Tribute to the Special Issue

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The topics of race, racial attitudes, and racial advancement are everywhere today. With an unrelenting 24-hour news cycle and pervasive social media, we are continually besieged with issues of race and racialized conflict. We are constantly pressured to form instantaneous opinions about high-profile racial conflicts and to make snap judgments about them. We are heatedly primed to take bold sides in racial disputes long before we have all of the relevant facts. If we express openness to viewing some matters through a multicultural lens, we're accused by some of being "politically correct." If we express skepticism that every distressing or negative social interaction can be traced to race, then we're accused by some of being callously insensitive to minority perspectives. If we attempt to call on America's bitter racial legacy as a way of explaining current structural inequities, we're accused by some of making excuses for people of color who are trapped in the underclass. If we acknowledge America's undeniable progress when it comes to the topic of race, we're accused by some of being hopelessly and dangerously naïve. All of this can be dispiriting even as we celebrate progress on race and many indisputably positive trends.

Despite the temptations and the incentives to view it differently, race and racial advancement are no different from other complex social, political, and economic phenomena. These topics can be studied, analyzed, and discussed with rigor, analytical sophistication, and intellectual elegance. Moreover, we can advance our knowledge and understanding through the same academic process used in other fields to create new knowledge and develop innovative solutions. Despite what some may think, we do not

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have to be stuck in a mode of visceral reactions, snap judgments, and reductionism. The articles that are a part of this special issue of the *San Diego Law Review* on the occasion of the 60th Anniversary of *Brown v. Board of Education* provide examples of how we can advance our thinking on race and racial advancement in rigorous and enlightening ways.

Professor Roy Brooks' and law student Kelly Smith's article, *Juridical Subordination*, builds on the unmatched body of scholarly work that Brooks has built over his exemplary career in the academy. The article blends complex theoretical insights with doctrinal insights in the skillful fashion that we have come to expect of Brooks' scholarship. The article surveys a wide swath of legal history from *Dred Scott* to *Brown* to the post-civil rights period. Then it presents four different post-civil rights theories that challenge the formal equal opportunity conception of *Brown: traditionalism, reformism, limited separation, and critical race theory.* Brooks and Smith explain how each theory defines the black equality interest and how each theory locates what they call "juridical subordination." Their article then explains how each theory would play out at the level of implementation when it comes time to determine how civil rights doctrines would operate. Unlike much of what passes for racial analysis in our popular (and even in some of our academic) discourse, Brooks and Smith do not generate simple answers or prescriptions that allow us to walk away either soothed or further enraged (if that is what we're looking for). Instead, their article, as all great scholarship should, produces only more difficult and complex questions for us to ponder and for future scholars to tackle.

Professor Don Dripps approaches his topic with the same analytical rigor and deep perspectives that mark the Brooks and Kelly article. In *Race and Crime Sixty Years After Brown v. Board of Education*, Dripps notes the exhausted nature of much of our current discourse about race and crime. He extracts from that conversation the most powerful insights produced by commentators on the left and commentators on the right and he then suggests what should be done (if we are to rely on the Supreme Court to do it) to improve our criminal justice system.Dripps marshals quantitative and qualitative evidence to show that the proactive enforcement of possessory crimes produces a disparate impact on incarceration rates among black men without producing concomitant safety gains for blacks in urban neighborhoods. What will produce these gains, he posits, is reactive prosecution of violent offenders. When it comes to the concrete solutions, Dripps calls on his unquestioned expertise in criminal procedure to show how shifts in Supreme Court jurisprudence can reorient the system toward improvement. Unlike the cynics and pessimists that seem to dominate discussions of race and crime on both the far right and the far left, Dripps

believes that dramatic and lasting improvements are not only possible but compelled by the inevitable and inspiring march of human progress.

Lawyer and legal educator Kiyana Davis Kiel responds adroitly to the urgent need for more legal and social context in her article, *Brown, Fisher, and the Necessity of Context to Achieve Racial Equity in Public Institutions.* Kiel blends theoretical, sociological, and doctrinal analysis to argue that the use of race, when understood as a method of achieving racial equity, is a compelling governmental interest consistent with the Equal Protection clause. Kiel's explication of racial equity, structural racism, institutional racism, and white privilege is based upon compelling empirical and sociological evidence. As her article demonstrates, this empirical and sociological foundation advances a greater understanding of the legal system's obligation to advance racial equity than would be possible without that foundation. Once we understand that the legal system has this obligation, it is not a vast leap, Kiel argues, to conclude that racial equity is a compelling interest and that a holistic review in the process for admissions to public universities is not only appropriate, but urgently necessary. With the Supreme Court set to take up another affirmative action case during the 2015-2016 term, Kiel's thoughtful analysis should be of interest to Court watchers.

The excellent student contributors to this special issue show us the powerful legacy of *Brown* in situations that go beyond traditional jurisprudential settings. Brooke Finley's article, *Growing Charter School Segregation and the need for Integration in light of Obama's Race To The Top Program*, contains an interesting analysis of how and why charter schools are not the panacea to closing the education equity gap that many thought they might be. To the extent that the schools are privately managed and, in effect, exempt from beneficent regulation, they tend to replicate rather than remove existing inequities. Finley proposes eliminating subjective admissions policies for charter schools and more aggressive governmental monitoring. Lindsey Herzik's article, *A Better IDEA: Implementing a Nationwide Definition for Significant Disproportionality to Combat Overrepresentation of Minority Students in Special Education*, demonstrates a troubling pattern nationwide: minority students consistently being placed in special education courses at a disproportionate rate to non-minority students. This pattern has pernicious effects, one of the most powerful being racial segregation through the over-identification of minorities in special education classes. Among other reforms, Herzik suggests that there should be a nationwide standard for how "significant proportionality" is defined in order to promote consistency and reduce systemic bias. Kelsey McCarthy's

article, *The Battle of the Branches: The Impact of the Judiciary and Title VI on Desegregation in the American Public School System* traces the historically complicated transition from judicial intervention, post-*Brown* to statutory intervention in the form of Title VI of the Civil Rights Act of 1964. The article then assesses the state of desegregation in American public schools today. This is a mixed picture, McCarthy asserts. What is clear, she argues, is that both legislative action and judicial action remain necessary to tear down segregation and promote racial justice.

As a faculty member and Vice Dean of the University of San Diego School of Law, I am proud of all of the efforts we have undertaken to celebrate the 60th Anniversary of *Brown v. Board of Education.* I am especially proud of this issue of the *San Diego Law Review*. In this era of overly-heated debates and instinctive reactions, we need more scholars who study racial matters in ways that are intellectually principled. We need more scholars who converse about racial topics in ways that emphasize the importance of persuasion rather than simple assertion. We need more scholars who engage in objective scholarly analysis rather than simply "preaching to the choir." The contributors to this special issue are precisely the voices we need to hear as we navigate together the increasingly vibrant and diverse America that *Brown* helped ensure sixty year ago.