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Roy L. Brooks: Racial Justice in the Age of Obama

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INTRODUCTION

IDEOLOGICAL DIVISIONS in civil rights theory too often form along politically partisan lines. Facts are cherry-picked, and formal analyses are shaped to fit preordained political perspectives. Yet, when one steps away from the politics, when one pursues the unvarnished truth, one is humbled by the enormous complexity of the subject matter. Nowhere is this more evident than in the area of race, especially the problems of African Americans. The end of government-sanctioned racial oppression, fading historical memory, the emergence of genuine class stratification within black society—especially the rise of the black upper and middle classes—the concomitant influx of poor immigrants of color, and the inertia of structural barriers that limit opportunities as well as the grudging recognition of dysfunctional behaviors within the black community have converged to make civil rights theory an extremely complex enterprise today. Inclined to provide facile answers to complex problems, political partisanship is very seductive in this climate. But the price of the ticket is quite high: we settle for comfortable positions over painful truths.

This book attempts to provide a nonpartisan approach to civil rights theory. My ambition is to facilitate penetrating and productive discussions about civil rights theory, particularly as it pertains to African Americans. (I shall in due course explain my reasons for limiting my inquiry to blacks.) To achieve this objective, I have created a rhetorical device called the “theory of completeness.” This is a theory about modern civil rights theory. It holds that civil rights theory today, in the Age of Obama, must be complete if it is to be taken seriously; that is, it must put forth an external and internal diagnosis of and prescription for the civil rights problem it seeks to address, be it civil rights pertaining to blacks, browns, women, or other groups. To suggest that there is an internal, or cultural, side to the race problem pertaining to blacks may seem like blaming the victim. That certainly is not the case. All I am saying is that given the death of Jim Crow and the concomitant increase in racial opportunities, it is now possible that cultural factors may offer some explanation as to why African Americans continue to face serious racial problems so long after the civil rights movement. Thus, in post-civil rights America—the decades since circa 1972, the end of the civil rights movement and Jim Crow—and most especially with the election of the first black president of the United States, internal factors must be considered along with external, or structural, conditions.

There are several reasons why this book focuses on African Americans. Lim-

iting the focus to a single racial group certainly simplifies the presentation and application of a new theory, the theory of completeness. Also, there is simply more demographic information on African Americans than on any other racial group with the exception of whites. The data on some groups do not even cover the entire post-civil rights period. In contrast, blacks have been studied and recorded since the nation's first census in 1790.¹ Furthermore, even though the number of civil rights groups, or "protected classes," has expanded during the post-civil rights years (now including, *inter alia*, the disabled and the elderly), the concern for racial justice remains the central preoccupation in civil rights theory. Indeed, most of the major civil rights theorists in the country, academicians as well as public pundits, focus on the question of race and, more particularly, the plight of African Americans, the nation's oldest civil rights group. "If we can address the problems between black and white Americans," former president Bill Clinton insists, "then we will be better equipped to deal with discrimination in other areas."² At the other end of the ideological spectrum, conservative James Q. Wilson comes to a similar conclusion: "The main domestic concern of policy-engaged intellectuals, liberal and conservative, ought to be to think hard about how to change these social weaknesses. Lower-class blacks are numerous and fill our prisons, and among all blacks the level of financial assets is lower than it is for whites. Many blacks have made rapid progress, but we are not certain how."³ Thus, within the civil rights cosmos, concerns about racial disadvantage form the primary galaxy. And within the racial galaxy, black/white relations, which coexist with other racial relations (such as Latino/white, Asian/white, Native American/white, black/Latino, black/Asian, and black/Native American), form the primary constellation. It is foundational, having provided the seed from which theories about other racial relations have developed in the post-civil rights era.

The fact that the civil rights problems of racial groups are sufficiently distinct to warrant separate treatment is yet another reason for limiting my inquiry to blacks. Immigration is a case in point. As I explain at the end of this chapter, immigration has a different effect on the quantum of resources available in Latino and African American communities. The former effect is negative while the latter is largely positive due to the arrival of West Indian blacks. Also, African Americans have an emotional and material connection to slavery and Jim Crow that other racial minorities simply do not and cannot have. Blacks were the main targets of slavery and Jim Crow. It simply cannot be gainsaid that they alone were stolen from their homelands and subsequently persecuted through the Middle Passage. All other racial minorities were either already here or came here willingly. It is factually wrong to say that all racial minorities went through the peculiar institution and Jim Crow together. It is even worse to claim, as some pundits have, that all Americans, including whites, "overcame slavery together." The psychological connection blacks have to slavery and Jim Crow is unique, just as the emotional connection Jews have

to the Holocaust is unique, even though other groups, including Africans, were put to death in Nazi concentration camps. Similarly, Latinos have a special relationship to the southwestern portion of the United States not only because the land used to be part of Mexico but also because Latinos were the main targets of racial violence and disadvantage in this territory. Blacks were not. For these reasons, I am not in favor of aggregating all racial minorities under a single conceptual umbrella, whether it is called “people of color” or something else. I am, in fact, a proponent of disaggregation. To me, the black/white binary (which focuses on the relationship between blacks and whites) makes sense, as do other binaries, including the Latino/white and Asian/white binaries. Each civil rights group deserves special attention. Each deserves book-length treatment. This book deals with African Americans, although it certainly provides information that can be used to discuss other civil rights groups.⁴

Focusing on African Americans, this book identifies, synthesizes, and organizes the myriad civil rights theories, half theories, and suppositions articulated during this post-civil rights era. The assembled information is molded into four distinct theories—traditionalism, reformism, limited separation, and critical race theory. Each theory, or, more precisely, post-civil rights theory, is presented along the coordinates of the theory of completeness. Hence, I tease out each theory’s external and internal diagnosis of and prescription for the American race problem as it relates to black Americans.

To prepare for this discussion, the remaining sections of this chapter will unpack the book’s conceptual tools. Terms like “civil rights” and “race” will be clarified, and the basis for extending civil rights to some groups but not to others will also be discussed. I will end the chapter with a definition of the race problem blacks have encountered since the end of the civil rights movement. The appendix delineates the facts and figures that give content to this definition.

A. WHAT IS “CIVIL RIGHTS” OR A “CIVIL RIGHTS GROUP”?

The term “civil rights” is used in this book in its conventional conceptualization. It refers to the congeries of government-enforced (i.e., legal) freedoms and privileges accorded to a person or group in furtherance of the equality principle enshrined in the Declaration of Independence.⁵ This notion of “equality,” as has been noted, “does not require that things different in fact be treated in law as though they were the same. But it does require . . . that those who are similarly situated be similarly treated. The measure of the reasonableness of the classification is the degree of its success in treating similarly those similarly situated.”⁶ In its conventional sense, then, the term “equality” in the context of civil rights means equal treatment or, more precisely, similar treatment for similarly situated individuals or groups.⁷ Thus, civil rights are government-

enforced freedoms and privileges designed to ensure that our society accords similarly situated groups similar treatment, especially “equal opportunity.”

The ideal of equality embedded in this definition—similar treatment for similarly situated groups—reflects a classical liberal view of the world that seems intuitively fair. Although I certainly embrace the liberal notion of similar treatment for similarly situated individuals and groups, I wish to make the logical point that where it can be shown that blacks and whites are *not* similarly situated in society because of historical forces, blacks must be treated differently if they are to be accorded equal opportunity, or similar treatment. My argument—equal opportunity requires different treatment for differently situated groups—is conceptually consistent with the liberal edict of similar treatment for similarly situated folks. I would hope, then, that those proceeding under the liberal view would accept the fairness of different treatment if it could be shown empirically, as the appendix seems to indicate, that blacks and whites are not similarly situated.

In light of this discussion we can remove the “similarly situated” language from the conventional definition of civil rights. That is, we can now say that the goal of civil rights is equal opportunity, and that this goal can be achieved either by treating similarly situated groups similarly or by treating differently situated groups differently. Civil rights, in a word, can be defined as *government-sanctioned freedoms and privileges designed to promote equal opportunity*. So defined, civil rights has several features that should be noted.

Although first enshrined in the Declaration of Independence, civil rights are now codified in federal and state constitutions, statutes, and case law. The U.S. Constitution, for example, delineates several basic freedoms and privileges: “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.”⁸ Freedoms and privileges provided by federal statutes include the right to be free from discrimination based on race, color, sex, national origin, age, disability, or religion in education, employment, the electoral process, public places, and other areas of American life.⁹ Judges often discover civil rights through their interpretation of constitutional and statutory law, especially the former. *Brown v. Board of Education* (1954),¹⁰ for example, found in the Constitution the right to attend public schools without regard to race or color. The Supreme Court has discovered other civil rights, including affirmative action and the right of alien children to receive a free public education.¹¹

Civil rights have certain peculiarities that often seem surprising. For example, citizenship is not a prerequisite for civil rights. Some civil rights extend to any person or group merely physically present within the jurisdictional reach of the United States. The due process and equal protection rights quoted here apply to every “person,” meaning citizens and noncitizens alike, and, as just mentioned, alien children have a civil right to receive a free public education. In addition, although civil rights primarily protect the individual or group

from governmental transgressions, they also protect against private wrongdoing under certain conditions (such as private parties who burden interstate commerce,¹² receive federal funds,¹³ or act under the authority of state law).¹⁴ Finally, civil rights operate both substantively and procedurally. Substantive rights, such as the right to be free from racial discrimination,¹⁵ are what we normally think of when we think about the term “civil rights.” Procedural rights, however, are just as important. These rights, such as the right to be heard in a timely fashion before suffering legal action or the right to a trial by jury, prescribe the rules by which substantive freedoms and privileges are initially established and subsequently enforced.¹⁶

Another peculiarity about civil rights is that not all similarly situated groups receive the same level of opportunities created by civil rights. Citizens have more government-enforced freedoms and privileges than noncitizens, who nonetheless receive some level of protection. Aliens have civil rights, to be sure, as mentioned earlier, but they do not have the same level of civil rights opportunities as do U.S. citizens. Native-born citizens, for instance, have the right to be elected the president of the United States, but foreign-born citizens as well as noncitizens in the country do not. The Constitution expressly states: “No person, except a natural born citizen, . . . shall be eligible to the office of president.”¹⁷ Civil rights, then, do not necessarily mean equal treatment, or opportunities, even for similarly situated groups.

Likewise, for most of this country’s history, whites received far more opportunities created by civil rights than did blacks. This infamous example of the unequal quality of civil rights occurred under the government’s “separate-and-unequal” and “separate-but-equal” civil rights policies. These policies predate the nation’s current official civil rights policy of formal equal opportunity.¹⁸ Under the separate-and-unequal civil rights policy, blacks “had no rights which the white man was bound to respect,” to quote the Supreme Court.¹⁹ Blacks did not have civil rights until President Lincoln signed the Emancipation Proclamation.²⁰ Although the Civil War created the political conditions for broadening the scope of civil rights accorded to blacks—most important, the Thirteenth,²¹ Fourteenth,²² and Fifteenth²³ Amendments—white male owners and nonowners of property exercised considerably more civil rights than blacks, including the right to maim and murder blacks almost at will. This state of affairs continued through the postbellum period and well into the next century.

Ira Katznelson brings the story of unequal civil rights into the twentieth century. In *When Affirmative Action Was White*,²⁴ Katznelson describes how governmental policies during the New Deal and Fair Deal of the 1930s and 1940s created racial preferences for whites. The majority of blacks lived in the seventeen southern states that had enacted Jim Crow laws before the turn of the century. Southern democratic members of Congress, the Dixiecrats, who chaired important congressional committees and subcommittees, used the principle of federalism (states’ rights), occupational exclusions, and the ab-

sence of antidiscrimination language in the statutory law to protect the Jim Crow racial order of the South from egalitarian federal legislation. Jobs held disproportionately by southern blacks, such as farmworkers and maids, were excluded from Social Security pension laws and denied the right to unionize. Veteran benefits were administered at the local level, which left them vulnerable to local racism that was pervasive in the South. For example, the GI Bill, which provided educational and housing benefits to American soldiers returning home from World War II and, thus, created no small amount of America's postwar prosperity, was implemented in ways that deliberately discriminated against blacks. Government-insured loans were administered in a racially discriminatory manner or not extended at all to blacks who fought in the war. Mississippi illustrates the level of discrimination: "Of the 3,229 GI Bill-guaranteed home, business, and farm loans made in 1947 in Mississippi, . . . only 2 went to black veterans."²⁵

Affirmative action for blacks was instituted in 1965. But this form of affirmative action does not, in my view, demonstrate unequal treatment, or unequal opportunities, as did affirmative action for whites under Jim Crow. (This is a bit redundant because Jim Crow means, in part, affirmative action for whites.) Instead, it is a manifestation of equal treatment, or equal opportunities, accorded to a differently situated group. Jim Crow tipped the racial balance in favor whites; affirmative action for blacks was a limited attempt to balance things out. As Katznelson remarks, "The black affirmative action programs instituted . . . were paltry in their scope and scale compared to the massive governmental transfers that disproportionately aided whites in the previous three decades, 1935–1965."²⁶ They did not deny opportunities to whites en masse. Affirmative action that grew out of the civil rights movement was very different from the Jim Crow version in yet another way: it did not stigmatize nonbeneficiaries as an inferior race, totally undeserving of government-sanctioned freedoms or privileges.

What groups are entitled to civil rights protection today? Why, for example, are blacks, Latinos, and whites among the groups protected by our civil rights laws today while ugly, short, or poor people are not? True, it is difficult to base public policy or law on a factor as subjective as beauty. But height and poverty are measurable qualities. What, then, is the line of demarcation between those who are deemed to be within and those who are deemed to be outside the protected classes? Is there a principled way of explaining such differential treatment? These are recurring civil rights questions, each in search of a good answer.

The conventional answer is that civil rights protection, at least after *Brown v. Board of Education*, is accorded to what the Supreme Court has termed "discrete and insular minorities."²⁷ These are minorities who have historically been targets of discriminatory treatment in our society and who lack political power to protect themselves. A protected class is a group as to whom "prejudice . . .

may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”²⁸ Laws directed toward protected classes, defined in this instance as “discrete and insular minorities,” are subject to “more exacting judicial scrutiny” than other types of laws and, hence, are more likely to be overturned.²⁹

As the primary victims of slavery and Jim Crow, blacks were the first group to be viewed as a “discrete and insular minority.” The meaning of the term, in fact, is virtually synonymous with the sociopolitical status of black Americans during the 1950s and 1960s.³⁰ Today, other racial minorities—Latinos, Asians, and Native Americans—are also viewed as “discrete and insular” due to their own histories of discrimination. So, too, are religious groups, who have experienced discriminatory treatment in the past, and women, who have a history of political vulnerability and continue to experience sex discrimination.³¹

The disabled and, to a lesser extent, the elderly and homosexuals also receive civil rights protection. Looking back at the historical experience of the disabled at the time it enacted the Americans with Disabilities Act (ADA), Congress found that “individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”³² The civil rights protection Congress has given to the elderly relates primarily to employment matters. Echoing a congressional finding, the Supreme Court has determined that “it is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.”³³ Most of the civil rights protections given to homosexuals are at the local rather than federal level. State and municipal governments have passed laws banning discrimination on the basis of sexual orientation. Slowly, however, the Supreme Court, more than Congress, is beginning to view gays and lesbians as “discrete and insular minorities,” bringing them within the ambit of full civil rights protection.³⁴

But the conventional view as to who is entitled to civil rights protection does not explain why some groups that have been historical targets of discrimination and exercise no political power (such as ugly, short, or poor people) are not protected by federal civil rights laws, and equally important, why other groups that cannot remotely be described as “discrete and insular minorities” (most particularly white males) are extended the full range of government-enforced freedoms and privileges. One might wish to argue that historical discrimination against ugly, short, or poor people is qualitatively different from the type of discrimination racial minorities have faced. But how so? Is it that discrimination against racial minorities involves immutable characteristics? Well, being short is just as immutable as race or color. In some instances, it is

more so, as in the case of a black person who is light enough to “pass” for white and chooses to do so.

Some scholars, in their search for a principled explanation for the granting of civil rights opportunities, have suggested that civil rights protection is based on the antidiscrimination principle. Claims that vindicate this principle receive civil rights protection even where the plaintiff, unlike the plaintiff who, for example, experiences employment discrimination, suffers no real harm. For instance, in *Shaw v. Reno*,³⁵ white plaintiffs were permitted to advance a civil rights claim to invalidate a voting district in North Carolina that the state legislature created to give voting power to blacks. Although the Court recognized blacks as a historically disadvantaged, politically weak minority,³⁶ the plaintiffs themselves “were not required to . . . show that they were part of a discrete and insular minority. Nearly all the plaintiffs . . . were white voters whose claim was simply that they objected to the reliance on race in the redistricting process.” In fact, as one scholar has noted, “The Supreme Court seemed to require no showing of injury at all for plaintiffs to invoke judicial review of a state’s redistricting decisions. Several of the plaintiffs did not live in either of the majority-black districts they had challenged.”³⁷

While the antidiscrimination principle seems to explain *Shaw*, the principle actually does a poor job of determining who is within or without the protected classes. The principle does not work well when, as in the case of legally permissible affirmative action, preventing discrimination against one group (say, African Americans) arguably aids discrimination against another group (say, whites). Not everyone receives protection from discrimination in this instance, albeit the discrimination is rather limited. The antidiscrimination principle, in addition, begs the question of how protected classes are determined in the first place. Again, why do we prohibit discrimination against blacks and whites but not against ugly, short, or poor people? Why is it not a violation of the antidiscrimination principle to treat poor people less favorably than blacks or whites?

My best answer is that civil rights opportunities are granted to those groups that are *not* politically powerless but, instead, are politically influential. In other words, it is just the opposite of the “discrete and insular minorities” theory. Civil rights are extended to groups that are politically powerful, including those who are able to gain political influence from their ability to pose a threat to domestic peace and tranquillity. Blacks, for example, have demonstrated a willingness as well as the wherewithal to rebel against discriminatory treatment; ugly, short, and poor people have not. And while it is true that the elderly enjoy civil rights even though they have not posed a threat to peace and tranquillity, unlike the unprotected classes, the elderly have strong advocacy groups, such as the AARP. So it may be that civil rights protection is, to a large extent, based on which group makes the most noise. This theory—call it “the squeaky-wheel theory”—would certainly explain why civil rights have been extended to white males. This is a group that has no history of discriminatory

treatment, but it certainly has political power, as well as power to disturb the peace and tranquillity of our society. Even intuitively reasonable extensions of civil rights protection to whites, as in the case of allowing white employees who suffer employment discrimination the right to sue,³⁸ can be explained by the squeaky-wheel theory.

The theory that I think ought to be used to determine civil rights protection is called the “perfectionist theory,” which holds “the view that legislators and officials may consider what is good and valuable in life and what is ignoble and depraved when drafting the laws and setting the framework for social and personal relationships.”³⁹ Under this theory, ugly, short, or poor people should be given civil rights protection. That fact that they are not demonstrates the theory’s limited explanatory power. Our society would, however, be much improved if civil rights protection were based on the perfectionist theory.

B. WHAT IS A “RACE” OR “RACIAL GROUP”?

The term “race” is another important conceptual tool in civil rights discourse. “Race” or “racial group” is typically defined sociologically in civil rights theory. A sociological definition of race emphasizes phenotypical differences—differences in facial features, skin color, hair, and so on. In contrast, a biological definition of race stresses genetic differences. Because biologically there is only one race, the human race, some scholars would retire the concept of race from civil rights discourse. They would not use the term to refer to any social group. Orlando Patterson would go further. He would jettison the terms “black” and “white” because these “are linguistically loaded terms and emphasize the physical, which is precisely what we want to get away from in inter-ethnic relations.”⁴⁰ He favors the term “ethnic group” over “racial group.” “Ethnic group” is defined as a group that has a distinct heritage or culture. Patterson also favors the term “Afro-American” (which he defines as “persons of African ancestry who identify themselves with this ethnic group”).⁴¹ He would use that term instead of “black” or even “African American” to describe slave descendants living in the United States because the latter term’s “emphasis on . . . Africanness is both physically inappropriate and culturally misleading.”⁴² Patterson would use “African American” to describe recent African immigrants who make their home in the United States. As Patterson would abandon the term “black,” he would also do away with the term “white.” He posits that “it makes no sense to continue to use the term ‘white.’” Patterson’s arguments are intended to clarify the terms we use in civil rights theory and, to that extent, are similar to the more recent argument that the term “enslave” should replace the word “slave” in our discourse. The former, it is argued, is less derogatory and more accurately describes the condition of human bondage in which blacks were held.

There is much truth to these arguments. I believe, however, that, in the con-

text of civil rights discourse, the sociological concept of race is preferable to the biological concept. I give two reasons. First, the sociological concept is cognizant of the human tendency, as regrettable as it is, to differentiate on the basis of phenotype—in other words, to judge a book by its cover. People see phenotype and not genes. There is, in addition, a tendency for society’s phenotypical preferences to change over time (such as from pale white to tan-white to café au lait), to which civil rights theory must respond. Second, the entire regime of civil rights law is founded upon prohibitions based on the sociological concept of race. Legal and social expectations have developed around this concept of race.⁴³ Civil rights law is committed to a concept of race that is both socially real, albeit constructed, and subject to change over time. For these reasons, I use the sociological concept of race in this book.⁴⁴

Whether sociologically or biologically defined, race remains the primary question within contemporary civil rights theory. But what is the nature of the race problem African Americans encounter today? Is it racism, as liberals contend? Is it an impoverished culture, as conservatives insist? The answer, I contend next, is neither.

C. WHAT IS THE NATURE OF THE RACE PROBLEM FACING BLACKS TODAY?

I take issue with both liberal and conservative conceptualizations of the American race problem, at least insofar as it pertains to African Americans. Liberals define the problem as racism. Conservatives define it as a misguided black culture, which is to say they see not a race problem but a class problem as to which the government can do little. I believe it is more accurate to describe the race problem blacks have faced since the end of the civil rights movement as one of *disparate community resources*. Perhaps the following allegory can help us see the problem more clearly:

Two persons—one white, the other black—are playing a game of poker. The game has been in progress for almost four hundred years. One player—the white one—has been cheating during much of this time, but now announces: “From this day forward, there will be a new game with new players and no more cheating.” Hopeful but somewhat suspicious, the black player responds, “That’s great. I’ve been waiting to hear you say that for some four hundred years. Let me ask you, what are you going to do with all those poker chips that you have stacked up on your side of the table all these years?” “Well,” says the white player, somewhat bewildered by the question, “I’m going to keep them for the next generation of white players, of course.”⁴⁵

The cheating (slavery and Jim Crow) caused the maldistribution of poker chips. The maldistribution of poker chips (disparate resources) is the American race problem in post-civil rights America, particularly as it relates to African

Americans. I am arguing, then, that the problem of race in the Age of Obama is not racism but racial inequality, and that the first step in concretely measuring racial inequality, or the absence of equal opportunity, in a diverse society is to look at the distribution of societal resources among racial groups. A small amount of racial disparity is, of course, to be expected. Hence, my argument is this: *significant maldistributions of societal resources along racial lines, while not conclusive, give strong, rebuttable evidence of the absence of equal opportunity and, hence, the presence of a race problem.* To arrive at this conclusion, one must assume, as I do, that racial groups are equally endowed in their ability and desire to acquire societal resources.

It is important to note that my definition of the American race problem as disparate resources does not refer only to financial resources. This definition also includes human and social resources. That is, the resource disparity that I describe in this book consists not only of financial capital deficiencies (income and property) but also of human (education and skills) and social (public respect, racial stigma, and the ability to get things done in society) capital deficiencies.⁴⁶ Thus, I would not agree with those who riff about the wealth gap.⁴⁷ The race problem is not just about wealth. Inequality is not simply measured by income and property. A group's level of educational achievement, occupational status, family structure, incarceration rates, racial profiling, political influence, social respect, and other human and social assets also count. A statistical profile of these capital deficiencies, this maldistribution of poker chips, appears in the appendix.

Whether these capital deficiencies require the ministrations of the federal government depends largely on whether they are fixable through governmental action. Capital deficiencies, or disparate resources, are fixable through governmental action if they are sustained by external factors, such as racism or racial discrimination. Disparate resources are far less repairable through governmental action if they are sustained by internal factors, namely, bad behavior or bad values within black society. Thus, my argument is that if we can say that the cheating has ended with the death of Jim Crow in the early 1970s, as I think we can, and if we can acknowledge the availability of racial opportunities (not the least of which is the election of a black president), as I think we must, the critical question facing civil rights theorists today is this: What *sustains* the maldistribution of poker chips, external or internal factors? Post-civil rights theory today can largely be viewed as a vigorous debate over this question. Indeed, each of the post-civil rights theories discussed in this book can be understood as offering a particular response to this important question—what sustains disparate resources?⁴⁸

If resource disparity is the most accurate description of the race problem insofar as it applies to blacks in this post-civil rights era, it may not be the best way to completely define the problem historically. The problem during slavery was mainly human bondage, the absence of freedom. This profound privation,

which was accompanied by disparate resources, was rationalized and sustained by the profit motive and various forms of racist rhetoric, including racial antipathy toward blacks and the “white man’s burden” to “civilize” Africans.⁴⁹ After emancipation, the race problem largely became a problem of second-class legal status and racial violence (punctuated by lynchings) as well as disparate resources.⁵⁰ Government-sanctioned racism was both a cause of and a sustaining factor for the resource-disparity problem during Jim Crow. The 1910 edition of the prestigious *Encyclopaedia Britannica* gave evidence of the level of racial antipathy in Jim Crow America when it asserted that “the negro would appear to stand on a lower evolutionary plane than the white man, and to be more closely related to the highest anthropoids.”⁵¹

Defining the American race problem as disparate resources is a materialist way of viewing it.⁵² This approach fundamentally rejects the long-held Myrdalian definition of the race problem, taken from Gunnar Myrdal, in which the race problem is largely seen as a sociopsychological or state-of-mind problem, that is, a problem that exists largely in the minds of whites.⁵³ A disparate-resources approach discounts negative personal opinion as a defining feature of the race problem to the extent that such opinion does not materially harm blacks. It is profoundly unfortunate, but in a free society there will always be racist, sexist, homophobic, anti-Semitic, and other forms of disgusting personal opinion. That is the price we pay for freedom of speech. While certainly an important problem, negative personal opinions alone do not create a level of concern commensurate with disparate resources. The Archie Bunker type, white but powerless, who utters racial slurs at his dinner table every night is nothing compared with the black/white differential in family financial assets (such as bank accounts, stocks, bonds, and real estate): the median net worth of African American families is about ten times less than that of white families: \$6,166 versus \$67,000.⁵⁴ Racist personal opinion becomes a serious concern for government action when it sustains disparate resources—in other words, when racist commentary turns into or otherwise encourages discriminatory or subordinating behavior.⁵⁵

Do disparate resources also define the race problem as it relates to nonblack racial minorities? I will not try to answer this question definitively here. Suffice it to say that the appendix charts resource disparities, or capital deficiencies, for Latinos and Asian as well as blacks. Important differences among these groups can, however, be seen. For example, Asians experience less resource disparity than blacks or Latinos, especially in areas of income and education. Indeed, in these categories Asians are at parity with whites and slightly exceed whites in some instances.⁵⁶ This raises an interesting question: If whites earn less than Asians or have lower college participation rates, do we to that extent have a race problem (disparate resources) *for whites vis-à-vis Asians*? The assumption has to be that these disparities are quite significant or at least statistically significant. Otherwise there is no race problem.

Assuming the Asian/white disparities are significant, there is an interesting argument that one might want to consider in the future. The argument is that there is no race problem, no problem regarding the absence of equal opportunity, because whites are the numerical majority in our democracy and, as such, they control the institutions that determine who gets paid for what and who gets into the best colleges. If whites exercise their power in ways that ultimately benefit minority groups (e.g., by repealing Prop 209, which ended affirmative action in higher education and public contracting in California), that can hardly be termed a race problem for whites. Whites, the argument continues, should be allowed to cede some of their power or resources to “discrete and insular minorities” without calling that a race problem. This argument is suggested in a position John Hart Ely took in a different context. Speaking about affirmative action as a form of reverse discrimination, Ely posited, “There is no danger that the coalition that makes up the white majority in our society is going to deny to whites generally their right to equal concern and respect [at least on racial grounds]. Whites are not going to discriminate against all whites for reasons of racial prejudice, and neither will they be tempted generally to underestimate the needs and deserts of whites relative to those, say, of blacks.”⁵⁷ Again, I will not attempt to determine here whether this is a persuasive argument. I simply place it on the table to stimulate our thinking about how best to define the race problem for particular racial groups in the Obama phase of post-civil rights America.

Like Asians, Latinos are beset by disparate resources, some of which track those of blacks.⁵⁸ But the post-civil rights forces that sustain resource disparity between whites and Latinos are not necessarily the same as those that sustain the American race problem relative to blacks. For example, immigrant flow and its attendant privations have carried and continue to carry substantial capital deficiencies into many Latino communities.⁵⁹ One simply cannot make this factual observation about black communities. Immigration does not sustain the race problem in black communities to the extent that it does in Latino communities. In fact, immigrant flow in black communities has just the opposite effect: “Black immigrants from Africa average the highest educational attainment of any population group in the country, including whites and Asians.”⁶⁰ This not only points to the dangers of aggregating all racial minorities under one conceptual umbrella but also tells us that taking disparate resources at face value will not give us the complete picture. Whether the focus is on blacks or other racial minorities, we get a truer picture of the American race problem in post-civil rights America when we also consider the factors, external or internal, that sustain capital deficiencies. Focusing on African Americans, we begin to develop that picture through the perspective of the first civil rights theory to arrive in the post-civil right era—traditionalism.