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### Centennial Reflections on the California Law Review's Scholarship on Race: The Structure of Civil Rights Thought Centennial Tribute Issue

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# Centennial Reflections on the *California Law Review*'s Scholarship on Race: The Structure of Civil Rights Thought

Richard Delgado\*

*The author reviews one hundred years of the California Law Review's rich body of scholarship on race and civil rights in an effort to discern its general direction and contours. Discerning two broad paradigms—a black-white binary of race and a liberty-equality divide—he notes that the two not only have been emerging in roughly the same period but are beginning to occupy the same territory. After describing the two paradigms and explaining their origin and operation, he puts forward a prediction for what their convergence may portend for the future of civil rights thought.*

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#### INTRODUCTION: TWO BINARY PARADIGMS OF RACE

Of all American legal journals, the *California Law Review* has published perhaps the richest and most extensive body of scholarship on the subject of race and equality in the country. With foundational articles by Tussman & tenBroek,<sup>1</sup> Derrick Bell,<sup>2</sup> Juan Perea,<sup>3</sup> Angela Harris,<sup>4</sup> Ian Haney López,<sup>5</sup> and

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1. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949) (discussing interpretation of the Constitution's Due Process and Equal Protection Clauses and pointing out that the tide had been running against equality and in favor of due process. No longer "the last resort of constitutional lawyers . . . [and] a dubious weapon in the armory of judicial review[,] . . . after eighty years of relative desuetude, the Equal Protection Clause is now coming into its own" drawing attention to over- and under-inclusive laws and ones that permit too much administrative discretion).

2. Derrick A. Bell, Jr., *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 CALIF. L. REV. 165 (1973) [hereinafter Bell, *Despair*] (exploring the impact on black defendants of implicit and explicit racial bias in the legal system); Derrick A. Bell, Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979) [hereinafter Bell, *Usual Price*] (discussing reasons for the slow progress of civil rights law, including the conviction that remedies should harm no member of the white race); Derrick Bell, *Foreword: The Final Civil Rights Act*, 79 CALIF. L. REV. 597 (1991) (noting the deterioration of 1960s-era civil rights legislation and positing that minorities should back a "Racial Preference Licensing Act" allowing firms to discriminate on the basis of race by purchasing a license to do so, with the proceeds supporting black community development).

3. Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997) [hereinafter Perea, *Black/White*] (describing how contemporary civil rights scholarship places the problems of two groups, black and white, at the center of analysis).

4. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741 (1994) [hereinafter Harris, *Jurisprudence of Reconstruction*] (discussing critical race theory's agenda, including an emphasis on transformation rather than incremental reform); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923 (2000) [hereinafter Harris, *Equality Trouble*] (describing how race-reform law continually accommodates

many others over the years,<sup>6</sup> the *California Law Review* stands virtually alone in its contribution to and influence in this socially important field.

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white supremacy, although the means by which it does so shift with the times).

5. Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CALIF. L. REV. 1143 (1997) [hereinafter Haney López, *Salience*] (observing that race rather than ethnicity or some other feature best accounts for Latinos' historical experience); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010) [hereinafter Haney López, *Post-Racial Racism*] (noting that imprisonment rates for minority groups have increased dramatically since the 1960s, and exploring the possibility that President Barack Obama's election presages a reduction in racialized mass incarceration).

6. See, e.g., Kathryn Abrams, *Race and Races: Constructing a New Legal Actor*, 89 CALIF. L. REV. 1589 (2001) (discussing the role of race in the legal curriculum); Anthony V. Alfieri, Book Review, *Teaching the Law of Race*, 89 CALIF. L. REV. 1605 (2001) (same); Anthony V. Alfieri, Book Review, *Black and White*, 85 CALIF. L. REV. 1647 (1997) (exploring critical race theory as an emerging reform movement with varying goals); Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1511 (1991) (urging greater incorporation of race and racial analysis into mainstream legal education); Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733 (1995) [hereinafter Armour, *Stereotypes and Prejudice*] (discussing the problem of jurors who harbor unconscious racial stereotypes); John O. Calmore, Book Review, *Displacing the Common Sense Intrusion of Whiteness from Within and Without: "The Chicano Fight for Justice in East L.A."*, 92 CALIF. L. REV. 1517 (2004) (discussing race, white privilege, and Latinos with black ancestry); Devon W. Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633 (2009) (noting law's role in the construction of racial groups); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241 (1993) (arguing that traditional scholarship fails to address the unique legal issues confronting Asian Americans); Richard Delgado, *Recasting the American Race Problem*, 79 CALIF. L. REV. 1389 (1991) (positing that many of the defects of liberalism will yield to the insights of critical race theory); Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CALIF. L. REV. 387 (1993) [hereinafter Delgado, *Third Chronicle*] (describing obstacles to empathy across racial lines); Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61 (1996) [hereinafter Delgado, *Eleventh Chronicle*] (same); Richard Delgado & Jean Stefancic, Essay, *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, 82 CALIF. L. REV. 851 (1994) [hereinafter Delgado & Stefancic, *Loving Communities*] (exploring why hate-speech reform has been so slow in arriving); Richard Delgado & David H. Yun, Essay, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CALIF. L. REV. 871 (1994) [hereinafter Delgado & Yun, *Pressure Valves*] (discussing common objections to hate-speech regulation); Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585 (1997) [hereinafter Espinoza & Harris, *Tar-Baby*] (analyzing black exceptionalism and its implications for interracial coalition); Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CALIF. L. REV. 853 (1995) [hereinafter Farber & Sherry, *Critique of Merit*] (charging critical theorists with anti-Semitism in rejecting a conception of merit that Jews and Asians have used to advance themselves); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775 (1998) (noting that existing legal structures provide little remedy for disproportionate placement of environmental hazards in minority communities but that grassroots activism offers promise); Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CALIF. L. REV. 662 (1975) [hereinafter Greenfield & Kates, *Mexican Americans*] (discussing application of federal civil rights statutes to Mexican Americans); Cheryl I. Harris, Book Review, *Whitewashing Race: Scapegoating Culture*, 94 CALIF. L. REV. 907 (2006) [hereinafter Harris, *Scapegoating Culture*] (noting that attempts to remedy racism and inequality often collide with deeply-held cultural norms described as "racial frames"); Lowell Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CALIF. L. REV. 583 (1930) (discussing

Centennial occasions like this one are opportunities to step back and examine accomplishments like these and to take a broad view of the path one has trod. In what follows I examine the *Review*'s race scholarship as a whole,

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the clause's evolution as a limitation on arbitrary governmental action); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CALIF. L. REV. 1401 (1993) [hereinafter Johnson, *Bid Whist*] (citing variants of poker and bridge, popular within the African-American community, to explain the need to respect black distinctness in the process of desegregation); William C. Kidder, Comment, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CALIF. L. REV. 1055 (2001) (demonstrating racial bias in a common test of analytical aptitude); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 CALIF. L. REV. 1251 (1998) [hereinafter Krieger, *Perestroika*] (reviewing the debate over affirmative action in light of social science evidence); Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CALIF. L. REV. 529 (1984) [hereinafter McClain, *Chinese Struggle*] (discussing periods of nativism and resistance toward the Chinese community during the nineteenth century); Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CALIF. L. REV. 7 (1947) [hereinafter McGovney, *Anti-Japanese Land Laws*] (criticizing state laws that deprived certain aliens of the ability to own farmland); Dudley O. McGovney, *Naturalization of the Mixed-Blood—A Dictum*, 22 CALIF. L. REV. 377 (1934) (same); Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?* 96 CALIF. L. REV. 1299 (2008) (investigating whether affirmative action stigmatizes its beneficiaries); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1 (2000) (calling for sociological study of the purposes of civil rights law); Cristina M. Rodríguez, *Language and Participation*, 94 CALIF. L. REV. 687 (2006) (arguing for language rights as a way to strengthen participatory democracy in mid-level institutions such as schools and workplaces); Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77 (2000) (evaluating the effects of addressing racial injustice in colorblind terms); Stephen D. Sugarman & Ellen G. Widess, *Equal Protection for Non-English-Speaking School Children: Lau v. Nichols*, 62 CALIF. L. REV. 157 (1974) (discussing school policies that disadvantage non-English speaking children); Stephanie M. Wildman, *Thinking About Race and Races*, 89 CALIF. L. REV. 1589, 1653, 1656 (2001) (noting "silences, omissions, and strained reasoning" in judicial treatments of race and racism); Eric K. Yamamoto, Book Review, *Teaching Race Through Law: "Resources for a Diverse America,"* 89 CALIF. L. REV. 1641 (2001) (urging increased scholarly attention to the legal dimensions of Japanese internment and reparations for it).

These are but a sample of the many notable articles on race and equality that have appeared in the pages of the *Review* since 1912; I introduce a few others later in this Essay. The list does not include symposium issues on specialized topics such as voting, economic development, or the *Bakke* decision, nor articles on narrow technical topics such as Indian jurisdiction or affirmative action. Nor does it contain many pieces predating the 1960s, when writing on civil rights exploded. See, e.g., Chester James Antieu, *Equal Protection Outside the Clause*, 40 CALIF. L. REV. 362 (1952) (analyzing non-Fourteenth Amendment legal avenues to ensure equal protection of the laws); Edward E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CALIF. L. REV. 61 (1947) (attacking a 1913 California alien land law as a discriminatory and unconstitutional measure aimed at denying Japanese-Americans the right to own their own land); Ira Michael Heyman, *Federal Remedies for Voteless Negroes*, 48 CALIF. L. REV. 190 (1960) [hereinafter Heyman, *Federal Remedies*] (surveying legal avenues through which African Americans could enforce their right to vote); Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States—Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171 (1951) (exploring the historical impetus for the Thirteenth Amendment).

The earliest reference to race or racial traits in the *Review* is Henry Winthrop Ballantine, *Military Dictatorships in California and West Virginia*, 1 CALIF. L. REV. 413, 413 (1912) (noting Mexico's "penchant for dictators" and observing that not a few U.S. Army generals and mayors exhibited the same trait in the wild West).

looking for patterns, signs of strain, significant changes, and theoretical breakthroughs. I look primarily for broad outline and structure. Thus, I do not plan to critique any particular article, respond to ones I disagree with, or put any article or group of them under the lens. Instead, I shall be looking at all of them at once in search of contours that only emerge on taking this more encompassing view. In undertaking this survey, I hope to illuminate where we are today in our thinking on American race theory, and highlight the role that the *California Law Review* has played in bringing us here.

What I find, upon examination, is essentially two different binary paradigms of racial thought,<sup>7</sup> one familiar to readers of this literature,<sup>8</sup> the other less so.<sup>9</sup> The first and more familiar paradigm conceives of American race relations as occurring within a black-and-white dichotomy. The second paradigm, which has emerged more recently, focuses instead on the relationship between individual rights and equality protection. What is most surprising is not so much the existence of two different paradigms, but rather that they are nested, with one inside the other.<sup>10</sup> The black-white paradigm approaches racial discrimination, a subset of general equality concerns, by thinking in terms of racial groups, and has resisted approaching race in individualized terms. The individual rights-equal protection paradigm, which addresses broader equality issues, thinks in terms of classes of protection, and had resisted approaching equality in individual liberty concerns. Furthermore, recent scholarship has (separately) criticized both paradigms for their balkanizing approaches to equality concerns, offering more unifying approaches.

I begin by describing the two paradigms and the evidence supporting their existence. Again, the reader should not mistake my intention. I believe each paradigm is fully justified and analytically helpful.<sup>11</sup> Attending to each can aid

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7. See *infra* Part II (describing two paradigms of civil rights thought, a black-white binary paradigm and an equal-protection/due process one).

8. The black-white binary paradigm of race is likely familiar to most Americans, and particularly to intellectuals familiar with critical race theory. See, e.g., Perea, *Black/White*, *supra* note 3, at 1214 (noting that the black-white racial paradigm is “one of the most salient features of past and current discourse about race in the United States”); Espinoza & Harris, *Tar Baby*, *supra* note 6, at 1593 (arguing that “[c]ritical race scholars see race as a black/white binary problem” and that this shortcoming “leads to failure to understand racism”).

9. See *infra* Section II.B, describing a second paradigm that focuses on individual rights and equality protection.

10. See *infra* Part III (describing this relation).

11. By “analytically helpful,” I mean that each paradigm is relatively clear and well defined, is a relatively accurate picture of how we talk, think, reason, and decide cases at a given moment in history, and is to that extent helpful in understanding the social reality of racism in American society. Paradigms, however, are like frost crystals that disappear on exposure to the sun. As soon as one starts talking about a paradigm, its days are numbered. See *infra* notes 133–41 and accompanying text. Labeling a paradigm—giving it a name and speaking of it as such—is thus a sign of its impending demise. One only speaks of paradigms in the past tense (“the way we used to speak and act”). See *infra* notes 133–37 and accompanying text.

in the search for a more just society.<sup>12</sup> Each one is thoroughly justifiable in light of social reality and the history of race.<sup>13</sup> Each helps us understand the case law and the march toward a more humane legal system.<sup>14</sup>

After briefly describing the two paradigms, I turn to their relation. I explain how these paradigms are nested within each other and why I believe this relationship tells us something about the evolution of thought on a difficult subject.<sup>15</sup> The *California Law Review* has published a large and impressive body of scholarship on race, most of it of the highest order. It has helped to introduce and critique two important paradigms of modern race theory, and, as I will argue, may be leading the way to a new paradigm that may help to transcend some of the problems with current racial thought.

## I.

### UNDERSTANDING PARADIGMS

#### *A. Defining Racial Paradigms in Civil Rights Law*

In organizing ways to think about the points of difference among civil rights scholars, it is useful to refer to the concept of a paradigm.<sup>16</sup> Paradigms of racial thought, as I use the term, refer to broad views or schools of

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12. More just, that is, from the perspective of those who operate within the dominant paradigms and have mastered the social understandings associated with them. *See infra* notes 134–35, 142–44 and accompanying text (describing some of the benefits that accompany this mastery of the most common binary paradigms of racial thought).

13. Of course, new outsider groups will someday come to question the justifiability of existing paradigms when they find no room within them for the questions they find pressing. *See infra* notes 131–53 and accompanying text; Greenfield & Kates, *Mexican Americans*, *supra* note 6; McClain, *Chinese Struggle*, *supra* note 6.

14. I explore the mechanism by which ousting outdated paradigms contribute to a more inclusive legal system in Section II.A *infra*, by explaining how an inchoate sense of dissatisfaction always attends recognition of a paradigm, legal or otherwise. When the paradigm is binary, the discontented faction is apt to be a third group that finds itself marginalized by the current one. *See supra* note 13; *infra* notes 131–46 and accompanying text; *see also* Tanya K. Hernandez, *Afro-Mexicans and the Chicano Movement: The Unknown Story*, 92 CALIF. L. REV. 1537, 1544 (2004) (noting that many Chicano scholars carefully ignore their black roots); Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multicultural Society*, 81 CALIF. L. REV. 863 (1993) (considering whether separatism is a viable approach to achieving racial justice in a culturally pluralist United States); McClain, *Chinese Struggle*, *supra* note 6; Rachel Moran, *What if Latinos Really Mattered in the Public Policy Debate?* 85 CALIF. L. REV. 1315, 1316 (1997) (noting the absence of Latino issues from social-policy agendas and arguing that this absence “can obscure the special concerns of Latinos and prevent them from emerging as a complex and compelling people in their own right”).

15. *See infra* Part III.A–C (describing some of the respects in which current racial paradigms may be breaking down); *see also infra* Part III.C and Conclusion (describing the gains I hope will emerge from this inquiry), and in particular note 167 (outlining what a larger, more inclusive paradigm might look like).

16. *See, e.g.*, THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10 (2d ed. 1970) (describing the concept of a scientific paradigm as a framework which “implicitly . . . define[s] the legitimate problems and methods of a research field for succeeding generations of practitioners”).

scholarship.<sup>17</sup> They connote ways of seeing something and a propensity to regard that view as vital and significant.<sup>18</sup> Paradigms, then, identify issues that a group of scholars believe important and worthy of study. They also determine what evidence is relevant and worth studying; matters falling outside the paradigm are digressions or even pseudo-science or pseudo-issues and not worth serious attention.<sup>19</sup> Paradigms do permit disagreements, but only within a narrow, well-understood range. For example, which is preferable: quotas or targets? Does it matter whether a person has conscious intent to discriminate or is merely a victim of his or her unconscious stereotype?

Within the contours of civil rights law lies a tangle of complex and difficult questions. Different paradigms of civil rights law will highlight different aspects of these field-defining issues. Most readers will think of civil rights litigation and scholarship as concerned with expanding the right of equal treatment, especially for African Americans.<sup>20</sup> They will associate it with case law and legislation ending slavery and segregation.<sup>21</sup> They will think of it in connection with developments forbidding employment discrimination,<sup>22</sup> real-estate redlining and racial covenants in white neighborhoods,<sup>23</sup> school

17. See, e.g., Perea, *Black/White*, *supra* note 3, at 1216 (describing legal paradigms as a “shared set of understandings or premises which permits the definition, elaboration, and solution of a set of problems defined within the paradigm”).

18. See KUHN, *supra* note 16, at 24–25 (“[D]uring the period when the paradigm is successful, the profession will have solved problems that its members could scarcely have imagined and would never have undertaken without commitment to the paradigm.”); Perea, *Black/White*, *supra* note 3, at 1216.

19. See Perea, *Black/White*, *supra* note 3, at 1217 (“[A]s a paradigm becomes the widely accepted way of thinking and producing knowledge on a subject, it tends to exclude or ignore alternative facts or theories that do not fit the expectations produced by the paradigm.”).

20. For example, the latest edition of Derrick Bell’s casebook opens with the following lines: “For weal or for woe, the destiny of the colored race in this country is wrapped up with our own . . . .” See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 1 (6th ed. 2008); see also Johnson, *Bid Whist*, *supra* note 6, at 1403 (noting the uniqueness of black culture and institutions); Loren Miller, *Race, Poverty, and the Law*, 54 CALIF. L. REV. 386 (1966) (calling attention to the special problems of the black poor).

21. See, e.g., Heyman, *Federal Remedies*, *supra* note 6, at 194 (assuming that “federal action in the voting field should be to aid significant numbers of qualified Negroes to avoid obstacles to registration and voting”).

22. See, e.g., BELL, *supra* note 20, at 149–227 (reviewing the history of black employment law); Armour, *Stereotypes and Prejudice*, *supra* note 6, at 743 n.46 (noting the role of African American stereotypes held by otherwise low-prejudiced people in a variety of settings, including job interviews and on the street); Sanford Jay Rosen, *The Law and Racial Discrimination in Employment*, 53 CALIF. L. REV. 729 (1965) (discussing developments in the law relating to workplace discrimination against African Americans).

23. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) (striking down a covenant restricting occupancy of residential houses by anyone other than whites); Harold W. Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in “Private” Housing*, 52 CALIF. L. REV. 1, 1 (1964) (exploring constitutional aspects of racial discrimination in selling and leasing “private” housing, including the obstacle of the state-action requirement); Marshall Kaplan, *Discrimination in California Housing: The Need for Additional Legislation*, 50 CALIF. L. REV. 635 (1962) (calling attention to the need for effective—and additional—state remedies to address housing discrimination).



segregation<sup>24</sup> and other similar practices. In short, they will think of scholarship and activism in this area as concerned with broadening the rights of minorities.

Of course, expanding the rights of one group will often have consequences for those of another. Vouchsafing the right of a black, for example, to rent a house or apartment without discrimination may interfere with the right of a white property owner to rent to a tenant with whom he or she feels comfortable.<sup>25</sup> Even when protecting the interests of a group does not require this sort of balancing, important questions may demand attention. How far does protection for different racial groups extend?<sup>26</sup> Must a claim for relief brought under an anti-discrimination statute allege intent on the part of the defendant to discriminate on the basis of race?<sup>27</sup> Do all racial groups have standing to bring a suit for race discrimination?<sup>28</sup> And how does one measure the damages resulting from a discriminatory breach?<sup>29</sup>

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24. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (declaring separate but equal schools unconstitutional).

25. See *Shelley*, 334 U.S. at 20 (holding that a black family's right to occupy housing covered by a restrictive covenant supersedes that of property owners wishing to preserve an all-white neighborhood in part because "freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment"); R. Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87, 87 (1979) (noting that affirmative action programs can sometimes give benefits to blacks "at the expense of whites who, apart from race, would have had a superior claim to enjoy them"); Wildman, *Thinking About Race and Races*, *supra* note 6 (calling attention to role of white privilege and expectations).

26. For example, does a prohibition on renting to a family of undocumented immigrants, most of whom will be brown and from Latin America, constitute housing discrimination on the basis of color? See *Shelley*, 334 U.S. 1 (discussing a housing covenant that excluded black families from a neighborhood); Bell, *Race, Racism*, *supra* note 20, at 425–96 (discussing fair-housing laws primarily in terms of their impact on black families and predominantly black communities). See also Perea, *Black/White*, *supra* note 3, at 1215 (arguing for extension of the law beyond the black-white paradigm to include more racial groups, specifically Latinos).

27. See *Washington v. Davis*, 426 U.S. 229 (1976) (holding that a plaintiff in a racial discrimination case must prove that the defendant intended to discriminate against him or her because of race, not merely that he adopted a practice or rule that disproportionately produced this result); Krieger, *Perestroika*, *supra* note 6, at 1229 (noting that much discriminatory social behavior stems from unconscious mental processes, resulting in "disparate treatment based on race, sex, national origin, or other factors, even among the well-intentioned"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (discussing the operation of unconscious discrimination and concluding that, "[t]o the extent that [our] cultural belief system has influenced all of us, we are all racists"); Michael S. Shin, *Redressing Wounds: Finding a Legal Framework to Remedy Racial Disparities in Medical Care*, 90 CALIF. L. REV. 2047, 2060 (2002) (noting that many disparities in medical care are not the product of deliberate design, but can be at least partially attributed to "psychological factors on the part of health care providers").

28. See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972) (holding that whites may sue for housing discrimination under a rule that "gives standing to sue to all in the same housing unit who are injured by racial discrimination").

29. See, e.g., MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 158–61 (2010) (exploring the constitutional dimensions of using race-based tables to determine life expectancy and future earning capacity for the purposes of

Some questions that remain unsettled have to do with the shape and extent of civil rights protection itself. For example, can a Latino sue for racial discrimination?<sup>30</sup> Suppose the Latino's lawsuit stems from a type of discrimination that does not visit blacks, such as looking foreign or speaking with a heavy accent?<sup>31</sup> What about a black woman discriminated against on the basis of her black womanhood? Can she sue for racial discrimination, sex discrimination, both—or neither?<sup>32</sup> Even in this small subset of the crucial issues in civil rights law, it is easy to see that the frame with which we view the questions and the field of what we deem important will shape both our answers and the additional questions we press to ask.

Civil rights law then is a shifting, overlapping collection of responses to a variety of practical and policy questions. Many of the authors of articles in the

calculating damages in tort actions); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 765 (1991) (questioning whether the judiciary, equipped with current tools, can remedy breaches of civil rights law because “[j]udicial decisions are of limited efficacy in bringing about social change”).

30. See *Hernandez v. New York*, 500 U.S. 352 (1990) (ruling that Latinos may not complain of jury exclusion based solely on bilingualism); Perea, *Black/White*, *supra* note 3, at 1220 (arguing that “because the Black/White binary paradigm is so widely accepted, other racialized groups like Latinos/as . . . are often marginalized or ignored altogether”); Greenfield & Kates, *Mexican Americans*, *supra* note 6, at 670 (noting that some courts may still consider “factors which indicate that Mexican Americans might be considered ‘white’ for purposes of section 1981 and 1982” of the Civil Rights Act of 1866). *But see* *Hernandez v. Texas*, 347 U.S. 475, 478 (1954) (holding that Mexican Americans may sue for relief from jury discrimination in areas where they can demonstrate that local residents consider Mexican Americans to be a separate group subject to discrimination).

31. See, e.g., Haney López, *Saliency*, *supra* note 5; Perea, *Black/White*, *supra* note 3. Both *California Law Review* articles break new ground in conceptualizing Latino legal rights. See also *LATINOS AND THE LAW: CASES AND MATERIALS* (Richard Delgado, Juan F. Perea, & Jean Stefancic eds., 2007) (discussing discrimination against Latinos based on language, perceived foreignness, and brown skin); Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CALIF. L. REV. 321, 326 (1987) [hereinafter Moran, *Status Conflict*] (observing that “Hispanics have frequently brought suit to enforce bilingual education provisions”); Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CALIF. L. REV. 1249, 1250 (1988) (asserting that the controversy over bilingual education programs “reflects a battle over the allocation of discretion to make educational policy”); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 281 (1990) [hereinafter Perea, *Demography and Distrust*] (discussing the consequences for Latinos of “language . . . being manipulated as a proxy for national-origin discrimination”); Rodríguez, *Language and Participation*, *supra* note 6, at 688 (summarizing local debates about English-only rules); Beatrice Bich-Dao Nguyen, Comment, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers*, 81 CALIF. L. REV. 1325, 1327 (1993) (“Courts recognize that discrimination against accent may function as the equivalent of discrimination against national origin . . .”).

32. On discrimination against intersectional individuals who are members of two or more groups, see, for example, Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1989 U. CHI. LEGAL F. 139, 139 (exploring the “problematic consequence[s] of the tendency to treat race and gender as mutually exclusive categories of experience and analysis” and noting that this “single-axis framework . . . is dominant in antidiscrimination law”); Angela P. Harris, *Jurisprudence of Reconstruction*, *supra* note 4, at 767–68; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 608 (1990).

*California Law Review* have grappled with questions such as these with keen intelligence and insight. That literature, however, inevitably exhibits signs of contention. Because not all authors or courts are by any means in accord on the above issues,<sup>33</sup> an understanding of racial paradigms can help provide a framework within which to examine these divergent perspectives. Moreover, as will become apparent, racial paradigms are far from static. As new cases arise and new scholarship appears, paradigms interact with one another to reveal new fissures in our modes and thought and intuitions about how we wish to live our lives together.

### *B. An Example of Racial Paradigms: Liberals and Conservatives*

To see how paradigms work, it can be useful to examine two familiar examples, racial conservatism and racial liberalism.<sup>34</sup> Racial liberals believe that racism is not dead and that combating it is a worthy goal.<sup>35</sup> They believe that discrimination can take many forms, such as structural, unconscious, and institutional.<sup>36</sup> They believe that most of the problems of African Americans

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33. See, e.g., Catharine A. MacKinnon, *From Practice to Theory, or, What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 13 (1991) (responding to black-feminist critiques of intersectionality and essentialism and denying that her own scholarship commits either error); Roy L. Brooks & Kirsten Widner, *In Defense of the Black/White Binary: Reclaiming a Tradition of Civil Rights Scholarship*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 107 (2010) (disagreeing that American race-remedies law incorporates an implicit black-white binary paradigm; asserting that, if it does, the paradigm is fully justified because of blacks' unique history; that the binary paradigm is readily capable of expansion to take account of the types of discrimination that visit nonblack groups; and asserting that this expansion has in fact occurred several times in history); Farber & Sherry, *Critique of Merit*, *supra* note 6; Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) [hereinafter Farber & Sherry, *Telling Stories*] (critiquing critical race scholarship and praising the conventional version for its adherence to scholarly norms).

34. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1998) (identifying defects in the accounts of race of both traditional liberalism and critical legal studies). On the conservative position, see, for example, DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1995).

35. See, e.g., BELL, *supra* note 20, at 19–72 (discussing various approaches to America's race problem).

36. See, e.g., Krieger, *Perestroika*, *supra* note 6, at 1279 (describing how unstated presuppositions guide thought and perception, especially in areas such as race, so that much discrimination “occurs when an individual's group status subtly, even unconsciously, affects a decision makers' [sic] subjective perception of relevant traits”); Lawrence, *supra* note 27 (discussing unconscious discrimination). On institutional discrimination, see Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1843 (2000) (discussing institutional discrimination in the judiciary through the lens of Supreme Court decisions, and finding that “government actions the Court hopes not to evaluate do in fact impose severe injuries on minority communities”); William C. Kidder, Review Essay, *Silence, Segregation, and Student Activism at Boalt Hall*, 91 CALIF. L. REV. 1167, 1173 (2003) (noting the “staggeringly low” levels of minority representation in the student body at Boalt Hall after the passage of Proposition 209); Amy DeVaurel, Review Essay, *Silence at the California Law Review*, 91 CALIF. L. REV. 1183 (2003) (same, at the law review).

are the product of slavery, Jim Crow laws, and discriminatory treatment extending over centuries.<sup>37</sup> For them, a large body of evidence illustrates the enduring nature of discrimination, including the strident opposition to President Barack Obama; society's insistence on using high-stakes tests even after their validity has come under question; and the persistence of black underrepresentation in many fields, such as the law, and their overrepresentation in the nation's prisons and jails.<sup>38</sup>

Racial conservatives, on the other hand, adhere to a different paradigm that includes a different set of premises and deems different facts to be material. They believe that black poverty is largely the product of a host of cultural factors, such as preferring sports, music, and entertainment to diligent study;<sup>39</sup> that society is now largely postracial;<sup>40</sup> and that active discrimination is mainly a thing of the past.<sup>41</sup>

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37. See, e.g., MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 226 (2003) (asserting that one reason race matters "is that the most important source of continuing racial disparities in modern America is still the legacy of past patterns of discrimination and racially coded patterns of disinvestment"); Bell, *Despair*, *supra* note 2, at 190–91 (tracing the role that American courts have played in perpetuating a deeply ingrained institutional racism that began with slavery).

38. Compare David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 496–97 (1996) (observing that "African Americans still constitute only a tiny percentage of the associates and partners working in the nation's largest corporate law firms"), with MICHELLE ANDERSON, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (noting the high proportion of black and Latino males behind bars).

39. See, e.g., DANIEL MOYNIHAN & NATHAN GLAZER, *THE NEGRO FAMILY: A CASE FOR NATIONAL ACTION* (1965) (describing cultural patterns in poor black families, including the relationship between the frequency of broken African American homes and the difficulty that black children face attaining middle- and upper-middle-class socioeconomic status); see also OSCAR LEWIS, *FIVE FAMILIES: MEXICAN CASE STUDIES IN THE CULTURE OF POVERTY* (1959) (describing how fatalism, superstition, living for the moment, and lack of confidence in the value of education and hard work keep poor Latinos from rising); RICHARD VALENCIA, *THE EVOLUTION OF DEFICIT THINKING: EDUCATIONAL THOUGHT AND PRACTICE* 190 (1997) (discussing the prevalence of deficit thinking, which posits that low-income parents of color typically do not value the importance of education); Harris, *Scapegoating Culture*, *supra* note 6, at 922 (noting a similar tendency in society at large to condemn African Americans for "maladaptive cultural practices").

40. See D'SOUZA, *supra* note 34, at 525 ("Racism undoubtedly exists, but it no longer has the power to thwart blacks or any other group in achieving their economic, political, and social aspirations."); Haney López, *Post-Racial Racism*, *supra* note 5, at 1069 (acknowledging the likelihood of a partial postracial "transformation" following the election of President Obama, but simultaneously recognizing that "preservation of the racial status quo" is likely to continue); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CALIF. L. REV. 683, 692 (2004) (offering a moral response to the conservative position by arguing that "[t]o the extent society participated in wrongful discrimination, society is arguably obligated, as a matter of corrective justice, to make amends to the victims thereof").

41. See D'SOUZA, *supra* note 34; see also Richard A. Posner, *The Bakke Case and the Future of "Affirmative Action"*, 67 CALIF. L. REV. 171 (1979) (pointing out difficulties with the doctrine's underlying rationale). But see Mark R. Killenbeck, *Pushing Things up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CALIF. L. REV. 1299, 1384–1405 (1999) (discussing six principles that can justify affirmative action in higher education); BROWN ET AL., *supra* note 37, at 198 (criticizing color-blind approaches to voting rights laws, and arguing that "[w]hites

Racial conservatives also deem a different set of inquiries to be interesting and relevant to understanding contemporary issues of racial inequality. They ask, for example, are blacks interested in science and math?<sup>42</sup> Does their reluctance to enter into stable marriages account for the poor performance of some of their children in school?<sup>43</sup> Can the fear that many white citizens feel toward African Americans be explained by the high crime rates that are common to many poor black communities, and if so, is that fear entirely irrational?<sup>44</sup>

Intriguing as the liberal and the conservative paradigms are, they are not the ones I shall be concerned with. I mention them merely because they serve as familiar examples of what I mean by a paradigm. They have also generated a great deal of writing, so that it seems pointless to add to it here, although I shall refer to them occasionally in what follows.<sup>45</sup> Moreover, the sophisticated race scholars who have contributed to the *California Law Review* over the years, in most cases, do not fall neatly into either of these two simple (if not simplistic) paradigms or schools of thought.

Instead, the paradigms I shall be concerned with are the black-white paradigm of racial thought<sup>46</sup> and an emerging equality-individual rights divide.<sup>47</sup> The first one is likely to be familiar to readers of this Essay; the latter, less so. Let us now turn to the two paradigms before examining, in Part III, their relation and meaning.

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who insist on color-blind redistricting are really demanding a[] [discriminatory] electoral system that acknowledges *their* majority status”).

42. If they are not interested, the argument goes, their poor representation in these sectors of the job market would not bespeak discrimination. See Vicki Shultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1994) (discussing the lack-of-interest defense in employment discrimination suits).

43. See Moynihan & Glazer, *Case for National Action*, *supra* note 39, at 34–40 (exploring the connection between broken African American homes and the startlingly high rate at which black children fail the Armed Forces Qualification Test, which “roughly measures ability that ought to be found in an average 7th or 8th grade student”).

44. See D’SOUZA, *supra* note 34, at 246 (stating the author’s conclusion that “whites view racial discrimination today as a rational response to black group traits”); Jody Armour, *Stereotypes and Prejudice*, *supra* note 6, at 748 (noting that “commentators suggest we are aware of . . . stereotypes, but that we experience them as rational reflections of objective reality”); Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 788 (1994) (discussing discrimination based on a group’s supposed high rate of criminality and noting that even some civil rights leaders believe that “heightened fear of black violence is factually justified”).

45. See *infra* notes 138–39, 151–53 and accompanying text.

46. See *infra* Section II.A (describing the first paradigm).

47. See *infra* Section II.B (describing a second paradigm).

## II.

## TWO PARADIGMS OF RACIAL THOUGHT

*A. The Black-White Binary Paradigm of American Racial Thought*

The black-white binary paradigm of American racial thought<sup>48</sup> includes both a descriptive<sup>49</sup> and a normative element.<sup>50</sup> Not all authors who subscribe to the first, descriptive, component do so to the second, normative one, as well. And many of those who would agree that the paradigm exists and is a useful way of thinking about race, divide over its normative consequences. Some, called black exceptionalists, believe that it is perfectly legitimate to organize racial thought along the lines of a black-white binary.<sup>51</sup> Others embrace “differential racialization” and hold that each group is racialized in different ways.<sup>52</sup> Since a black-white binary obscures this basis of differentiation, they say, it oversimplifies and can lead to multiple errors of analysis and action.<sup>53</sup>

48. See Perea, *Black/White*, *supra* note 3, at 1219–20 (defining and illustrating the binary paradigm as primarily addressing the relations between two racial groups: black and white); see also Richard Delgado, Book Review, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181, 1190 (1997) [hereinafter Delgado, *Fifteenth Chronicle*] (identifying problems with a binary approach).

49. By “descriptive,” I mean passages setting out the author’s conception of the paradigm and giving examples of it. See, e.g., Perea, *Black/White*, *supra* note 3, at 1221–52 (introducing the author’s contention that much of today’s race literature “comprehends only the study of White racism against Blacks as the legitimate scope of racism”).

50. By “normative,” I mean passages condemning or praising the paradigm, or otherwise pointing out how it distorts analysis. See, e.g., Perea, *Black/White*, *supra* note 3, at 1220 (noting defects in reasoning under the paradigm, particularly when considering the rights of nonblack minorities, who “often [end up] marginalized or ignored altogether” as a result of the pervasiveness of the black-white paradigm); Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283, 299 (2000) [hereinafter Delgado, *Toolkit*] (arguing that “[b]lack/white or any other kind of binary thinking can also warp minorities’ views of themselves and their relation to whites”); Richard Delgado, Book Review, *Locating Latinos in the Field of Civil Rights: Assessing the Neoliberal Case for Radical Exclusion*, 83 TEX. L. REV. 489, 519 (2004) [hereinafter Delgado, *Locating Latinos*] (pointing out drawbacks of black exceptionalism, particularly its tendency to render “much mistreatment that is not precisely analogous to any [harm] that blacks suffer . . . legally invisible”); Delgado, *Fifteenth Chronicle*, *supra* note 48, at 1186 (explaining how the binary paradigm operates so that “[i]f you’re neither, you have trouble making claims or even having them understood in racial terms at all”); see also George A. Martinez, *The Legal Construction of Race: Mexican Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 336–38 (1997) (pointing out that Latinos historically were classified as legally white—and so not worthy of their own cognizable group subject to constitutional protection—but unable to take advantage of any societal benefits such a classification may have brought).

51. See, e.g., Brooks & Widner, *supra* note 33, at 142 (noting that “it makes sense for African-American and other civil rights scholars to focus on black/white racial relations”); Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177, 1192–1201 (1999) (noting the depth of the black predicament); Johnson, *Bid Whist*, *supra* note 6 (asserting that the uniqueness of blacks within American society is a result of historical forces that shaped the African American community).

52. Under this view, each minority group, because of its own specific situation and history, requires legal treatment tailored to those differences. See Perea, *Black/White*, *supra* note 3, at 1235–39 (criticizing the notion that a deeper understanding of black-white relations will shed light on the

### 1. Defining the Paradigm

The black/white paradigm of American racial thought holds that, as a descriptive matter, most civil rights discourse in this country centers around two groups, considering their experience typical and fundamental.<sup>54</sup> For writers who subscribe to this paradigm, including scholars, historians, novelists, and social commentators, those two groups are the white and the black.<sup>55</sup> For these scholars, “race” means black, and civil rights means the relations between blacks and whites.<sup>56</sup> Although other groups, such as Native Americans, Asian Americans, and Latinos, have experienced discrimination in this country, the earliest, longest, and most virulent form of it is that which has visited African Americans, beginning with slavery.<sup>57</sup>

To understand race in America, then, one must begin with the black experience. The experiences of other groups—for example, Japanese with World War II internment<sup>58</sup> or Latinos with language discrimination<sup>59</sup>—may

experiences of other communities of color); Delgado, *Toolkit*, *supra* note 50, at 289, 297–98 (discussing the different bases on which various groups within American culture are racialized); Martinez, *supra* note 50, at 325–28 (pointing out how Latinos confound easy classification); *see also* TOMAS ALMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* 4–7 (1994) (discussing the wide variety of racialized experiences among different ethnic groups in the United States); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 55 (2d ed. 1994) (proposing a definition of racial formation “as the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed”); Espinoza & Harris, *Tar-Baby*, *supra* note 6, at 1596–97 (discussing the contours of black exceptionalism as it relates to other racial groups).

53. *See supra* notes 14, 25–32; *infra* notes 62–67, 71–84 and accompanying text.

54. *See generally* Perea, *Black/White*, *supra* note 3, at 1219–21 (describing the black-white binary paradigm of race theory); Delgado, *Toolkit*, *supra* note 50, at 291–306 (outlining the ways in which binary thinking about race can harm minority groups, even the groups forming half of the binary association).

55. *See* Perea, *Black/White*, *supra* note 3, at 1221–52 (discussing well-known works of scholarship that analyze racial issues in black-white terms).

56. *See id.* at 1221 (asserting that literature on race relations “comprehends only the study of White racism against Blacks as the legitimate scope of racism”); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 67–74 (2001) [hereinafter DELGADO & STEFANCIC, *CRT: AN INTRODUCTION*]; *see also* Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261 (2006) (noting the importance of preserving black distinctness in integrated settings and identifying two different strains of racial equality thought: the integrationist view and the community-centered approach).

57. *See, e.g.*, Brooks & Widner, *supra* note 33, *passim* (suggesting that African Americans are unique and deserving of special attention, particularly because of the role of slavery in shaping the African American concept of race).

58. *See, e.g.*, ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATIONS: LAW AND THE JAPANESE AMERICAN INTERNMENT* 23 (2001) (observing that “many legal scholars have pointed out that traditional paradigms of civil rights law contemplate only Black and White racial groups,” and that “[u]nlike African Americans, Asian Americans are often treated as foreigners and may be excluded from a vigorous application of equal protection doctrines”); JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 436–62 (2d ed. 2007) (collecting cases and government reports on the internment during World War II of Japanese American citizens); *see also* McGovney, *Anti-Japanese Land Laws*, *supra* note 6, at 26–34 (discussing nativist treatment of Japanese Americans through the lens of the development of California’s anti-Japanese land-use law).

merit attention, but are nevertheless subordinate to the more foundational and pervasive variety of discrimination experienced by blacks. Indeed, if one understands the relationship of blacks and whites and the forces shaping that relation, one will find a template for understanding the reception society has afforded other groups lying at the periphery of the American experience.<sup>60</sup>

## 2. Diverging Perspectives on the Black-White Paradigm of Racial Thought

The principal exponent and critic of this way of looking at race is Juan Perea. In a landmark article in the *California Law Review*,<sup>61</sup> Professor Perea sets out his interpretation of the black-white binary paradigm and gives examples of it from the writing of leading race scholars.<sup>62</sup> He shows how writers and jurists who subscribe, consciously or not, to this paradigm tend to give short shrift to the problems and histories of nonblack groups.<sup>63</sup> According to Professor Perea, they either ignore these issues entirely or assume that one can understand and address them by analogy to familiar problems affecting blacks.<sup>64</sup>

Like many critics of the black-white binary of civil rights thought, Perea does not rest content with merely describing the foibles of this form of thought, but actively attacks it. For him and other critics, the binary is not just an interesting habit of mind, or even a perfectly understandable choice to

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59. See, e.g., Moran, *Status Conflict*, *supra* note 31, at 326–41 (tracing the historical and legal development of what the author terms “the bilingual education controversy” pertaining to Hispanics); Perea, *Demography and Distrust*, *supra* note 31, at 361–62 (tying the “anti-Hispanic origins of the official English movement” to nativist tendencies); Rodríguez, *Language and Participation*, *supra* note 6, at 690 (acknowledging the work of scholars like Samuel Huntington, who warn that “American democracy now faces the possibility of its own unraveling brought on by the failure of an unprecedented number of recent immigrants, mostly from Latin America, to assimilate linguistically and culturally”); Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CALIF. L. REV. 1347 (1997) (noting obstacles to redressing language discrimination in the workplace).

60. See Perea, *Black/White*, *supra* note 3, at 1221–32 (critiquing this view by explaining that “Whites can ignore our claims to justice, since we are not Black and therefore are not subject to real racism. . . . Latinos/as do not fit the boxes supplied by the paradigm”). *But see* Brooks & Widner, *supra* note 33, at 107–22 (defending this view on the ground that the black experience illustrates racism in its most pristine form).

61. Perea, *Black/White*, *supra* note 3.

62. *Id.* at 1221–32 (discussing the works of Andrew Hacker and Cornel West).

63. *Id.* at 1240–52; see also Delgado, *Fifteenth Chronicle*, *supra* note 48, at 1185–1289 (demonstrating how the black-white racial binary makes it difficult for nonblack minorities to think of themselves in racial terms).

64. See Perea, *Black/White*, *supra* note 3, at 1220 (arguing that “the paradigm dictates that all other racial identities and groups in the United States are best understood through the Black/White binary paradigm”); see also Delgado, *Toolkit*, *supra* note 50, at 297 (asserting that “the concerns of other [racial] groups would come into play only insofar as they resemble, in kind and seriousness, that one great mistake” of African slavery); Delgado, *Locating Latinos*, *supra* note 50, at 519 (“The black/white binary paradigm of race left Latinos and other nonblack minority groups with essentially two choices: They could be whites, or they could be blacks.”).



emphasize one set of topics over another, like a torts scholar who focuses on intentional torts rather than ones of negligence. Instead, the black-white binary does affirmative harm by marginalizing the problems of other groups and forcing them to analogize the injuries they suffer to ones that befall blacks.<sup>65</sup> The paradigm also impairs coalitions by encouraging nonblack groups to wait their turn.<sup>66</sup> Further, it obscures how America's legal history of race is a patchwork of advance and retreat, with one group now progressing while another moves backward, and the groups trading positions as the interests of the majority group dictate.<sup>67</sup>

Others take the opposite normative position. The paradigm's defenders include black exceptionalists who believe that the problems of this group are unique, serious, and deserving of a central place in any discussion of race.<sup>68</sup> The category also includes traditional scholars reluctant, sometimes out of inertia, to extend their analysis to new groups.<sup>69</sup> It also includes those who hold that attention is a limited commodity, so that pondering the issues facing smaller or less important groups is a digression from the civil rights community's main task, namely, solving the problems of the one group that has suffered the longest, namely, blacks.<sup>70</sup>

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65. Perea, *Black/White*, *supra* note 3, at 1220, 1238, 1242 (noting the various ways the binary can misdirect analysis); DELGADO & STEFANCIC, CRT: AN INTRODUCTION, *supra* note 56, at 67 (arguing that "the black-white binary[] effectively dictates that nonblack minority groups must compare their treatment to that of African Americans to gain redress"); Delgado, *Toolkit*, *supra* note 50, at 1292-99 (same).

66. See, e.g., Delgado, *Toolkit*, *supra* note 50, at 302-06 (exploring the manner in which the focus on binary racial paradigms inhibits different racial groups from working together, through an examination of an exception to this rule where the NAACP and Mexican-American plaintiffs worked together to combat forced segregation of Hispanic students because of language barriers).

67. For an example of a nonblack racial group advancing an anti-discrimination cause that was subsequently championed by blacks, see Perea, *Black/White*, *supra* note 3, at 1242-52 (describing the role that Mexican Americans played in ending racial discrimination by litigating cases regarding school segregation and grand jury service prior to the landmark *Brown v. Board of Education* decision). But see Delgado, *Toolkit*, *supra* note 50, at 294-95 (observing instances in legal history where different racial groups have been played off against one another to advance the interests of the dominant white majority); Delgado, *Locating Latinos*, *supra* note 50, at 515-16 (surveying examples where "progress for one racial minority group often accompanies reversals for another"). On the difficulty of determining the contours of an identity group, particularly in connection with distributing benefits, see Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CALIF. L. REV. 1231 (1994).

68. See Brooks & Widner, *supra* note 33, at 130-41 (discussing black uniqueness and defending the related idea that African Americans deserve special attention from race theorists); Espinoza & Harris, *Tar-Baby*, *supra* note 6, at 1596-1605 (defining the contours of black exceptionalism); Johnson, *Bid Whist*, *supra* note 6, at 1415 (asserting that most racial-justice claims "emanate from the theory that the African-American community is unique in American society because of the historical forces that shaped it").

69. See Delgado, *Locating Latinos*, *supra* note 50, at 490, 497-98 (discussing scholars who adopt black exceptionalism by default, that is, out of inertia and a sense of familiarity).

70. See *id.* (citing other writers who mention the argument that nonblack actors are unworthy of affirmative action); Mutua, *supra* note 51, at 1178.

Some of these scholars attempt to stake out a middle ground, holding that the rich body of race-remedies law created with African Americans in mind is readily capable of expansion to cover the milder troubles that visit, say, Hispanics or Japanese Americans. Leading defenders of this view include Angela Harris, writing in the *California Law Review*,<sup>71</sup> as well as Roy Brooks and Kirsten Widner, writing in the *Berkeley Journal of African-American Law & Policy*,<sup>72</sup> and John Hope Franklin, who, as chair of a national race commission urged at its first meeting that it limit its consideration to the problems of blacks because understanding those problems represented the first step toward obtaining the same insights and remedies for members of other groups.<sup>73</sup> According to Franklin, since America “cut its eyeteeth” on racism against blacks, they deserve to be at the center of analysis, with the others respectfully taking seats off to the side.<sup>74</sup>

### 3. Examples of the Black-White Binary Paradigm of Racial Thought

Examples of binary thinking are legion. Perea mentions a number of prominent figures who, intentionally or not, proceed as though only two groups were significant for the study of race.<sup>75</sup> On reviewing the race writing in the *California Law Review* one comes across many other such writers. Although a few, such as Ian Haney López and Angela Harris, are for the most part remarkably ecumenical,<sup>76</sup> most writers, especially in the early years, proceed well within the reigning binary paradigm, with, at best, passing references to the fortunes of nonblack minority groups.<sup>77</sup> Phrases generalizing nonblacks as

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71. Espinoza & Harris, *Tar-Baby*, *supra* note 6, at 1600 (“The moral claim to inclusion that African Americans made during the 1960s civil rights movement has become the rhetorical template for all subsequent civil rights struggles.”); *id.* at 1626–27, 1629–30, 1644 (illustrating this extension of African American civil rights rhetoric and its potential benefits).

72. Brooks & Widner, *supra* note 33, at 119 (“The law does not require other racial minorities to analogize their situation to blacks, but rather to show that they have been discriminated against because of their relationship to a category larger than blacks.”).

73. See Gregg Zoroya, *Beautiful Dreamer*, L.A. TIMES MAG., Feb. 1, 1998, at 10 (recounting how a suggestion that the panel’s research encompass more than the traditional black-white narrative aroused the ire of Chairman Franklin); Warren P. Strobel, *Panelists Argue over What to Focus On*, WASH. TIMES, Sept. 21, 1997, at A8 (reporting that Chairman Franklin said that “when it comes to racial discrimination, the country ‘cut its eyeteeth’ on the black-white issue”); see also LENA WILLIAMS, IT’S THE LITTLE THINGS: EVERYDAY INTERACTIONS THAT ANGER, ANNOY AND DIVIDE THE RACES 244 (2000) (quoting President Bill Clinton on how addressing the problems between black and white Americans can better enable us to tackle those of other groups).

74. Zoroya, *supra* note 73, at 10.

75. Perea, *Black/White*, *supra* note 3 (citing Cornel West, Andrew Hacker, and various writers in the field of whiteness studies as examples of prominent figures who employ the black-white binary paradigm in their work).

76. Haney López, for example, writes about blacks and Latinos, as well as Asian Americans and ethnic whites, e.g., Haney López, *Saliency*, *supra* note 5, at 1148 n.20, 1162, 1175, 1208–09, while Harris often considers the problems of nonblack groups and sexual minorities, e.g., Harris, *Equality Trouble*, *supra* note 4, at 1949, 1950, 1953.

77. For examples of writing during this early period that addresses equality issues in conventional (often black-white) terms, see, for example, Antieu, *supra* note 6; Greenawalt, *supra* note

“other people of color” appear often, as does the word “race” followed immediately by a reference to a black problem or issue (as though the author thought the two were synonymous) and no other.<sup>78</sup>

Two articles by Derrick Bell in the *California Law Review* exemplify this tendency. Perhaps the leading black legal intellectual of his time in the United States, Bell was mainly interested in the fortunes of his own group. His casebook, *Race, Racism and American Law*, is unabashedly Afrocentric (although less so in the later editions, which devote brief treatment to the problems of Chinese, Japanese, Mexicans, and Muslims after September 11).<sup>79</sup> His two articles in the *Review* describe America’s racial troubles in explicitly black-white terms,<sup>80</sup> as though “race” were equivalent to “black”. He notes the long history of black oppression<sup>81</sup> without mentioning that other groups, such as Asians and Latinos, have suffered similar oppression, not to mention the equally bloody and cruel treatment the settlers and U.S. Army inflicted upon Native Americans.<sup>82</sup> He laments, correctly, how slow the legal system has been at redressing black injuries, but neglects to point out that redress might have come earlier had the many minority groups of color made common cause with each other.<sup>83</sup>

While a number of more recent writers, including Andrew Hacker<sup>84</sup> and Cornel West,<sup>85</sup> write in similar fashion, many scholars, such as Kathryn

25; Heyman, *supra* note 6; Howe, *supra* note 6; Miller, *supra* note 20; Rosen, *supra* note 22; tenBroek, *supra* note 6. *See also* Johnson, *Bid Whist*, *supra* note 6 (evincing similar focus in a 1993 article); *cf. infra* note 92 and accompanying text (noting that before roughly 1980, these references were infrequent throughout law review literature).

78. *See, e.g.*, Perea, *Black/White*, *supra* note 3, at 1237 (discussing the marginalization of “other people of color”); *id.* at 1257–58 (“‘Other people of color’ are deemed to exist only as unexplained analogies to Blacks.”). This is indeed a common practice; a Westlaw search turned up hundreds of such phrases in the law review literature about race.

79. *See* BELL, *supra* note 20, at 684–703 (discussing issues affecting American Indians); *id.* at 704–14 (discussing aboriginal Australians); *id.* at 715–18 (discussing the Maoris of New Zealand); *id.* at 719–30 (surveying legal issues affecting Japanese Americans, Chinese Americans, and Mexican Americans).

80. Bell, *Despair*, *supra* note 2, at 166 (considering the “view that racial injustice in the courtroom is caused, not by society, but by the criminal propensities of blacks”); Bell, *Usual Price*, *supra* note 2, at 3 (“Issues of race in America are perceived through a kaleidoscope . . . [c]onceding that blacks have been harmed by slavery.”); *id.* at 9 (Part II. The Cost to Blacks of Earlier Racial Remedies).

81. *See, e.g.*, Bell, *Despair*, *supra* note 2, at 171–81, 191–92 (recounting unjust treatment of black attorneys and litigants); Bell, *Usual Price*, *supra* note 2, at 9–14 (recounting the history of slavery, Jim Crow, and southern resistance to desegregation decrees).

82. *See, e.g.*, PEREA ET AL., *supra* note 58, at 179–283 (discussing legal treatment of American Indians and various cases affecting the group’s legal rights).

83. *See* Bell, *Usual Price*, *supra* note 2, at 11 (noting that desegregation in the educational system was “delayed . . . for more than a decade”). *But see* Delgado, *Toolkit*, *supra* note 50, at 306 (positing success at achieving long-held goals if racial groups “set up a secondary market in which they negotiate selectively with each other”).

84. *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992). *See* Perea, *Black/White*, *supra* note 3, *passim*.

85. *See* CORNEL WEST, RACE MATTERS (1993), *discussed in* Perea, *Black/White*, *supra* note 3,

Abrams,<sup>86</sup> Ian Haney López,<sup>87</sup> and most of the contributors to recent symposia on Latino-Critical issues<sup>88</sup> or critical race theory,<sup>89</sup> treat race in much broader terms. A few expressly note that they are consciously proceeding outside the traditional black-white binary paradigm of race,<sup>90</sup> and short forewords to the *California Law Review* symposia promise the same.<sup>91</sup>

#### 4. Significance of the California Law Review's Pioneering Work on the Black-White Binary Paradigm of Race

Although scholars have divided over the normative weight we should place on the black-white binary paradigm—that is, whether it is a good or a bad thing to proceed in that fashion—no one should doubt that its identification in the pages of the *California Law Review* was a major development.<sup>92</sup> No serious scholar doubts that before about 1980, practically all race scholarship and most litigation of racial issues proceeded within this paradigm, and that it remains deeply embedded in our thinking, if only at an unconscious level.<sup>93</sup>

Some scholars wish to interrogate that paradigm, believing it hampers analysis and consideration. Others believe it fully justified by the unique

*passim*. More recent writers exhibiting the same focus include BROWN ET AL., *supra* note 37, at ix–x (explaining that the authors will largely limit their discussion of colorblind racism to that which targets blacks, because that is where the main problem lies); Brooks & Widner, *supra* note 33.

86. Abrams, *supra* note 6, at 1592 (noting that modern teaching materials highlight the experiences of different racial groups).

87. Haney López, *Salience*, *supra* note 5, at 1148, 1153–54 (taking issue with the Census Bureau and other authorities that treat Latinos as an ethnic group and positing that race is a more apt lens through which to view the group's history).

88. See Symposium: *LatCrit: Latinas/os and the Law*, 85 CALIF. L. REV. 1087 (1997) (published concurrently in 10 LA RAZA L.J. 1 (1998)).

89. See Symposium, *Critical Race Theory*, 82 CALIF. L. REV. 741 (1994).

90. E.g., Perea, *Black/White*, *supra* note 3; Jennifer Chacon, *Race as a Diagnostic Tool*, 96 CALIF. L. REV. 1215 (2008) (noting the difficulty of expunging race entirely from the admissions process, mainly due to the personal statement); Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139 (2008) (same); Devon W. Carbado & Mitu Gulati, Review Essay, *What Exactly Is Racial Diversity?*, 91 CALIF. L. REV. 1149 (2003) (recommending greater precision regarding types and functions of diversity); Delgado & Stefancic, *Loving Communities*, *supra* note 6, at 860–63; Jean Stefancic, *Latino and Latina Critical Theory: An Annotated Bibliography*, 85 CALIF. L. REV. 1509 (listing works about Latinos and Latinas, including their relations with other groups of color).

91. Harris, *Jurisprudence of Reconstruction*, *supra* note 4, at 742–43 (surveying alternative paradigms of race theory literature); Francisco Valdes, *Foreword: Under Construction*, 85 CALIF. L. REV. 1087, 1093–95 (1997) (advancing a view of Latino-Critical (LatCrit) scholarship against traditional race paradigms).

92. Before Perea, a few other scholars had written about the black-white binary paradigm of race, e.g., Elizabeth Martinez, *Beyond Black/White: The Racisms of Our Time*, SOC. JUST., Spring-Summer 1993, at 22, but the first comprehensive treatment of it in the legal literature was his in the *California Law Review*. See Perea, *Black/White*, *supra* note 3.

93. See, e.g., Delgado, *Locating Latinos*, *supra* note 50, at 514–24 (detailing some ways in which traditional race analysis carried out within a black-white binary paradigm can give short shrift to aims of nonblack minority groups); Delgado, *Fifteenth Chronicle*, *supra* note 48, at 1185–1200 (same).

history of the primary groups, the black and the white, and their never-ending struggles with each other.<sup>94</sup> The descriptive part of the scholarship on the paradigm, then, seems to stand on firm ground. Its elaboration and description by Juan Perea and others, beginning with Perea's foundational article in this *Review*, very considerably advanced our thinking about the complex world of race in American society.

*B. A Second Paradigm:*

*The Emerging Binary of Individual Rights vs. Equality-Protection*

A second binary paradigm, long latent in writing and thinking about social issues, is beginning to attract attention and a name.<sup>95</sup> This new paradigm highlights how attention to human needs, problems, deprivation, and flourishing may proceed under one of two banners, individual rights or equal protection. Both approaches aim at the same goal, both result in heightened judicial scrutiny, and the choice to proceed under one banner or the other is largely a matter of tactics, ideological commitment, or perceived public sentiment.<sup>96</sup> As with the broader conception of racial analysis urged by Juan Perea and others, this second paradigm has begun to emerge as a critique and revision of traditional scholarship on race.

*1. Recent Examples of the Second Paradigm: The Case of Hate Speech*

Recent controversy over the regulation of hate speech illustrates the emergence of this second binary paradigm.<sup>97</sup> Some scholars argue for protecting minority interests, particularly on school campuses, by invoking the

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94. See, e.g., Brooks & Widner, *supra* note 33, at 135–41 (noting that the African-American experience is qualitatively different from the Latino-American experience); Espinoza & Harris, *Tar-Baby*, *supra* note 6, at 1596–1604 (defending “black exceptionalism” for the sake of argument).

95. This other paradigm has long roots, having been identified by Laurence Tribe nearly a decade ago, see *infra* note 115 and accompanying text, and by Lowell Howe and Tussman and tenBroek even earlier. See Howe, *supra* note 6 (noting the early evolution of due process as a protection against arbitrary treatment by the state); Tussman & tenBroek, *supra* note 1 (noting the relation of the Equal Protection and Due Process Clauses, with one now eclipsing the other and at other times the two trading places).

96. See sources cited *supra* note 95. Others have noted that one may protect the rights of minorities—for example to march in protests or be free from excessive restraints—by means of equal protection or individual-rights analysis, depending on whether one emphasizes the group or the personal aspects of the grievance. See, e.g., GEOFFREY STONE ET AL., *CONSTITUTIONAL LAW* 448 (1986); ALEXANDER TESIS, *THE PROMISES OF LIBERTY* (2010); see also Mary D. Fan, *Post-Racial Proxies*, 32 *CARDOZO L. REV.* 905, 938–42 (2011) (pointing out how today the pre-emption doctrine often serves to advance equal-protection values and the civil rights of locally unpopular groups); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 *CALIF. L. REV.* 673 (2002) (noting a similar feature in freedom-of-religion scholarship); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 *U. PA. L. REV.* 67 (1960) (pointing out how vagueness as well as equality and individual-liberty norms often work together to protect constitutional values).

97. See generally MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993) (discussing the case against racial epithets and vituperation).

values of the Fourteenth Amendment.<sup>98</sup> Others argue, however, that the best way to protect minorities from insult and invective is to strengthen, not weaken, protection for free speech and encourage minorities to avail themselves of it.<sup>99</sup> Minorities should learn to talk back to the aggressor; more speech is the best remedy for speech that is wrong or insulting.<sup>100</sup> Indeed, if minorities knew their own history, they would realize how important free speech has been for social progress and would hesitate to demand rents in the vital fabric of speech-protection.<sup>101</sup> These scholars cite occasions, like Martin Luther King, Jr.'s speech at the Lincoln Memorial, that moved a nation to tears and that illustrate the vital role speech can serve for struggling groups.<sup>102</sup>

Some of the most influential pieces on this controversy, particularly the equality side, have appeared in the *California Law Review*.<sup>103</sup> A recent symposium on critical race theory contained two pieces illustrating the equality view<sup>104</sup> and came down on the side of hate-speech regulation.<sup>105</sup> Pointing out how demeaning speech can easily silence its victim, proponents of the equality view noted that a rain of insults can end up reducing, rather than increasing, the net amount of interchange in society.<sup>106</sup> Two note how difficult it has been for

98. *Id.* at 1, 7, 12–13, 53–88 (discussing hate speech on university campuses); see also RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 111–18 (1994) (same). For treatment of this issue in the *California Law Review*, see Delgado & Stefancic, *Loving Communities*, *supra* note 6, at 854–58 (noting how different scholarly schools invoke liberty or equality values in the debate about hate-speech regulation); Delgado & Yun, *Pressure Valves*, *supra* note 6, at 871, 875–76, 881–83, 890 & n.124.

99. See, e.g., NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE: HOW AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER (1992) (defending the free-speech position); Nadine Strossen, *Regulating Hate Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484 (same). But see Delgado & Yun, *Pressure Valves*, *supra* note 6, at 881–83 (critiquing the suggestion that speech has been minorities' best friend). On how the two sets of constitutional values—liberty and equality—come into play in the controversy over hate speech, see Delgado & Stefancic, *Loving Communities*, *supra* note 6, at 854–58.

100. See Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1530–53 (1997) (suggesting that hate speech does not “systemically repress the expression of viewpoints within a national dialogue on race and gender”); Strossen, *supra* note 99, at 562, 567–68 (urging that the victims simply talk back to the aggressor); HENTOFF, *supra* note 99, at 101–02, 167 (same). But see Delgado & Yun, *Pressure Valves*, *supra* note 6, at 877, 883–85 (doubting the effectiveness of this response to hate speech).

101. See, e.g., DELGADO & STEFANCIC, UNDERSTANDING WORDS THAT WOUND, *supra* note 98, at 205–07; Delgado & Yun, *Pressure Valves*, *supra* note 6, at 881–83; Strossen, *supra* note 99, at 562, 567–78; see also Edward L. Rubin, Review Essay, *Nazis, Skokie, and the First Amendment as Virtue*, 74 CALIF. L. REV. 233 (1986) (discussing the role of hate speech in a political system founded, in part, on virtue).

102. Strossen, *supra* note 99, at 567–68; see also HENTOFF, *supra* note 99, at 101–02 (citing other civil rights figures who moved audiences by inspired advocacy).

103. See Symposium, *Critical Race Theory*, *supra* note 89.

104. See Delgado & Stefancic, *Loving Communities*, *supra* note 6 (describing some of the broad social effects of racial language).

105. See Delgado & Yun, *Pressure Valves*, *supra* note 6.

106. On how racial invective can cause its target to fall silent, resulting in less speech and diversity of viewpoints in society than there would be if this form of speech were regulated, see DELGADO & STEFANCIC, CRT: AN INTRODUCTION, *supra* note 56, at 27–28, 155, and Richard

judges to escape the influence of a free-speech narrative with long historical roots.<sup>107</sup> Others debunk some of the mantras and easy maxims of the free-speech camp, including the idea that hate speech can serve as a pressure valve allowing hateful sentiments toward minorities to dissipate safely.<sup>108</sup>

### 2. Other Examples of the Individual Rights-Equal Protection Paradigm

Many areas of civil rights jurisprudence exhibit this same dichotomous quality, with one group of authorities calling attention to the manner in which a social practice endangers equality or equal respect, and another weighing in for a liberal or libertarian solution. For example, an article by Robert Post in the *California Law Review* questions whether the legal system can or should regulate hate speech in order to promote the values of democratic dialogue. He notes, “American courts have consistently opted to protect individual autonomy against regulations of public discourse designed to maintain the integrity of collective thinking processes.”<sup>109</sup> Another, in the same issue, by Phillip Johnson argues against political correctness and group-think and urges greater respect for individual liberties, including religious freedom and the right to dissent.<sup>110</sup>

Many of the authors on both sides of this fence are fierce champions of progressive change and consider themselves friends and supporters of minority causes. But, as we have seen, one group believes that the best way to achieve this is by framing violations in broad equal-protection terms, while another favors strengthening the exercise of individual rights and freedoms.

### 3. Hybridization of the Individual Rights-Equal Protection Paradigm

A number of recent articles, many in the *California Law Review*, discuss the emerging individual rights-equal protection paradigm in explicit terms. Two

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Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) [hereinafter Delgado, *Narratives in Collision*].

107. See, e.g., Delgado & Stefancic, *Loving Communities*, *supra* note 6, at 858–59 (explaining why the judicial paradigm of First Amendment protection resists change).

108. See, e.g., Delgado & Yun, *Pressure Valves*, *supra* note 6, at 876–80 (arguing against the idea that hate speech operates as a pressure valve that makes society safer than it would be if this form of speech were suppressed).

109. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2369 (2000). Post notes that in other settings courts have found similar efforts “wholly foreign to the First Amendment.” *Id.* at 2369–70. He adds that the argument that a torrent of racist speech “‘distorts’ public discussion by perpetuating imbalances of social and economic power” and rendering women and minorities silent has gained little traction. *Id.* at 2370. See also Post, *supra* note 100, at 1533 (doubting that hate speech, even if concerted, is likely to “systematically repress the expression of viewpoints within a national dialogue on race and gender”).

110. See Phillip E. Johnson, Review Essay, *The Creationist and the Sociobiologist: Two Stories About Illiberal Education*, 80 CALIF. L. REV. 1071 (1992); see also Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006) (noting obstacles in the way of remedies for broad, structural discrimination).

articles of my own make mention of it,<sup>111</sup> while Reva Siegel, a former Berkeley professor, also wrote two articles on the subject.<sup>112</sup> Not to be outdone, NYU professor Kenji Yoshino offers a thorough discussion of the same approach, discerning a recent tendency to move away from group-based claims to ones framed in terms of individual liberties under the Due Process Clause or legislation aimed at protecting specific rights or interests.<sup>113</sup> He ascribes this evolution to “pluralism anxiety” and suggests a number of ways of addressing that anxiety by means of a hybrid form of protection that advances both the group-protective values of the Fourteenth Amendment and the liberty values of the Due Process Clause.<sup>114</sup> In similar fashion, Professor Laurence Tribe used the term “legal double helix” to describe the equality-liberty dichotomy, which he also refers to, at times, as a synthesis.<sup>115</sup>

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111. See Delgado & Yun, *Pressure Valves*, *supra* note 6, at 874–76, 882, 888, 890; Delgado & Stefancic, *Loving Communities*, *supra* note 6, at 851–54 (noting that the controversy over hate speech features a camp that frames it in equal-protection terms and another in terms of liberty and the right to say what is on one’s mind); see also Michael Barbaro, *Behind Gay Marriage, an Unlikely Mix of Forces*, N.Y. TIMES, June 25, 2011, at A1 (noting that wealthy Republican supporters of gay marriage joined forces with Democratic Governor Andrew Cuomo in backing a same-sex marriage bill not out of egalitarian concerns but because “they were inclined to see the issue as one of personal freedom, consistent with their more libertarian views”).

112. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011) (positing that the Supreme Court is beginning to emphasize racial divisiveness in equal-protection opinions); Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 276–77 (1992) [hereinafter Siegel, *Reasoning from the Body*] (noting that constitutional equality and liberty claims often present themselves in interconnected fashion).

113. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–49 (2011). Others have expressed dissatisfaction with the overly formulaic structure of constitutional protection of human rights and urged differing solutions. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 70, 98–110 (1973) (Marshall, J., dissenting) (proposing a sliding-scale approach that would take into account both the relative suspectness of the class suffering the discrimination and the fundamentalness of the interest invaded—in effect combining equal protection and due process into a single standard). As early as 1949, scholars were noting how equal protection and due process claims came intertwined and how courts could often analyze cases under one doctrine as easily as the other. Tussman & tenBroek, *supra* note 1, at 363–64 (noting that judicial concerns over racism prompted the Court to shift, in the restrictive covenant cases, toward “not only read[ing] due process arguments into the equal protection clause but [to go] out of its way to use the equal protection clause in preference to due process”).

114. Yoshino, *supra* note 113, at 747 (attributing this anxiety to fear of balkanization as the country’s population diversifies); *id.* at 748, 803 (positing a new hybrid approach combining liberty and equality under a new banner, dignity, that will be universal in scope); *id.* at 755 (noting that this shift has occurred because the Supreme Court today is unreceptive to group-based claims).

115. See Laurence H. Tribe, Essay, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1897–98 (2004) (calling the structure of constitutional protection a legal double helix and noting an emerging substantive due process-equal protection synthesis protecting human dignity); see also Richard Delgado, *About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties*, 39 HARV. C.R.-C.L. L. REV. 1 (2004) (noting how civil rights and civil liberties can easily come into conflict in constitutional discourse and that this conflict cannot be simply wished away).



For all these scholars, the upshot is that liberty claims are “inflected with equality concerns,”<sup>116</sup> while equality concerns are bound up with protecting equal personhood, which, in turn, presupposes the ability to exercise a panoply of rights, including voting, speech, and the exercise of religion.<sup>117</sup>

What we have, then, is a set of overlapping legal norms that aim to promote human flourishing. The paradigm includes both a liberty component that emphasizes the importance of human freedom, as well as an equality dimension that guards against threats to human dignity, self-respect, and equality of status. The two often appear together because anything that erodes one is apt to curtail the other. Attention to the dual quality of our system of human-rights protection enables us to see more clearly what is at stake and how courts and legislatures at different periods respond to recurring challenges. Professor Yoshino believes that the judiciary currently is more receptive to liberty-based claims and that the best that can be done for equality is to forge a new hybrid that protects that value under a new guise.<sup>118</sup> The hybrid, while attending to the two underlying values that characterize the binary (liberty and equality), attempts to advance those values by, essentially, merging them and giving them a single new name.

### III.

#### THE RELATION BETWEEN THE TWO PARADIGMS

Both the black-white paradigm and the individual rights-equal protection paradigm are binary, meaning that they include two and only two significant items and profess to cover the field.<sup>119</sup> Both are, to some extent, irrational in that each responds to a need to reduce anxiety, simplify analysis, and manage society's business on grounds that the binary's defenders find familiar and coherent.<sup>120</sup>

Yet, viewed another way, the binaries define rationality, so that they cannot, by definition, be unreasonable, unjust, incomplete, unfair, or otherwise

116. Yoshino, *supra* note 113, at 788; *see, e.g.*, Tribe, *supra* note 115, at 1897–98.

117. *See, e.g.*, Delgado, *Narratives in Collision*, *supra* note 106; Delgado & Stefancic, *Loving Communities*, *supra* note 6, at 854–58 (noting that the two sets of norms presuppose each other); Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Hate Speech on Campus*, 1990 DUKE L.J. 431 (noting that with campus speech, liberty presupposes equality, or at least a considerable measure of it; otherwise, speakers will not command equal respect).

118. *See* Yoshino, *supra* note 113, at 747–48, 774–87 (noting that the Court now uses liberty-based analysis to protect many of the interests it formerly protected under the banner of equal protection); Barbaro, *supra* note 111.

119. *See* Perea, *Black/White*, *supra* note 3, at 1219 (noting that the traditional binary focuses attention on two groups, the black and the white, considering them constitutive of the subject of race). By the same token, scholars who discuss the equality-liberty divide presuppose that those two values are the main ones worth pondering in relation to human flourishing.

120. *Id.* at 1219–32 (noting that the selection of the two groups, while seemingly a response to historical realities, is, at bottom, an arbitrary decision, particularly if it proceeds in the face of mounting evidence of its deficiencies).

seriously deficient.<sup>121</sup> Instead, they determine the universe of discourse, mandating that one examine evidence and seek solutions only within certain confines and not others.<sup>122</sup> Paradigms are, for that reason, very slow to change. As Thomas Kuhn points out, paradigm change requires a substantial accumulation of nonconforming evidence and sets in only when the costs of adhering to the old paradigm become unacceptably high.<sup>123</sup> A discipline will then, and only then, consider a new paradigm, such as the hybrid constitutional approach several scholars have suggested, or the more expansive one that the discontented Latino-Critical scholars posit as an improvement over that of the black-white binary.

Intriguingly, the two binary paradigms in the field of civil rights today are nested one inside the other.<sup>124</sup> The black-white binary paradigm of racial thought is, itself, largely contained within and a subset of the individual liberty-equal protection paradigm that Reva Siegel, Kenji Yoshino, and I have outlined.<sup>125</sup> The black-white binary usually takes up residence within the equality-protection side of constitutional human-rights jurisprudence.<sup>126</sup> But it also occupies, at times, a niche in the due process or individual-liberties side of the equation. Consider, for example, how Perea's scholarship highlights the way certain liberty claims—such as the right to speak Spanish or accented English—are of great concern to Latinos, yet the traditional black-white binary paradigm can easily render those concerns unredressable.<sup>127</sup>

The location of the black-white paradigm within either side of the equality-liberty dichotomy invites attention, particularly when one considers that both paradigms are beginning to come under challenge right now. What does it mean that both paradigms are coming in for interrogation at the same time? Can one survive without the other? Does one generate the other? How should a reformer desiring to improve the fortunes of minorities and the poor proceed? Does one get more mileage by working within one of the reigning paradigms (black-white and liberty-versus-equality) or seeking a new one? Which of the two should one change first?

Little that I have been able to find in the pages of the *California Law Review*—or elsewhere, for that matter—addresses questions such as these. I therefore take this opportunity to put forth some observations about the two

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121. *Id.* at 1214–19 (observing that paradigms define reasonable discourse).

122. *Id.* at 1216 (showing connection between paradigms and selection of relevant evidence).

123. KUHN, *supra* note 16, at 5, 7, 24 (noting that paradigm change requires the gradual accumulation of anomalous facts).

124. *See supra* Sections II.A and II.B (identifying and discussing two paradigms).

125. *See supra* Section II.B (identifying second paradigm).

126. That is, it concerns itself mainly with equal protection, rather than individual liberty, and within that framework makes a further refinement.

127. Thus, Perea's groundbreaking work on language rights, *see Perea, Demography and Distrust, supra* note 31, would fall analytically within this area, as would Rodríguez, *Language and Participation, supra* note 6.

binary paradigms and what they tell us about social power and authority and their role in legal change.

*A. It Takes One to Know One  
(How Recognition of a Paradigm Often Signals Its Impending Demise)*

People begin to speak and write about paradigms only when they are beginning to be dissatisfied with them.<sup>128</sup> Before then, a paradigm is not a paradigm at all—it is the truth. It is what we mean by doing science, or social science, or literary criticism, or case analysis, or law. “Paradigm,” then, is the name we give to a mode of thought when we are beginning to be discontent with it—or, if that is putting it too strongly—when we are starting to see problems with its coverage or implications.

Naming a type of scholarship or science a paradigm means that one has begun to divorce oneself from it. A scholar first steps outside the paradigm and says, in effect, this is the prevailing way of thinking about something (i.e., race) and it’s not working.<sup>129</sup> Something is wrong with it, and not just in a few points of detail. If that were all that were wrong, we would merely change the textbooks a little, the changes amounting to a kind of scholarly second edition. And that is what ordinarily happens with legal discourse. We point out a problem, show how one group or another is not receiving fair treatment under it, and propose a small, incremental fix. We show how the case law under statute X is divided, that neither of the dominant approaches (“models”) solves the problem, and propose a third. We show how our preferred approach best harmonizes with the dominant policies with which we are in accord. Problem solved.

In other words, most authors who write about paradigms are really writing about paradigm change. They are not normatively indifferent to the current way of thinking about a subject. If they were, they would merely perform “normal science,” as most of us do most of the time.<sup>130</sup> By designating some aspect of our conceptual repertoire a paradigm, one is putting it under a lens. One is inviting others to step back, too, and pay attention to how it is beginning to produce injustice or miss things that it should consider.

Interestingly, the critic who first points out the flaws in a current paradigm already has a new one in mind. He or she cannot help this—it is the only way we can reason.<sup>131</sup> So, for example, it is no surprise that Juan Perea had in mind

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128. See *supra* notes 51–67, 93–94 and accompanying text (discussing how paradigm change arrives).

129. See *supra* notes 55–57 and accompanying text (summarizing criticisms of the binary paradigm of race).

130. See Perea, *Black/White*, *supra* note 3, at 1217–18 (describing the term).

131. In this process of reasoning about reasoning, we have only our deepest values, hunches, and premises to guide us. For example, see text and notes immediately following (discussing reform in two areas of law).

a new playing field—Latino legal studies—when he deconstructed the black-white paradigm.<sup>132</sup> Nor should it be surprising that Yoshino, a gay scholar, was one of the first to write systematically about the deficiencies of a constitutional system that protects equality (but not that of gays and lesbians, at least not very well) and liberty (but not the liberty that gays and lesbians are interested in) in such fragmentary, theoretically threadbare fashion—and outlined an entirely new approach to such protection.<sup>133</sup>

It is not surprising, then, that the pushback against new paradigms is so hard and comes so fast.<sup>134</sup> The old paradigm protected some interests and not others. Facility at working within it brought benefits, such as tenure, predictable rulings in response to motions to dismiss, and book contracts from middle-aged editors and publishers.<sup>135</sup>

But the main point I want to note is that the *enfant terrible* who brilliantly and implacably names, ridicules, subverts, and brings down an old paradigm needs to be stepping somewhere. He or she must be reasoning from some standpoint or set of premises with which he or she expects the reader to agree, if only momentarily, for the sake of the argument. And that new paradigm will one day become the new orthodoxy attracting a new host of *enfants terribles* who will name it, patiently explain its inadequacies, and proceed to tear it down. The relationship between old and new paradigms, thus, recurs indefinitely. We escape from one mental prison only to another, slightly larger one.<sup>136</sup> Someday, one of our successors will deem the more comfortable room where we have been setting up housekeeping a prison—because, for them, it is one. We will find ourselves declared defenders of the status quo.<sup>137</sup> Out with the old paradigm, in with the new.

132. On Latino-Critical Studies, see, for example, *THE LATINO CONDITION: A CRITICAL READER* (Richard Delgado & Jean Stefancic eds., 2d ed. 2011); Symposium, *LatCrit: Latinas/os and the Law*, *supra* note 88.

133. See Yoshino, *supra* note 113, at 750, 796–800. For a second author's discontent with the current structure of constitutional rights, see Siegel, *Reasoning from the Body*, *supra* note 112.

134. See, e.g., DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997) (critiquing the critical race theory movement in broad terms); Brooks & Widner, *supra* note 33 (asserting that the current black-white binary paradigm of race is fully justified; that criticisms of it are misguided; and that as the need arises it is fully capable of expansion to include other groups); Farber & Sherry, *Critique of Merit*, *supra* note 6 (taking issue with critical race theory's challenge to conventional notions of merit); see also Farber & Sherry, *Telling Stories*, *supra* note 33 (critiquing legal storytelling in critical race theory scholarship).

135. See Delgado, *Locating Latinos*, *supra* note 50, at 496–98 (discussing the appeal of the comfortably familiar).

136. See Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1933 (1991) (describing this incremental process of escape and confinement); Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 650–51, 658–73 (1993) [hereinafter Delgado, *Sixth Chronicle*] (same); see also G.W.F. HEGEL, *THE PHENOMENOLOGY OF MIND* (J.B. Baillier trans., 1967) (describing how ideas succeed each other—thesis, antithesis, synthesis—each broader than the last).

137. See *supra* notes 135–36 and accompanying text.

*B. Paradigms and Social Power*

Paradigms express social power, if only that of comfortable familiarity and everyday practice. In law and social science, the power that they express and create is the power to routinize, as well as to normalize or abnormalize. For example, the conservative paradigm of racial thought that I mentioned earlier<sup>138</sup> normalizes the experience of white, Anglo-Saxon Protestants who work hard at school, have faith in the future, trust most adults and authority figures, and believe that merit, hard work, and waiting one's turn will bring their own reward.<sup>139</sup> Needless to say, a set of legal and social rules that punishes the opposite forms of behavior (cutting in line, skipping school, insisting on up-front money for every transaction, and going for broke now)<sup>140</sup> will reward people for whom the first sort of conformity is second nature.

In similar fashion, the black-white binary paradigm empowers, to put it simply, blacks and some of their allies and fellow travelers. It is a form of black privilege, admittedly rare, since blacks don't enjoy many other forms of privilege. It also benefits those whites who have formed cozy relationships with some blacks, taken the trouble to learn a bit about black history, know a few black slang words—and can't be bothered to learn much about nonblack groups, such as Filipinos (what language do they speak, anyway?) or Indians (aren't they nearly extinct?).<sup>141</sup> Latinos are even tougher to figure out. (Aren't they socially conservative? Aren't a lot of their histories and major literary texts in Spanish? What does "Aztlán" mean, anyway? And is Puerto Rico still a colony? Aren't they just an ethnic group, bound together by a custom or two, like the Masons with their special handshake?)<sup>142</sup>

If, as mentioned, knowledge is socially created and arrives through a highly social, consensual process akin to mutual recognition and group-think,<sup>143</sup> it is easy to see the role that a paradigm would play in reinforcing prestige, influence, and authority. In science, many of the most important breakthroughs come at top schools with the most well funded labs and the

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138. See *supra* notes 38–41 and accompanying text.

139. On the Protestant ethic, see, for example, RICHARD BROOKHISER, *THE WAY OF THE WASP* (1991) (discussing the habits and predilections of this group); MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., Dover ed. 2003) (1904–05).

140. See LEWIS, *supra* note 39 (explaining a supposed culture of poverty that traps some minority families in failure and fatalism); MOYNIHAN & GLAZER, *supra* note 39; VALENCIA, *supra* note 39 (showing how such pernicious attitudes pervade schools and shape the relations of some middle-class schoolteachers with students of color).

141. See Delgado, *Locating Latinos*, *supra* note 50, at 496–501.

142. *Id.* These questions correspond to a few of the simplistic generalizations according to which some intellectuals justify their own refusal to take this group seriously and make the effort to learn about its culture, history, and hopes.

143. See KUHN, *supra* note 16 (noting how paradigms of scientific knowledge develop, operate, and eventually recede in favor of others); see also PETER L. BERGER & PAUL LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966) (offering a sociological description of this process).

highest paid researchers.<sup>144</sup> In social analysis, pretty much the opposite is true. (Think: Howard Zinn at Boston University, where he was among the lowest paid faculty members of his division,<sup>145</sup> although perhaps the most widely read and respected; Derrick Bell, who was essentially fired from Harvard;<sup>146</sup> and Karl Marx, sitting at a table in the British Museum, his bag lunch at his side).

Paradigm change may not *require* personal or professional discontent, but it helps. As I mentioned on another occasion, change often begins with small discontented groups who are willing to challenge the members of the next-larger groups.<sup>147</sup> Black women challenge white women, pointing out how the feminist revolution has not benefited all women equally. The white women are surprised. They had thought themselves on the side of the angels, yet now find themselves accused of some of the same mistakes they have been charging patriarchal men with—taking things for granted, seizing the baseline, punishing nonconformity, and the like.<sup>148</sup>

We only escape from one jail to a slightly larger one, however. Soon the black women will find themselves under siege by black women who are gay, or who are Latina, or who like Sarah Palin, or who believe in one Christian God, and want *that* set of issues to be placed on the feminist agenda.<sup>149</sup>

It seems, then, that paradigms emerge “from below”—when some group, feeling beleaguered and ignored, wants a new structure of thought that will respect its interests better than the old one. This is particularly true in the world of social thought, and only a little less true in hard science.

### *C. On Finding Two Nested Paradigms in a Single Area of Discourse*

When, as now, two paradigms are coming into question at the same time with one located largely inside the other, something unusual is going on.<sup>150</sup>

To see this, consider the liberal paradigm mentioned early in this Essay.<sup>151</sup> That paradigm, under pressure from the right,<sup>152</sup> split into a traditional faction

144. See, e.g., *UC Berkeley's 22 Nobel Prize Winners*, <http://berkeley.edu/news/features/nobel>, U.C. BERKELEY (last visited Dec. 28, 2011); *Nobel Laureates*, HARVARD U., <http://www.harvard.edu/nobel-laureates> (last visited Dec. 28, 2011).

145. See Helen Epstein, *Crusader on the Charles*, N.Y. TIMES, Apr. 23, 1989, <http://www.nytimes.com/1989/04/23/magazine/crusader-on-the-charles.html> (describing Zinn's career).

146. See, e.g., Tamar Lewin, *Comments Concerning Race Divide Harvard Law School*, N.Y. TIMES, Apr. 20, 2002, at A14 (describing the circumstances of Bell's departure from Harvard Law School, where he had been the first black professor to receive tenure); THE DERRICK BELL READER 12–13 (Richard Delgado & Jean Stefancic eds., 2005) (same).

147. Delgado, *Sixth Chronicle*, *supra* note 136, at 665–73.

148. *Id.*

149. *Id.*; see also Johnson, *supra* note 110 (discussing how current norms of scholarship exclude discussion of Creationism).

150. See text and notes immediately *infra*, employing a temperature analogy to forecast the consequences of a double dose of discontent. It is relatively rare for two paradigmatic revolutions to intersect. When they do, it behooves us to pay attention to what the intersection heralds for the future of legal thought in the area in question.

that advocates the standard remedies (mainly punishing treating likes unlike), and a set of closely related critical factions, including critical race theory.<sup>153</sup>

Latinos and other nonblack groups believe that both left-wing factions, the traditional and the critical, have been ignoring them, marginalizing their concerns by adhering to some version of the black-white binary paradigm of race. The *California Law Review* has been the birthplace for this reform movement, with the publication of key articles such as those of Juan Perea and Leslie Espinoza and Angela Harris, discussed earlier.<sup>154</sup>

At the same time, several scholars, including one who is liberal but racially unaligned, point out a second paradigm that is no longer working well.<sup>155</sup> For these scholars, it is time to retire or modify the bifurcated treatment that conventional constitutional scholarship deploys in cases where human rights are being trampled but the law has no single obvious way of redressing them. Take, for example, the rights of gays and lesbian couples to marry or claim a federal tax deduction.<sup>156</sup> Should those claims proceed under equal protection or due process? Depending on which feature of them—the group or the individual aspect—one wishes to highlight, they could proceed under either. The same is true of police profiling of Muslims,<sup>157</sup> requiring Latinos to speak only English on a job that does not entail meeting the public,<sup>158</sup> and many other situations.

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151. See *supra* notes 35–38 and accompanying text.

152. See, e.g., Farber & Sherry, *Critique of Merit*, *supra* note 6 (criticizing critical race scholarship as itself unfair to Jews); RICHARD DELGADO & JEAN STEFANCIC, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* (1995) (discussing the rise of conservative movements).

153. On critical race theory, see Symposium, *Critical Race Theory*, *supra* note 89; CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002). On the traditional view of equal protection as guaranteeing like treatment of like classes, see Tussman & tenBroek, *supra* note 1.

154. See Perea, *Black/White*, *supra* note 3; Espinoza & Harris, *Tar-Baby*, *supra* note 6, at 1596–1604 (setting out the case for and against black exceptionalism). A sister review, the *Berkeley Journal of African-American Law & Policy*, published a second defense of black exceptionalism and the traditional binary paradigm. See Brooks & Widner, *supra* note 33.

155. See Yoshino, *supra* note 113. Yoshino's writings have, to date, mainly concerned nonracial matters. See, e.g., KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006) (discussing sexual minorities); Kenji Yoshino, *The City and the Poet*, 114 *YALE L.J.* 1835 (2005) (discussing law and literature).

156. See ANTHONY C. INFANTI, *EVERYDAY LAW FOR GAYS AND LESBIANS (AND THOSE WHO CARE ABOUT THEM)* (2008) (discussing a host of issues confronting gays and lesbians under traditional heterosexually-normed law); Anthony C. Infanti, *Decentralizing Family*, 2010 *UTAH L. REV.* 605 *passim*.

157. This could take the form of a group-based equal-protection claim or one for violation of the individual right to be free from unreasonable searches and seizures. See, e.g., Muneer I. Ahmad, *A Rage Shared by Law*, 92 *CALIF. L. REV.* 1259 (2004) (discussing surveillance of people who look Middle-Eastern in the wake of 9/11).

158. This claim, too, is susceptible to framing in either set of terms. See, e.g., LATINOS AND THE LAW, *supra* note 31, at 206–302 (describing bilingualism and language rights); see also Rodríguez, *Language and Participation*, *supra* note 6 (discussing bilingualism as a broad process right); Cameron, *supra* note 59 (same).

Scholars who point out that the current paradigm of constitutional law is weak and confused on issues such as these are calling for a sharper form of analysis (referred to as “hybrid”<sup>159</sup>) suited to analyze, sort, and redress complex grievances like these. Since many of these grievances are the very ones that ignored groups marginalized by the black-white binary paradigm are complaining about, the two sets of paradigm-anxiety intersect. That is why one paradigm (the black-white paradigm) is starting to come under attack just as another (the constitutional-path paradigm) is, as well.

One can easily envision a point sometime in the future, perhaps soon, when the two paradigms, which address similar and overlapping concerns, dissolve into a new approach capable of addressing the sorts of problems they now ignore or treat poorly.

Examples of such paradigm-shifting points include, in the development of strict scrutiny, *Carolene Products*,<sup>160</sup> and, earlier, Justice Harlan’s dissent in *Plessy v. Ferguson*,<sup>161</sup> which led to *Brown v. Board of Education*<sup>162</sup> and the rejection of separate but equal. In modern times, I would name the publication of Derrick Bell’s article on *Brown v. Board of Education* and its announcement of an interest-convergence principle operating in racial analysis.<sup>163</sup> I would also name a pair of articles calling attention to the role of unconscious discrimination, one of them in the *California Law Review*.<sup>164</sup> And I would name the Tussman and tenBroek article that laid the basis for seventy years of development of equality and equal protection jurisprudence.<sup>165</sup> Perhaps the development of legal storytelling and narrative analysis, as well.<sup>166</sup> But the precise details of the new paradigm remain, at this point, a matter of conjecture.

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159. See *supra* notes 113–14, 118 and accompanying text.

160. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (positing that strict scrutiny might be appropriate in cases concerning discrete, insular minorities whose interests could easily be overlooked in the legislative arena).

161. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (noting that the Constitution is colorblind and cannot tolerate the caste-creating aspects of a state law that required blacks to ride in railroad cars separate from those reserved for whites).

162. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (rejecting school-assignment rules that required separate schools for black and white children).

163. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

164. Krieger, *supra* note 6; Lawrence, *supra* note 27.

165. Tussman & tenBroek, *supra* note 1 (observing how judicial concern over minority rights prompted the shift from due process to equal protection as a vehicle for protecting those rights). Once again, marginalized segments within the minority community are dissatisfied with the quality of protection they receive under the current system. Right on schedule, scholars have begun developing new paradigms for addressing these issues, see *supra* Sections II.A and II.B, in an unending process that gives the structure of civil rights its recursive character, with periodic expansions, contractions, shifts, and splits.

166. See Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (analyzing the legal storytelling movement); Delgado, *Third Chronicle*, *supra* note 6; Delgado, *Eleventh Chronicle*, *supra* note 6 (illustrating this approach); see also Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971 (1991) (calling for attention to the use and misuse of storytelling).



## CONCLUSION:

WHEN PARADIGMS TUMBLE—THE ROLE OF THE *CALIFORNIA LAW REVIEW*

When writers begin naming and demonstrating the deficiencies of a reigning paradigm—the way we always used to speak and think—an immediate commotion often sets in. As mentioned, paradigms flirt with and do business with social power, so that they generate investments on the part of their backers. Even those with little investment in the paradigm and its associated machinery (case law, the division of academic departments, tenure, course syllabi, textbooks, book series, etc.) may find the old ways of speaking, writing, and teaching comfortable and familiar. Thus, the old ways generate an inertial momentum of their own. Usually it is outsiders, persons for whom the familiar ways are not the best, or at least not the best imaginable, who name and challenge an existing paradigm.

When two paradigms come under attack at the same time, an area of discourse is a goner. Major change is on the horizon. This is particularly so if the critiques are credible and well substantiated, as Perea's and Yoshino's are. It is not enough to say, "I am post this or that," as some camp followers of the latest academic trend do. One needs to show why the old paradigm is inadequate—that it overlooks important social groups and alignments of power, is unattractive to the judiciary as a whole, or is otherwise out of keeping with the times. That is what the many critics discussed in these pages do.<sup>167</sup>

As we have seen, the *California Law Review* has played a major role in both the development of, and the critique of, each of the two reigning paradigms of racial thought. If things are poised for major change—one that has been overdue for some time—the *Review* will have performed a vital part in ushering it in.

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167. What will the new paradigm look like? Will it include both race and class? See RICHARD KAHLBERG, *THE REMEDY* (1997). Races other than the black and white? What about discrimination on the basis of religion, especially minority religions like Islam? Will it find a place for discrimination on the basis of disability and sexual orientation? Will it include new forms of judicial review and tiers of scrutiny? Time limits (such as 25 years) and grandfather clauses? Will it be simple (a unified theory of discrimination) or complex, with differentiated analyses corresponding to different groups and settings? My guess (hope, really) is that it will include all these matters and in unified fashion.