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WSBA Civil Rights Law Section Newsletter
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Civil Rights Law Section

WASHINGTON STATE BAR ASSOCIATION

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A Parting Note as Chair

Fighting the Shame of Racism in the United States

Alec Stephens

Immediate Past Chair, WSBA Civil Rights Law Section

It is my firm belief that we who have been trained as lawyers have bought in to not discussing the shame that is racism in the United States, and its effects throughout the history of our nation. We will engage in efforts and discussions regarding concepts or actions regarding discrimination, bias, ignorance, prejudice, segregation, intolerance, or bigotry to name a few placeholders. We will make arguments and distinctions regarding whether such manifestations are intentional or unintentional, implicit or explicit, de facto or de jure. We will argue about the justification to correct these manifestations if they are conditions of intent or the effects and impact of discrimination, whether there are identifiable targets, whether the cause is societal or specific to an identifiable perpetrator, and whether the actions are current or are rooted in the past.

We have gotten so far away from the shameful acts rooted in racism, and made institutionalized and built into the structures of society and the causal connection that explains the otherwise unexplainable: the persistent and consistent outcomes that result in ongoing gaps in sharing in the positive benefits or the negative experiences based on whether one is considered white, or not. While we must stand against all of the “isms” that set us apart from each other and have similar if not the same issues (sexism for example), from before the founding of our nation, policies and practices and laws that set apart races in our nation were fundamental to framing the Constitution and its handling of slavery; how to deal with the people who were already here, violating and showing no respect for treaties and creating reservations to remove them whenever necessary; and western expansion that treated people who were from areas that were once a part of Mexico as if they had no physical connection to the land that was now their new country.

In the spring of 2016, I was participant in an 8-week workshop series sponsored by Leadership Tomorrow, entitled “Racism: A Leadership Issue.” I was interested in this program as I was troubled with reflections I was having regarding policing in communities of color and shootings that followed, the increase in racial tensions throughout our country on so many levels, not the least being the lack of respect given to our first African American President of the United States, a reading of Ta-Nehisi Coates’ essay “The Case for Reparations,” and an ongoing feeling of insult reflecting on Supreme Court decisions rejecting “societal discrimination” as an amorphous concept and not sufficient as a justification for race conscious remedies for past discrimination.

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- **Race** has been defined by Ron Chisom and Michael Washington in their book, *Undoing Racism: A Philosophy of International Social Change*, Tulane University Press (1997), as “a specious classification of human beings created by Europeans (“whites”) which assigns human worth and social status using “white” as the model of humanity and the height of human achievement for the purpose of establishing and maintaining privilege and power.”
- **Racism** is a political construct based on the theory that “race” accounts for differences in human character or ability and that the white “race” is superior to others; the ability to use discrimination and prejudice via institutions and structures to reinforce the theory of white superiority.
- **Institutional Racism** is a pattern of discriminatory treatment, unfair policies and inequitable opportunities produced and perpetuated by, within and between social institutions — e.g., governmental agencies, schools, media, banks, courts, police, health care, etc. — giving positive treatment to white people and giving negative treatment to people of color, based on the political construct of race, that leads to inequity. Institutional racism need not involve intentional racial discrimination. For example, individual judges might intend to impose similar sentences for similar crimes; yet if white people tend to receive lighter punishments, plausibly institutional racism occurs.
- **Structural Racism** is a system of hierarchy, inequity, preferential treatment, privilege and power for white people that is diffused and infused in all aspects of society. This system is primarily characterized by white supremacy that normalizes and legitimizes an array of historical, cultural, institutional and interpersonal dynamics that routinely advantage whites while producing cumulative and chronic adverse outcomes for people of color. Other forms of racism (e.g., interpersonal, institutional or internalized) emerge from structural racism.

Because these definitions carry with them an indictment of the history and present circumstances in the United States, there is a constant tendency to call the issues of race and racism something else. Those of us who bring up the subject of race and its past or present effects and manifestations are quickly admonished to change the subject; to stop being overly sensitive; to not dwell on the past; to not “play the race card.” We are asked to turn the page and be colorblind and race neutral. We are asked to buy into the lie that issues of race and racial inequities and institutional and structural racism have been overcome and will die out as we become a more post-racial society.

From time to time during his tenure as President, Barack Obama acknowledged the issues regarding race in America, took actions to address issues such as stepped-up enforcement of the Voting Rights Act, directed the Justice Department to get involved in putting in place consent decrees in areas where there had been tensions in the aftermath of police shootings in communities of color, or commuted the sentences of mostly non-white non-violent drug offenders who had served disproportionate sentences. Absurdly in the responses by some, Barack Obama is pointed to as the cause for greater racial divide in this country since he took office and has been accused of hating white people. Little is said of the many white people who, from the beginning and throughout the Obama Presidency, expressed the need to “take my country back.” Even in the face of current racial inequities, the recent election results not only point up the constant racial divide, but reflect a view by a number of white people that they have been left out. Yet in the aftermath there are many who suggest that race had little or nothing to do with the results. In a disconnect between what are now festering wounds from ever widening racial divisions and a call for healing divisions that have roiled our country, there is a refusal to take any responsibility for what was one of the most racially virulent campaigns, responding either that the divisions were already there, or that there is nothing to apologize for because they won.

I recall from my youth in the 1960s many white southern politicians (and the mayor of Chicago) expressing the view that the marches and demonstrations of that period, and backlash from opposing

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along under the status quo. To those who struggle for freedom, dignity, respect and equality, and know that this is not their experience and the experience of those around them, the status quo could not then, and cannot now be acceptable.

The Black Lives Matter Movement is the inevitable successor to the history of struggle for freedom and justice and equality and dignity for African Americans. Just its name has sparked the conversation and put forth succinctly a discourse that comes with the seemingly inclusive rebuttal, "All Lives Matter." There is a basic truth that all lives matter, and what comes next is another very painful truth. In our country, while all lives should matter, we do not as a country treat all people, and in this specific case, black people as if we matter. Certainly not to the same extent. In our painful history, the lives of black people bear little if any similarity to white lives. It would be fiction to paint a picture that those differences are in a few instances. They permeate just about every measure of society's benefits and burdens of our countrymen and women. Years before the deaths of 17 year-old Trayvon Martin or 18 year-old Michael Brown, having benefitted from programs and policies of the late 1960's, as a highly educated, middle class African American, I had to give "the talk" to my sons regarding the danger of being stopped by white police officers. I had to talk about their not becoming a target, or another police shooting statistic. When some horrible criminal act takes place, I join with so many people of color, and particularly black people, taking a pause to hope that the perpetrator was not black, concerned on how our entire race or our community will be judged. While I hear so many whites, and ironically whites who oppose affirmative action and race-conscious remedies, quote Dr. King on the goal of not being judged by the color of one's skin, but by the content of one's character, I know that the "first black person" in so many endeavors carries the hopes and dreams of all of us; they will set the stage for whether more of us will be accepted into the group, company, school, etc.

I can no longer allow myself to not call racism for what it is, when I see it. I can no longer sit by and let the subject drift to other reasons, downplaying the issue of race. Societal Discrimination based on race is real, and is no more amorphous than breathing dirty air or drinking fouled water. To deny its existence and its continued evil allows others to change the subject and downplay the harm. In too many instances, the racism that is encountered is something that everyone has been in on, by commission, omission, denial or silence.

The Rev. Dr. Martin Luther King Jr. discussed the need to speak up and speak out as well as the cost of not doing so when he stated: "Our lives begin to end the day we become silent about things that matter."

There is an old saying, "tell the truth and shame the devil." The devil is racism, and we must call it what it is and not allow it to continue to do its evil in our country. We cannot let the shame of racism to continue unchecked. We must call racism what it is, and then fight to eradicate it at every turn.

Civic Leader and Distinguished Service Awards

Each year, the Civil Rights Law Section recognizes individuals or organizations who have made a notable contribution to the cause of civil rights. Recipients are persons or entities who have championed the cause of equality for impoverished, underserved, or minority populations, or persons with disabilities, in Washington. Examples of exemplary work in this area would include, but are not limited to, those who regularly fight on local or state government levels for expansion or defense of civil rights protections, or who represent or advocate on behalf of people or issues concerning civil rights or basic human rights.

Distinguished Service Award

Recipients of this award are primarily attorneys who have demonstrated in their career regular work for the expansion or defense of civil rights protections at the local, state or national level. The following persons were recognized for their distinguished service during the Civil Rights Law Section's Annual

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Adam Moore, 2016 Distinguished Service Award

Civic Leader Award

Recipients are attorneys, individuals, or organizations that represent or advocate on behalf of people or legal issues regarding civil rights, civil liberties, or basic human rights such as freedom from discrimination, protection from abuse, or obtaining essential human services such as food, healthcare and shelter. The following persons were recognized for their distinguished service during the Civil Rights Law Section's Annual Meeting on September 23, 2016:

Larry Gossett & Bob Santos, 2015 Joint Civic Leader Award**Rep. Luis Moscoso, 2016 Civic Leader Award**

Civil Rights in the United States of America: Fact or Fiction?

Terrence J. Roberts, Ph.D.

In the aftermath of the Civil War, the 39th Congress of the United States submitted a bill that would provide civil rights to the recently enslaved and now newly freed men, women, and children of African descent. The bill stipulated that this group of formerly enslaved people would be classified as citizens, but as to whether they would enjoy all the rights and privileges that such status would convey would quickly become a point of contention. The first iteration of the bill was presented to President Andrew Johnson in 1865 and was promptly vetoed by him. He vetoed the 1866 version as well, but the Congress was able to muster the required two-thirds vote of the combined houses and the bill became law in 1866. This was the first federal law defining citizenship in the United States. Here is how the law was described by historian Eric Foner: "The first statutory definition of American citizenship, the Civil Rights Act of 1866, declared all persons born in the United States (except Indians) national citizens and spelled out rights they were to enjoy equally without regard to race." [1] This action was followed by the addition of the 14th Amendment to the Constitution in 1868; this was seen as the most definitive statement to date about the citizenship rights of formerly enslaved people.

So far, it seems that things were on track to ensure that black people who were now free of the bonds of slavery would be granted all the rights that citizens enjoy. But you know as well as I do that this was not to be the case. There was something in the national character that could not or would not accept black people as full citizens. Nonetheless, those who were and had been engaged in the struggle for civil rights continued to fight. The evidence is there in the passage of more civil rights acts, more barriers to full participation by all citizens removed, much clearer rhetoric in support of those who were denied access to opportunities on myriad levels of society.

But, all of this has not proven to be especially fruitful; we continue to be a nation divided by multiple lines of separation, not the least of which is that of legalized racial group identity. The division is further amplified by a rather rigid hierarchy wherein the racial groups are arranged by category from most desirable to least desirable. And this is not a consequence of choice by those who find themselves assigned, arbitrarily, to one or another such group. It is entirely a function of the system as it has been designed by those who have had the power and willingness to do so.

Further, the very concept itself, "civil rights," which suggests a preferred state of being for an entire national population, is in fact today coded language for offering, belatedly, opportunities for people of color and others to be included as equals in the body politic. And, as it has been demonstrated time after time, this is not something that a majority of citizens find to be palatable. In 1954, in the wake of the *Brown* decision, many voices of opposition were raised in the halls of Congress, fears about the dangers of "race

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think that white Americans would devise ways to live in the ocean rather than support fair housing legislation for black people.”

Why, you might ask, does this situation remain? What drives a nation to be so blind to universal moral truths? Yes, civil rights laws have been passed with the intention of offering relief to black people on many fronts. That point is not in dispute. What is in dispute, however, is whether those actions have led to meaningful change given the ongoing influence of systems, institutions, philosophies, practices, and ideologies developed over time in support of maintaining the status quo.

I invite you to consider an element that may help to clarify why a growing body of civil rights law has not resulted in radical changes in our society. Law appeals first and foremost to reason and objectivity. The unfortunate truth is that civil rights law involves issues that bypass the seat of reason and objectivity for most people—the cerebral cortex—and winds up instead being processed by elements of the limbic system—the seat of emotion and memory.

If it were simply and only a matter of reason, and if the majority of citizens were reasonable beings, it is quite likely that “civil rights” would be an artifact of the distant past. The logic upon which the laws were based would have persuaded the body politic to accept the rationale that all people were indeed intended to enjoy the freedoms and liberties available to most and our historical tale would be a very different narrative indeed. But our history is what it is, and in large measure, because it is an unexamined history, we are saddled with the onerous status quo that we experience today.

James McCune Smith, an African American physician and pharmacist, saw what could happen when the mind turns from reason to create mental images of black people that have nothing whatsoever to do with objective reality. In 1852 he wrote: “The negro ‘with us’ is not an actual physical being of flesh and bones and blood, but a hideous monster of the mind, ugly beyond all physical portraying, so utterly and ineffably monstrous as to frighten reason from its throne, and justice from its balance, and mercy from its hallowed temple, and to blot out shame and probity, and the eternal sympathies of nature, so far as these things have presence in the breasts and being of American republicans! No sir! It is a constructive negro—a John Roe and Richard Doe negro, that haunts with grim presence the precincts of this republic, shaking his gory locks over legislative halls and family prayers.”[2]

Smith was able to see the profound impact of internalized belief systems as they were played out in his 19th century existence. Akin to his report we have the following statement from a man soon to be our 16th president, Abraham Lincoln, in a speech to an audience in Springfield, Illinois: “Mammon is after him; ambition follows, and philosophy follows, and the Theology of the day is fast joining the cry. They have him in his prison house; they have searched his person, and left no prying instrument with him. One after another they have closed the heavy iron doors upon him, and now they have him, as it were, bolted in with a lock of a hundred keys, which can never be unlocked without the concurrence of every key; the keys in the hands of a hundred different men, and they scattered to a hundred different and distant places; and they stand musing as to what invention, in all the dominions of mind and matter, can be produced to make the impossibility of his escape more complete than it is.”[3]

Lincoln made his statement in 1857, in the wake of the *Dred Scott* decision. He could not have known how prescient a statement he was making at the time. But, as we extrapolate from the reports of both these men, we see vestiges of their realities being played out in this year, 2016. Among the questions we must ask at this juncture is whether or not these messages from our past can be helpful as we seek to make changes in the arena of civil rights. I am certain we will find clues about how to proceed if we are willing to care enough to confront self and each other about our distorted views of our own history. One prevailing narrative of our time is the idea that positive change is taking place over time; that as we “mature” as a people, we rid ourselves of the worst traits. Does an objective assessment of history support such a narrative? Does believing this story make it impossible for a person to see evidence to the contrary?

In the early sixties as a college student in Los Angeles, I discovered social anthropologist Ernest Becker’s *BIRTH AND DEATH OF MEANING*, in which he wrote: “It is the task of culture to provide the individual with the firm conviction that he is an object of primary value in a world of meaningful action.”[4] Becker’s thoughts were compelling and I thought about his premise as I remembered what life had been like for me in Little Rock, Arkansas just a few years before. I had moved to Los Angeles in 1958 in the wake of the Arkansas Governor’s decision to close all public high schools. (They remained closed for the school year 1958 – 59). Culture, as I had experienced it in Little Rock, did not provide me with a firm conviction that I mattered in the least. In fact, what I had experienced was the exact opposite. The Governor’s decision was a direct response to me and six other members of the original Little Rock Nine who were eligible to

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we were objects of primary value. His action was, however, in keeping with the way in which we had been treated as black children in Little Rock for all of our lives; we were not welcome in most places by law and by custom. If Becker's premise has merit, we must hold society responsible for failing to provide us with the firm conviction that our lives mattered. Yes, schools were reopened the following school year, and five black students (including two of the Little Rock Nine) entered in September, 1959. Unfortunately some would see the schools' reopening as progress, as the defeat of a determined Governor, but this would obscure the fact that racist ideology still informed decisions at every level of life in Little Rock. (The Governor was re-elected six times; he served from 1955 to 1967).

It is at this juncture that serious and in-depth conversation must take place. If we blithely conclude that progress has taken place since no enraged citizens are on hand to harass black students who wish to attend schools that formerly had been reserved for white students only, we choose to ignore a long list of compelling social dynamics. Research results in the field of education show that public schools throughout the country are more segregated today than they were in 1954 when the *Brown* decision was handed down. This is not a surprising result when you have an unbiased, objective view of history.

School integration is not and has not been a favored outcome for the majority of white Americans and it just so happens that this group is the best equipped financially to utilize private schools and other forms of non-public education. This combination of factors in concert with "white flight" to suburban areas, results in racially segregated public schools in mostly urban areas. And it is not the racial composition of the student body that makes this an urgent civil rights issue. It is the accompanying policy shifts and budget allocations that demand our attention. We have to acknowledge as well the economic disparity between white people and black people brought on by a combination of unfair labor practices, discriminatory lending policies, and continuing housing discrimination in spite of laws against all three. The impact of this reality is quickly felt in communities where school funding is tied to local tax dollars.

Something else that demands our undivided attention is the rate at which black men are being disproportionately involved in police and justice department actions around the country. In general, we find more improbable statistical data in America's police records of stopping, frisking, arresting, and in the Justice Department's record of charging, trying, convicting, and imprisoning men of color than we find in the records of other public service agencies. Looking at this through my psychologist lens, I see patterns that suggest strongly that black and brown men are seen as different beings than their white counterparts.

In my role as adjunct faculty member at the Simon Wiesenthal Center's educational wing in Los Angeles, I work with groups of police officers from a variety of agencies including city and county officers and sheriffs, highway patrolmen and patrolwomen, and members of the Immigration and Customs Enforcement (ICE) unit of the Department of Homeland Security. In a recent session with Los Angeles city police officers, I asked whether or not the code "NHI" was still being used by officers who responded to calls. There was general agreement in the group that such behavior was no longer tolerated. Officers were no longer able to report from the scene to which they had been called with the terse message: NHI, or no humans involved. I had learned about this practice from groups of officers who had attended previous sessions. If the people involved in whatever activity had been reported were white Americans, NHI would have been inappropriate, but if they were black or brown, NHI was acceptable.

Of course, many questions arise in the wake of such a startling revelation not the least of which is what if it is not a startling revelation? And then, of course, what would compel an officer to refrain from the use of deadly force if NHI was in play? There are many other questions to be asked but suffice it to say, here is an area to be explored in the search for violations of civil rights and to discover how policy, planning, and training can help to create different outcomes from those we see all too often on nightly newscasts. And in developing the ideas for new policy, planning, and training, we have to also learn how to confront effectively the resistance from those who are called upon to implement the new ideas. Habits and patterns of response are difficult to eradicate because they tend to become deeply imbedded in the human psyche.

The larger question is this: what would compel members of a society to change the ways in which they have learned to perceive and characterize those deemed as "other?" In American society, black children often find that they are perceived to be much older than they really are and are held to adult standards of behavior. This has a massive impact on life chances especially for young black males; their civil rights are likely to be violated at a much higher statistical rate than those of white age-group peers. In their recent research, social psychologists at the University of California have uncovered a most startling truth: "Children in most societies are considered to be in a distinct group with characteristics such as innocence and the need for protection. Our research found that black boys can be seen as responsible for their

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The death of 12-year-old Tamir Rice at the hands of Cleveland, Ohio police officers is a graphic example of the disastrous results this misperception can cause. This young boy was seen as a “dangerous and threatening adult,” a status often conferred simply because one is black and male, but egregiously more onerous when applied to a child. This example is but one of hundreds of ways in which people of color continue to be maligned in our society and, hopefully, gives us enough food for thought as we consider how to proceed in this fight for civil rights for all.

As I write the closing words to this article, I glance out of my window just in time to see a woman deliver a yard sign to my next door neighbor. The sign is not elaborate, but simply states, “Trump for President.” My neighbor will tell me that he is a lifelong Republican and will vote for any person nominated by his party. (He has done this in the past). I respect his right to do both these things: erect a yard sign of his choosing, and to vote for his party’s candidate. At the same time, I care enough to confront him about the implications of his choice in light of what I know about the history of our country, his candidate’s shallow understanding of this same history, and the future of America with a national leader bringing the dubious credentials his candidate has to offer. Donald Trump has said repeatedly that he wants to return to an America when things were great. The meaning is clear and unmistakable, the America he references is one in which black people were relegated to the margins of society as they had been until the civil rights movement of the late fifties and into the sixties. In his world, white men would regain their undisputed status as the only people whose lives really matter.

Civil rights law then, and civil rights law now, stands in support of a just and equitable society. Our big question now is how to convince citizens that this is an honorable goal. Far too many of us have opted to remain cloistered in xenophobic, homophobic, racist, anti-Semitic, and patriarchal bubbles. Outside these hermetically sealed environments is the sunlight of objective truth, and if enough people are willing to exit these self-defined comfort zones and even if we have to start with the least detrimental available alternative to the current status quo as a first step, it will be well worth the effort. Such a quest falls naturally under the rubric of forming a more perfect union. And it this goal, having a union that exemplifies the very best ideals embedded deeply even in the approved national narrative, for which I strive. What I wonder about is whether that goal is shared by my neighbor.

[1] Foner, Eric, *The Story of American Freedom*, W.W. Norton and Company, NY, 1998, pg. 105

[2] James McCune Smith, *Frederick Douglass Paper* (1852)

[3] Basler, ed., *Works of Abraham Lincoln*, “Speech of June 20, 1857,” II, 404; quoted in Michael P. Johnson & James L Roark, *Black Masters: A Free Family of Color in the Old South*, W.W. Norton & Company, NY, 1984, pg. 164

[4] Becker, Ernest, *The Birth and Death of Meaning: An interdisciplinary Perspective on the Problem of Man*, The Free Press, New York, 1962, Chapter 8

[5] Goff, Phillip Atiba and Jackson, Matthew Christian, et al, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, in *Journal of Personality and Social Psychology*, 2014, Vol. 106, No. 4, 526-545

About the Author

Terrence J. Roberts, Ph.D., is one of the “Little Rock Nine” who desegregated Central High School in Little Rock, Arkansas in 1957. As a 15-year-old eleventh grader, he joined eight other students and became one of the first nine black students to go to a formerly segregated public high school in Little Rock.

Dr. Roberts is CEO of Terrence Roberts Consulting, a management consultant firm devoted to fair and equitable practices in business and industry. More information is available at his website: www.terrenceroberts.com.

Additionally, he is co-principal of Roberts & Roberts, LLC, a consulting firm offering assistance to groups who wish to engage in substantive conversations about race and the issues related to race in America. (See: www.talkingaboutrace.com)

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LESSONS FROM LITTLE ROCK, a memoir by Dr. Roberts was published on October 1, 2009. In this book he describes his experience at Central High School and talks about the salient lessons to be learned from that episode. On February 1, 2010, his second book, *SIMPLE, NOT EASY: Reflections on Community, Social Responsibility, and Tolerance* was published. The essays in this volume seek to guide the reader toward more socially responsible positions in life.

A much sought after speaker and presenter, Dr. Roberts lectures and presents workshops and seminars on a wide variety of topics.

[Evenwel v. Abbott](#)

Breanne Schuster

Voting Rights Researcher, ACLU of Washington

“One person, one vote.” We have heard the phrase a million times, and it is commonly touted as a bedrock principle of the constitutional right to participate equally in the electoral process. Countless lawsuits have been brought to enforce this longstanding protection. Less attention has been paid, however, to what these words actually mean when applied by the courts. That is, until the U.S. Supreme Court heard the *Evenwel v. Abbott* case this past year in its 2015–16 Term.

The U.S. Constitution requires that House seats in Congress be allocated or apportioned according to total population. However, throughout much of the United States' history, states were given nearly absolute discretion to draw districts for their own legislatures in any way they wanted. This meant that until the 1960s, many states utilized apportionment plans that were infrequently updated to account for population growth and/or based on geographic boundaries rather than population. Unsurprisingly, this resulted in the under-representation of urban areas and gave way to significant disparities in voting power and equal representation.

After decades of voting inequalities, the U.S. Supreme Court declared such state legislature apportionment schemes unconstitutional under the Equal Protection Clause of the 14th Amendment and mandated that legislative districts must be roughly proportional in population totals. *Reynolds v. Sims*, 377 U.S. 533 (1964). This rule came to be known as “one person, one vote.” The decision garnered significant opposition, including attempts to amend the Constitution to permit unequal districts. Ultimately, however, nearly every state had to redraw its legislative districts to comply with the Court’s ruling. While the Court in *Sims* did not explicitly define what “population” meant in terms of districting, almost every jurisdiction in the country opted to utilize total population. Total population figures include all residents who live in the area, helping to ensure everyone is represented in the political process, and their rights are protected, regardless of age, citizenship, or criminal history.

The *Evenwel v. Abbott* case was brought by two Texas residents, Sue Evenwel and Edward Pfenninger, who were represented by the Project on Fair Representation, the same group who brought *Shelby County v. Holder*, which gutted the Voting Right Act. Plaintiffs specifically challenged the apportionment of Texas Senate Districts, arguing that counting non-voters in districting dilutes the political power of eligible voters in violation of the Fourteenth Amendment’s Equal Protection Clause. They alleged that the State Senate districts where they reside contain more eligible or registered voters than other districts, and therefore, the relative weight of their vote is less than that of voters in other districts containing fewer eligible voters.

Evenwel had the potential to not only upend how nearly every jurisdiction in the country draws its legislative districts, but change the very definition of representation. Plaintiffs in the case did not articulate a clear definition of how districts should be drawn, or who would be considered within the “one person, one vote” protections. However, reference was frequently made to the citizen voting age population and eligible voting population, as alternatives to total population. Utilizing citizen voting age or eligible voting figures to draw districts would exclude children, noncitizen permanent residents, and potentially millions of individuals living with felony convictions who are no longer incarcerated but still barred from voting. *Evenwel* was arguably the most important voting rights case before the U.S. Supreme Court since the Court struck down Section 4 (and functionally, Section 5) of the federal Voting Rights Act in 2013 in the

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case also presented a back door attack on Section 2 of the federal Voting Rights Act (VRA) by attempting to create a conflict between the use of total population in state redistricting and Section 2's use of voting age population or citizen voting age population to establish vote dilution and remedial districting.

A number of amici weighed in on the issue, including advocacy organizations like the ACLU and NAACP, as well as states, cities, and the U.S. Government, with many asking the Court to draw different lines for use in drawing state legislative districts. The state of Texas asked the Court to allow it to utilize total population in this election, but also wanted the Court to hold the state could use eligible voters to draw districts in the future. Alternatively, the federal government argued that the Constitution required total population be used as a starting point in districting. The Attorney General of Washington and the City of Yakima also submitted briefing to the Court, arguing for opposite outcomes.

Ultimately, attempts to force the Court's hand in either undermining the VRA's protections, or the constitutional protections afforded to individuals ineligible to vote but still entitled to representation, failed. In a unanimous 8-0 decision, the U.S. Supreme Court held that a state or locality may draw its legislative districts based on total population. The court found that allocating districts based on total population was supported by constitutional history, the Court's past decisions, and settled practice. The Court also emphasized that nonvoters have an important stake in many policy debates and in receiving constituent services and that by "ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation." *Evenwel v. Abbott*, 136 S.Ct. 1120, 1132 (2016) located at https://www.supremecourt.gov/opinions/15pdf/14-940_ed9g.pdf. Justices Clarence Thomas and Samuel A. Alito Jr. ultimately agreed with the outcome the majority reached, but filed separate concurrences emphasizing these questions should be left to the state.

While the Court clearly found that jurisdictions are authorized to use total population in districting, the Court declined to address whether other methods of calculating population could be used to draw districts. While this leaves open the possibility of states attempting to use citizen voting age or registered voter populations to apportion districts, such a districting scheme would almost certainly make its way to the Supreme Court. Despite any remaining ambiguity, many voting rights advocates consider this case to be a significant win. States can continue to ensure that all individuals in a jurisdiction receive representation, whether they are eligible to vote or not.

[Of Friendship and Freedom](#)

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The histories of Archer Alexander, a fugitive slave, and William Greenleaf Eliot Jr., Washington University in St. Louis' first president, intersect in a dramatic and inspiring story of courage and compassion.

I. Archer Alexander possessed dangerous knowledge.

Confederate sympathizers aimed to sabotage a bridge over which Union soldiers were soon to pass. The situation was hazardous, especially for Alexander. He was a slave. His owner was among the saboteurs.

So one night in February 1863, Alexander snuck out of his quarters. He conveyed warning.

Disaster was averted. But secessionist suspicion fell quickly on him.

And so Alexander left again, fleeing St. Charles, Missouri, one step ahead of the slave catchers. In

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“Dr. Eliot called Archer ‘the most Christian man he ever encountered,’” says Errol Alexander, Archer’s great-great-grandson. “On Sundays they would walk together to church.”

And when the slave catchers finally caught up, “Eliot rescued him.”

II. The Spirit of Freedom

Many details of Alexander’s early years have been lost to history. For more than a century, the primary source about his life has been *The Story of Archer Alexander: From Slavery to Freedom*, a biography Eliot wrote in 1885.

Eliot reports that Alexander was born into slavery around 1813 on a large Virginia farm owned by a Rev. Delaney. When Delaney died, Alexander was brought to Missouri by the reverend’s son, Thomas Delaney, and later sold to a St. Charles farmer named Hollman.

But Eliot, writing six years after Alexander’s death, relied almost entirely on his own recollections. In *The Rattling of the Chains: A True Story of an American Family* (2009/2015), Errol Alexander, PhD, presents fresh details and a somewhat different chronology.

According to Errol—who has spent three decades combing historical archives—Archer was born in December 1816, the unacknowledged son of a white family, the Alexanders, who owned his mother. It was the Alexanders who brought him to Missouri in 1829, but in 1837, they sold him to a cousin named Ferrell. He was then sold again to Louis Yosti and finally, in 1844, to Richard Pittman.

In either case, Archer spent most of his adult life in St. Charles working on a farm, where he largely oversaw daily operations. Although unions between those enslaved were not recognized by law, Alexander in mind and spirit married a woman named Louisa, with whom he raised 10 children.

Here, too, Errol adds fresh detail. Drawing on family accounts and slave oral histories, he says that the couple’s youngest child—Alfred, born in 1862—was likely fathered by Louisa’s owner, a man named James Naylor.

Like Pittman, Naylor was a Confederate sympathizer. Thus, reporting the conspirators — who also had secreted a cache of weapons—was not only a valorous act, it was also retribution for the treatment of Archer’s wife, says Errol.

III. The Capture

For Eliot, Alexander’s arrival at Beaumont Place, as the family home was called, represented a moment of truth. Though he’d long preached against the return of fugitive slaves, Eliot believed in obedience to the law. “What, then, was I to do?”

This:

Within hours, he obtained a 30-day order of protection from Lt. Col. Franklin Dick, the Union provost marshal of St. Louis. The order allowed Alexander to remain in Eliot’s employ until legally claimed.

A few days later, Eliot went to Judge Barton Bates, an acquaintance of Alexander’s master. Eliot explained that he wished to purchase Alexander’s freedom and could pay up to \$600. Bates relayed the message, but Eliot received no answer.

Until, that is, one fine spring morning not quite a month later. Leaving for class, Eliot noted a peaceful scene: Alexander working in the yard, Eliot children trailing happily behind, all under the seeming protection of nearby Union barracks. But on the street loitered three rough-looking characters. They gave Eliot pause but seemed to be leaving, and Eliot, with his mind on his lessons, continued to campus.

That evening, Eliot realized the enormity of his mistake.

The house was in disarray. The children were crying, and the nurse was distracted—only Abigail remained calm in the crisis. The men had been slave catchers, armed with clubs, with knives, with pistols.

They bludgeoned Alexander. They kicked him in the face. They handcuffed him. They hauled him away. The family thought Alexander had been killed before their eyes.

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IV. 'Shoot Them Dead'

The Old City Jail, located at Sixth and Chestnut, was a strange architectural affair. First-floor gentility—even proportions, a classical cornice—was undone by a ramshackle second, which appeared deposited by tornado.

It was here that Alexander was taken, here where he lay unconscious. But Eliot had one more card to play. Alexander's 30-day order of protection was 29 days old. Under military law, the fugitive slave had been grabbed too soon.

"Eliot came from New England; his friends were all radical abolitionists," says Laurie F. Maffly-Kipp, PhD, the university's inaugural Archer Alexander Distinguished Professor in the John C. Danforth Center on Religion and Politics. But as a transplant to a more conservative, slave-holding state, "Eliot learned to work the system."

Eliot took his case to the provost marshal's office. Capt. James F. Dwight examined the document, interrogated Eliot and summoned local police. Dwight then charged John Egan, who would later become St. Louis' first detective supervisor, with ensuring Alexander's return. Eliot reports the exchange between Egan and Dwight:

"What shall we do, captain, if they refuse to give him up?"

"Shoot them on the spot."

"We are to understand that, Captain Dwight, shoot them on the spot?"

"Yes, shoot them dead if necessary."

By 10 p.m. the slave catchers were in custody, and Alexander, beaten and bruised, was back at Beaumont Place.

V. Safety

The next day, Eliot obtained a full order of protection. But the political situation remained volatile. Though President Lincoln had issued the Emancipation Proclamation in January 1863, it did not apply to slave-holding border states. In Missouri, the "peculiar institution" stood until 1865.

And so, once he'd recuperated sufficiently to travel, Alexander went by steamboat to Alton, Illinois, a free state. There he worked as a farmhand, saved his wages and waited for things to settle down across the Mississippi.

Six months later, when Alexander returned to Eliot's employ, he deposited \$120 in the Provident Savings Bank. It was a good sum: Over the same period, a Union private would have earned \$78. He then sent word to Louisa, whose freedom he hoped to purchase.

"My dear husband," Louisa wrote back.

"I received your letter yesterday, and lost no time in asking Mr. Jim if he would sell me, and what he would take for me. He flew at me, and said I would never get free only at the point of the [bayonet], and there was no use in my ever speaking to him any more about it. I don't see how I can ever get away except you get soldiers to take me from the house, as he is watching me night and day."

Eliot read Alexander the letter. But Alexander had a back-up plan: A German farmer who lived nearby had agreed to help Louisa escape. Eliot, sensing slavery's imminent demise, cautioned that the months of freedom might not be worth the risks of flight.

Alexander disagreed. He worried that Louisa, having sought to leave, might now be endangered. "Her life wasn't safe if they got mad at her."

Eliot took the point. The German farmer kept his word. On a moonlit night, Louisa and Nellie, the couple's young daughter, climbed into an ox-drawn cart and hid beneath the corn shucks.

A horseman soon rode by. He grilled the farmer: "Have you seen Louisa and Nellie?"

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As Eliot would later observe, "Literal truth is sometimes the most ingenious falsehood."

Mother and daughter arrived before dawn. Alexander paid the farmer \$20.

VI. A Literate Man

Archer and Louisa were soon reunited with two more daughters. They learned that a son, Tom, had been killed in action while serving in the Union army. Archer was grieved but proud. "I couldn't do it myself," he told Eliot, "but I thank the Lord my boy did it."

Louisa died shortly after the war ended, under suspicious circumstances. Returning to "Mr. Jim's" house, to collect her few belongings, Louisa reportedly took ill and died two days later. Alexander mourned a year, then remarried.

Alexander stayed at Beaumont Place for a time, then took rooms of his own. Still he and Eliot remained close. According to Errol Alexander, on Sunday mornings, the pair would walk together to Eliot's First Unitarian Church. Alexander worked the organ bellows while Eliot addressed the congregation. When Eliot's mother died in 1875, "Archer was the only person he'd talk to."

Alexander acquired a pocket-watch, which he saw as a symbol of freedom. "Slaves did not need watches," Errol explains.

Alexander also learned to read.

"It was an educated household," Errol says. "They had weekly recitations from Dickens and Shakespeare. Julia [Alexander's second wife] could speak German. You could not be in that household and not learn how to read."

Errol credits Eliot's son, Christopher, with tutoring his great-great-grandfather. The accomplishment is even more impressive given that, prior to the war, many slave states had passed anti-literacy laws.

"Reading was a political act," says Maffly-Kipp, an authority on slave narratives and author, most recently, of *Setting Down the Sacred Past: African-American Race Histories* (Harvard University Press, 2010). She points out that in 1847, when Missouri legislators banned education for blacks, the Rev. John Berry Meachum, himself a former slave, opened his Floating Freedom School in a steamboat on the Mississippi River.

"Once you develop skills of literacy, you're able to tell your own history," Maffly-Kipp explains. "It's a way of organizing community and establishing political legitimacy."

For the Alexander family, Archer's values still echo today. "My grandfather used to quote Shakespeare," says Errol, who taught business and psychology at the University of Stirling, Scotland, before retiring in 1996. "He didn't go to college. Where did he get that?"

"The fact that Archer could learn to read, as a man in his 50s ... he symbolized what is best about education," Errol adds. "He died a literate man."

Archer Alexander passed away in 1879. The funeral was held downtown, at the African Methodist Church on Lucas Avenue. Eliot officiated.

Alexander left his watch to Christopher.

[2016 Legislative Update](#)

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elections in certain circumstances, and establishing a cause of action to redress lack of voter opportunity. CRLS submitted a letter in support.

2016 outcome: Passed in the House, but Senate did not vote on it.

[HB 1739/SB 5639 – Death Penalty](#)

Would abolish the death penalty.

2016 outcome: Did not pass.

[HB 2907, 2908, 1910/SB 6294 – Police Oversight and Use of Force](#)

Involve police use of force and police oversight.

2016 outcome: HB 2908 passed, creating a task force on the use of deadly force in community policing.

[HB 1701/SB 5608 – Ban the Box](#)

Washington Fair Chance Act (“ban the box”), which would prohibit employers from asking about arrests or convictions before a job applicant is determined otherwise qualified for the position.

2016 outcome: Neither chamber voted.

[SB 6443, 6548 and Initiative 1515 – Gender-Segregated Facilities](#)

SB 6443 would have required the Washington State Human Rights Commission to repeal WAC 162-32-060 regarding gender-segregated facilities and would have prohibited the Human Rights Commission from initiating rule-making regarding gender-segregated facilities. SB 6548 was also regarding gender-segregated facilities. Initiative 1515 sought to repeal Washington’s non-discrimination protections for transgender people.

2016 outcome: SB 6443 and 6548 did not pass. Initiative 1515 failed to get enough signatures to get on the ballot.

[HB 1553 – Certificate of Restoration of Opportunity](#)

Would create a “Certificate of Restoration of Opportunity” (CROP) that certifies a person has been rehabilitated, thus allowing the person to apply for certain state-regulated professional licenses under Title 18 RCW despite having a criminal history.

2016 outcome: Passed.

[HB 1390/SB 6642 – Legal Financial Obligations Reform](#)

Would address Washington’s “debtor’s prison” problem where indigent criminal defendants are jailed for failure to pay non-restitution fines, fees, and costs.

2016 outcome: Passed the House on a 94-4 vote, but did not get a vote in the Senate.

[HB 2076/SB 5752 – Racial and Ethnic Impact Statements](#)

Would require racial and ethnic impact statements be included in certain legislation.

2016 outcome: Did not pass.

[2016 Case Law Update](#)

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Note: *Some rulings may be subject to change due to subsequent appeals or other proceedings.*

U.S. Supreme Court

[Foster v. Chatman](#), 136 S.Ct. 1737 (May 23, 2016) (7-1)

The Court held that prosecutors in this capital case had violated the anti-discrimination principle of *Batson v. Kentucky*, 476 U.S. 79 (1986), by using at least two peremptory challenges to disqualify prospective Black jurors on the basis of race, and that the state court ruling to the contrary was clearly erroneous.

[Fisher v. University of Texas at Austin](#), 136 S.Ct. 2198 (June 23, 2016) (5-3)

The Court rejected an equal protection challenge to the admissions plan at the University of Texas (UT) in

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The Court rejected an equal protection challenge to the decision by Texas (and all other states) to apportion state legislative districts on the basis of total population rather than voter-eligible population.

[Utah v. Strieff](#), 136 S.Ct. 2056 (June 20, 2016) (5-3),

The Court held that the exclusionary rule did not bar the use of evidence discovered when the defendant was searched incident to an arrest based on an outstanding warrant, even though the initial stop that led to the warrant check was conceded to be unconstitutional. In dissent, Justice Sotomayor emphasized the indignity of being stopped by the police, the consequences that followed, and the fact "that people of color are disproportionate victims of this type of scrutiny."

Washington Supreme Court

[Blackburn v. State](#)

On July 28, 2016, the Washington Supreme Court ruled unanimously that Western State Hospital's (WSH) racially discriminatory staffing directive violated the Washington Law Against Discrimination (WLAD). Employees had sued WSH asserting that their employer illegally took race into account when making staffing decisions in response to patients' race-based threats or demands.

Upcoming Cases: U.S. Supreme Court

Lynch v. Morales-Santana

Whether the government may constitutionally make it more difficult for citizen fathers than citizen mothers to transmit citizenship to their out-of-wedlock children born outside the United States.

Fry v. Napoleon Community Schools

Whether a student denied the right to bring her service dog to school must exhaust administrative remedies that cannot provide her with the relief that she seeks.

Moore v. Texas

Whether Texas is violating the U.S. Constitution by using a test to determine intellectual disability in death penalty cases that is inconsistent with both Supreme Court precedent and science.

Peña-Rodriguez v. State of Colorado

Whether a court may consider evidence of racially discriminatory comments during jury deliberations in deciding whether to grant a new trial.

Contact the List Serve about Questions and Events!

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The mission of the Civil Rights Law Section of the Washington State Bar Association shall be to educate and advocate for civil liberties and equal rights in the context of civil rights law and the legal issues of Washington state residents, with particular focus on those who have traditionally been denied such rights and equal treatment under the law including, but not limited to, racial, ethnic, or religious minorities; elderly; gay, lesbian, bisexual or transgendered; immigrants; those with cognitive or physical disabilities; impoverished; and homeless.

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