cited therein.

23. L. SIEGEL, CRIMINOLOGY, 73-77 (1983); *The Ghetto: From Bad to Worse*, TIME, Aug. 24, 1987, at 18; Delgado, *supra* note 22, at 137-38. *See* N. PEPINSKY, CRIME CONTROL STRATEGIES 211 (1980).

24. Delgado, *supra* note 16, at 930.

regation is increasing in America's neighborhoods,[25] and that racial attitudes are hardening, not softening.[26]

Attorneys have used statistical analysis to examine the decisions of particular courts or even individual judges in search for an unbiased forum—or, sometimes, one biased in their favor.[27] None of these tasks was impossible in the pre-computer age; computers simply made them faster and easier.

II. Law's Response to the Inequality Explosion—Retrenchment and the Rephrasing of Promises

Aided by computerized analysis, attorneys have been vigorously pressing actions on behalf of disadvantaged groups. Initially some of these claims were successful,[28] but recently successes have become rarer and rarer.[29] Instead, what we have seen is doctrinal retrenchment; as the factual predicate for inequality claims advanced, legal doctrine retreated.[30] The circle of redressable racism shrank as courts required proof of intent to discriminate[31] and demanded tight chains of causation.[32] Changes were made in standing to sue,[33] and limitations were

25. R. Farley & W. Allen, *supra* note 15, at 136-57 (high degree of housing segregation present in United States; segregation not any less pronounced for Blacks earning over $50,000 per year); McLeon, *Blacks Are Losing Integration Fight, New Study Claims*, San Francisco Chron., Dec. 30, 1987, at A2, col. 5.

26. Gallup, *Intolerance on the Rise in U.S.*, San Francisco Chron., Mar. 6, 1989, at A12, col. 1. *See* Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 Harv. C.R.-C.L. L. Rev. ___(1989) (forthcoming).

27. Miller, *supra* note 2, at 21-22; Altfeld & Spaeth, *Influence on the Supreme Court*, 24 Jurimetrics J 237 (1984).

28. *Compare, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (disparate impact theory permitted for proof of inequality in cases brought under Title VII) *with* Washington v. Davis, 426 U.S. 229 (1976) (rejecting this approach under equal protection clause). See also Melani v. Board of Higher Educ., 561 F. Supp. 769 (S.D.N.Y. 1983), and the zig-zag course the Supreme Court has followed in school desegregation cases, described in D. Bell, Race, Racism and American Law 364-473 (Ch. 7, The Quest for Effective Public Schools) (2d ed. 1980).

29. *See infra* notes 30-37 and accompanying text. Delgado, *supra* note 16, at 936.

30. Delgado, *supra* note 16, at 936; D. Bell, And We Are Not Saved 165-77 (1987) (retrenchment of race remedies doctrine); D. Bell, *supra* note 28. *See also* Patterson v. McLean Credit Union, 57 U.S.L.W. 4705 (1989) (limiting reach of Runyon v. McCrary, 427 U.S. 160 (1976)).

31. Washington v. Davis, 426 U.S. 229 (1976) (fifth amendment equal protection clause requires showing of discriminatory intent); McCleskey v. Kemp, 481 U.S. 279, 292 (1987); Wards Cove Packing Co., Inc. v. Atonio, 57 U.S.L.W. 4583 (1989).

32. *E.g.*, City of Richmond v. J.A. Croson Co., 109 S.Ct. 706 (1989); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 451 (1984); Daniels v. Williams, 474 U.S. 327 (1986); D. Bell, *supra* note 30, at 170-73 (burden of proving discriminatory intent is so great Blacks gain no benefit from suspect classification standard).

33. The Court has limited a plaintiff's standing to sue for racial discrimination (Warth v. Seldin, 422 U.S. 490 (1975)), but apparently has loosened standing requirements in reverse discrimination suits (Martin v. Wilks, 57 U.S.L.W. 4616 (1989)); L. Tribe, American Constitutional Law 107-11 (2d ed. 1988).

placed on state action[34] and on the type of relief allowed.[35] Disparate impact was sharply curtailed,[36] and in *McCleskey v. Kemp*[37] the Supreme Court devalued statistical proof—which all but the most skeptical would have found convincing—that Blacks are executed in Georgia more frequently than whites. Thus, our response to Blacks' "You promised" has been, in effect, "No, we didn't." Scarcely unprecedented—in everyday life we often do the same thing when reminded of promises we now find inconvenient. Yet, the consequences of repudiating our civil rights promises are much greater than with ordinary ones, endangering the uneasy social contract between the majority and minority races in our society. The next Part shows that the gap between our original promises and the scaled-back versions we hold out today is growing. There are only two ways to close it; each has costs.

III. The Founding Story and Current Antidiscrimination Law—Closing the Gap Between "That was Then" and "This is Now"

Antidiscrimination law today increasingly has an ectoplasmic quality—thin and more than a little pale. Its promises have a hollow sound. But the hollowness is not that of the parent who, having promised his child something, tells him or her that the promised item will not be forthcoming—straightforward breach. Rather, it is that of the parent who insists that the promised thing was another, less desirable, item entirely. A parent who does this too often, however, courts trouble; sooner or later the child will demand an accounting. The growing enfeeblement of civil rights law will spur a similar demand. In the ensuing accounting, our starting point will be the original promises—those constitutive ideals, principles, and narratives that form our founding story. That story, our story of origins,[38] holds that our nation was founded on mutuality and equal personhood. All men are created equal[39] and endowed with fundamental human rights.[40] What is more, those truths are not just contingently, but self-evidently so;[41] they are in the nature

34. *E.g.*, Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

35. *E.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

36. *See supra* note 31.

37. 481 U.S. 279 (1987). *See* Kennedy, McCleskey v. Kemp: *Race, Capital Punishment and the Supreme Court*, 101 Harv. L. Rev. 1388 (1988).

38. *See supra* note 6. The story, like all stories, is in part aspirational. It deals with what we wish to be true of ourselves—or, at least, what we *wish* to wish. We subscribe to these myths more strongly in certain eras, such as the 1960s, than others. *See infra* note 48 (the story is losing ground and may be rewritten).

39. The Declaration of Independence para. 2 (U.S. 1776).

40. *Id.*

41. *Id.*

of things and supply the cement we rely on to form a more perfect union.[42]

This founding story is reinforced by narratives emanating from dominant codes of ethics and the Judeo-Christian tradition. In this tradition, all persons are equal in the sight of God.[43] We must act toward others as we would have them act toward us, respecting their humanity just as we respect our own.[44] We must love other persons as ourselves.[45]

This founding story is taught in our schools, preached in our churches, and enshrined in song and literature. It is part of our self-concept as a generous and inclusive people. Yet, alongside that story is set a much more somber one, a story of nonwhite people caught in poverty, neglect, and despair.[46] In this other story, inequality is everywhere, and is everywhere unredressed. Law's story today tells Blacks, "You may recover, but only if you satisfy us that your grievance meets our definition of racism, which is of course much narrower than yours. Moreover, you must satisfy requirements A through E and rebut several defenses that we have decided to let the other side use against you. You must wait several years for relief, and your measure of damages should you be successful will be less than you might have envisioned. Do you want to proceed?" Law's story and our story of origins cannot co-exist much longer; the differences between them are becoming too great.[47] Soon we will have to decide between two ways of closing the gap. We can adjust current reality in the direction of the original promises. Or, we can decide in favor of present reality and forfeit our

---

42. U.S. CONST. preamble. Numerous commentators have recognized the ironic gap between the story of our origins as embodied in the Declaration of Independence and the society that took shape after the Constitutional Convention. Archibald Cox thinks it likely that the Declaration of Independence held as equals those admitted to the political process, but reminds us that excluded from that community were both slave and free Blacks, women, and the propertyless. He also points to the original Constitution's lack of assurances of either equality or of the right to vote. A. COX, THE COURT AND THE CONSTITUTION 251 (1987). For an argument that the drafting of the Constitution was motivated by the economic self-interest of the framers, rather than by any egalitarian spirit, see C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1935). For commentary on the "Constitutional Contradiction" by which the Framers traded Black enslavement for white privilege, see D. BELL, *supra* note 28, at 20-28; Delgado, *supra* note 16.

43. Gilson, *Foreword to* ST. AUGUSTINE, CITY OF GOD at 24-35 (Image abridged ed. 1958); 2 *Corinthians* 8:14; *Matthew* 7:21-24; *Romans* 10:12 (no difference between the Jew and the Greek; all are equal in the sight of God).

44. *See supra* note 43; Pledge of Allegiance ("one nation, under God, indivisible, with liberty and justice for all").

45. *Mark* 12:31.

46. *See supra* notes 13-26 and accompanying text.

47. *See* B. BETTELHEIM, THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES (1975) (one function of myths is to enable us to cope with discrepancies between our system of idcals and the world as it is; at some point, however, even "a good story" will not enable us to reconcile flatly contradictory versions of the world).

ideals. The former course would entail putting new vitality back into civil rights law. We could ease the requirements of intent and near-straight line causation. We could define redressable discrimination more broadly and take firmer steps to remedy inequality even when it cannot be shown to have resulted from intentional discrimination. We could re-examine the many qualifications, exceptions, and defenses we have engrafted in antidiscrimination law. By such measures we could indicate to outgroups that we are serious about including them in our community. This course is costly; it will entail relinquishing privileges and prerogatives that many of us now enjoy.[48] We may well decide not to pay this price.[49] The alternative, however, is also costly. Its price is the admission that our founding story, with its myths about brotherhood, equality, and redress of grievances, is just that: a collection of myths. We will then confront the somber realization that, as a people, we are not serious about equality, that we embrace inequality and status so long as they benefit us, and that in these respects we are no different from the many Western and nonwestern nations that are built on, and willingly accept, permanent, ineradicable divisions of race, sex, and caste.

CONCLUSION

Computers and statistical analysis enable us to prove inequality and unequal treatment more compellingly than ever before. But as our ability to prove the facts necessary to sustain a discrimination case has advanced, legal doctrine has retreated, with the result that civil rights claims are exactly as difficult to win as before. As modern methods of proof shone a bright light on the inequality in our world, we dimmed the lights in doctrine, not wanting to see what was there.

But this has only postponed the moment of reckoning. The inequality we banished by verbal trickery from our field of vision now shows up in our spectacles. Doctrine's enfeeblement is now visible to all; its promises no longer come close to matching those contained in our story of origins. Potential claimants are beginning to realize that our once-proud system of civil rights statutes and case law is not maintained for their benefit, that it has little to do with equal justice. We are

48. *See* Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (whites resist Black-justice claims unless these are costless, i.e., coincide with white self-interest); Bell, Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979) (same).

49. I believe this alternative is, unfortunately, the more likely of the two. Because of the current climate—fear of Japanese economic competition and of crime, and the generalized sense that we have gone "too far" in the civil rights direction—it will be easier than at any comparable point in the past 30 years to rewrite the story of our origins and to take a new, less generous stance vis-a-vis Black justice.

thus entering the first stage of a civil rights crisis precipitated by this growing realization. There are only two ways out. We can adjust the promises contained in civil rights law back in the direction of the original ones. Or, we can abandon our story of origins and face the realization that we are no longer committed to the vision of equality and racial justice it contains. Our decision will say much about what kind of people we are and will become. To say that much will ride on it is an understatement.[50]

50. It is grimly ironic that after almost 100 years the paradox recognized by the first Justice Harlan applies as though written yesterday: "We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law." Plessy v. Ferguson, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting).